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Professional Legal Training Course 2024

Practice Material

Family

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Printed for the May 2024 Session
of the Professional Legal Training Course

Law Society
of British Columbia

A requirement for admission to the bar of British Columbia, the Professional Legal Training Course is supported by grants from the Law Society of British Columbia and the Law Foundation of British Columbia.
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FAMILY

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Chapter 1

Overview and Preliminary Matters[1]

[§1.01] Introduction to These Materials

These materials on family law introduce substantive family law and the diverse processes through which family law matters may be resolved.

Chapter 1 introduces the applicable legislation and provides an overview of family law practice and the duties of counsel. It is followed by Appendix 1, a sample intake form for an initial consultation with a client. Chapter 2 reviews court processes as well as processes for out-of-court resolution. It is followed by Appendix 2, which summarizes BC court jurisdiction. Chapters 3–5 provide an overview of the law on common family law issues, including parenting arrangements, child and spousal support, and division of property and debt. Chapter 6 surveys court applications and is followed by Appendix 3, which reviews the required content for particular applications. Chapters 7–8 survey trial preparation, undefended family matters and other alternatives to a full trial. Chapter 9 deals with agreements in family law matters, and chapter 10 covers enforcing orders and agreements. Finally, chapter 11 discusses adoption and child welfare.

These materials refer extensively to the *Divorce Act* R.S.C., 1985, c. 3 (2nd Supp.) (the *"Divorce Act*"); the *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*"); the *Supreme Court Family Rules*, B.C. Reg. 169/2009 (the "SCFR"); and the *Provincial Court Family Rules*, B.C. Reg. 120/2020 (the "PCFR").

[§1.02] Overview of Family Law Issues and Legislation

Practicing family law engages the same obligations that apply to all BC lawyers, as well as important considerations that arise specifically in family law cases. Generally, your role is to protect and advance your client's legal rights while complying with your duties under the legislation and all professional and ethical obligations applicable to BC lawyers. Throughout your work with your client, you should advise them about the applicable law and the options available, ensuring that they understand your advice. You should find out what your client hopes to achieve, and help your client evaluate and make decisions about the case.

In advising clients about their legal rights and obligations upon the breakdown of their relationship, you will advise on diverse issues, such as the following:

- parenting arrangements (*Divorce Act* or *FLA*);
- division of property and debt (*FLA*);
- entitlement to an interest in assets under equitable principles and the law of trusts;
- divorce (*Divorce Act*);
- spousal support (*FLA* or *Divorce Act*);
- child support (*FLA* or *Divorce Act*);
- parentage (*FLA*);
- preservation of family property (*FLA*, rules of court);
- protection of a party or a child (*FLA*);
- varying or enforcing court orders (*FLA* or *Divorce Act*);
- setting aside or enforcing agreements (*FLA*); and
- removal or protection of a child (*Child, Family and Community Service Act*).

The *Divorce Act* and the *FLA* are the primary legislation that apply in most family law matters. Additional relevant legislation, rules and guidelines include the following:

- *Adoption Act*;
- *Court Order Enforcement Act*;
- *Family Maintenance Enforcement Act*;
- *Indian Act*;
- *Interjurisdictional Support Orders Act*;
- *Land Title Act*;
- *Land (Spouse Protection) Act;*
- the PCFR;
- the SCFR;
- Child Support Guidelines;
- Spousal Support Advisory Guidelines; and
- The Law Society's *Report of the Family Law Task Force: Best Practice Guidelines for Lawyers Practising Family Law*.

Note that Canada is also a signatory to international instruments, including the *UN Convention on the Rights of the Child* and the *Hague Convention on the Civil Aspects of International Child Abduction*.

[1] **Magal Huberman** revised this chapter in July 2023 and provided the comments on trauma- and violence-informed practice. This chapter was previously revised by Magal Huberman (2022, 2021, 2020, 2019 and 2016); John-Paul Boyd, QC (2005, 2006, 2008, 2012 and 2013); Carolyn Christiansen (2010 and 2011); Jeremy Sheppard (2002 and 2003); Cindy Lombard (2001); and Nancy Cameron (1994 and 1997).

Lawyers practising family law may meet clients who are in their first exposure to the justice system and to handling legal disputes. Lawyers need to understand family violence and trauma- and violence-informed practice (discussed later in this chapter). They will need to be aware of the impacts of separation, divorce, or other family law matters on the parties and any children, including the fact that parties with children will often continue to have some form of relationship post-separation, and that family law issues can impact finances and housing. Family law can also intersect with other areas of law, such as tax law and immigration law. Counsel plays an important role but does not necessarily have all the skills required to meet all of the client's or their children's needs, and you should therefore be prepared to refer your client to other resources and services such as counsellors, financial advisors, and resources about parenting after separation.

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

- The *FLA* replaced the *Family Relations Act* (the "*FRA*"), formerly the main provincial legislation on family relations, on March 18, 2013. At the time of writing, the Ministry of the Attorney General of BC is undertaking a multi-year review of the *FLA*. The first phase of the review, completed in 2023, led to amendments regarding property division (see chapter 5), and further amendments are likely in coming years as the *FLA* review continues.
- The *Divorce Act* underwent comprehensive reforms that came into force on March 1, 2021. In these chapters, any reference to the "former *Divorce Act*" refers to the *Divorce Act* before these amendments came into force. These were the first significant reforms to the *Divorce Act* since 1985.
- At the BC Provincial Court, the former *Provincial Court (Family) Rules*, B.C. Reg. 417/98 have been repealed and replaced by the PCFR, most of which came into force in May 2021 (the rest came into force in May 2022).
- At the BC Supreme Court, the SCFR, including forms, have been amended to accommodate the *Divorce Act* changes. In addition, important changes to the SCFR will go into effect in September 2023. Some of the changes are noted in these materials, where applicable.
- The *Child, Family and Community Service Amendment Act* came into force on October 1, 2018 and April 1, 2019.
- *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families* came into force on January 1, 2020. It affirms the rights of Indigenous peoples to exercise jurisdiction over child and family services.

Due to the COVID-19 pandemic, court appearances were remote for a period of time. As of the time of writing, the BC Supreme Court has returned to in-person appearances, and a party or lawyer who wants to appear remotely has to seek leave of the court. In contrast, the Provincial Court has issued Practice Direction FAM 11, which lists the default manner of appearance (in-person or remote) for each type of Provincial Court appearance. Lawyers and parties should follow the default rules, and seek leave to appear in a different manner when needed.

Court processes and procedures continue to change from time to time, so counsel should remain up to date on court operations in the applicable registries, and check any practice directions and administrative notices on the websites of the applicable courts.

Lawyers should also be aware that due to the COVID-19 pandemic, from March 26, 2020 until March 25, 2021, the provincial government temporarily suspended the limitation periods for commencing court proceedings. See the Law Society's Guidelines for calculating BC limitation periods, available on the Law Society website (www.lawsociety.bc.ca).

[§1.03] Legislated Duties

1. Duties of Counsel

(a) *Divorce Act*

Section 7.7 of the *Divorce Act* sets out the duties of legal advisors acting in divorce proceedings. Unless it would be clearly inappropriate in the circumstances of the case, the legal advisor must:

- draw to the client's attention the provisions of the *Divorce Act* that have as their object the reconciliation of the spouses (s. 7.7(1)(a));
- discuss with the client the possibility of reconciling with their spouse, and inform the client of the counselling facilities available to assist in efforts at reconciliation (s. 7.7(1)(b)); and
- encourage the client to attempt to reach resolution through a "family dispute resolution process" (meaning a process outside of court to resolve the dispute, such as mediation) (s. 7.7(2)(a)).

The legal advisor must also:

- inform the client of the family justice services known to the legal advisor that can assist with resolution or with com-

plying with an order or decision (s. 7.7(2)(b)); and

- inform the client of the parties' duties under the *Divorce Act* (s. 7.7(2)(c)).

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

(b) *Family Law Act*

Under s. 8 of the *FLA*, the lawyer must assess whether family violence is present and, if so, the extent to which the family violence may impact the safety of the client or a family member of the client, and the ability of the client to negotiate a fair settlement (s. 8(1)). (See §1.04 for the definition of "family violence" under the *FLA*.)

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

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

2. Duties of the Parties

(a) *Divorce Act*

The duties of the parties to a proceeding under the *Divorce Act* are as follows (ss. 7.1–7.6):

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

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

(b) *Family Law Act*

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

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

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

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

3. Duties of the Court

Section 7.8 of the *Divorce Act* sets out the court's duties. The purpose of these duties is to facilitate the identification of orders, undertakings, recognizances, agreements or measures that may conflict with an order under the *Divorce Act*, and to allow for coordination among various legal proceedings (s. 7.8(1)).

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

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

- a civil protection order or a proceeding in relation to such an order (a "civil protection order" means an order to protect a person's safety, such as a restraining order, and is defined in s. 7.8(3));
- a child protection order, proceeding, agreement or measure; or

- an order, proceeding or undertaking in relation to any matter of a criminal nature.

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

[§1.04] Family Violence

1. Introduction

Family violence is a pervasive and complex social issue, in Canada and elsewhere. These materials discuss family violence in the context of family law, but all lawyers should be knowledgeable about family violence. Even when the case does not involve family violence issues directly, your client's decision-making and circumstances may be affected by family violence. Without at least some understanding of family violence, you risk missing important issues.

Myths and biases regarding family violence are prevalent. Common misconceptions include the belief that that physical abuse is the only form (or the only significant form) of family violence, that claims of family violence are not credible if the person making the claim did not leave the relationship or report the abuse immediately, that separation from the perpetrator eliminates or reduces the risk of family violence, that children are not affected by family violence if they are not directly targeted, that family violence against a spouse is unrelated to parenting, and that family violence is only present in certain socioeconomic or ethnic groups.

The understanding of family violence has evolved significantly, and continued education about this topic can help debunk myths and biases. Though it is beyond the scope of these materials to delve deeply into the research, it is important to note that research has recognized the multi-faceted nature of family violence, including the profound harm of non-physical family violence such as emotional, psychological, and financial abuse. There is also extensive research showing that survivors of family violence face formidable hurdles to leaving perpetrators or reporting the abuse, that separation and the period afterwards are highly dangerous for the survivor and the children, that there is an adverse impact on children of direct or indirect exposure to family violence, that there is a relationship between family violence and parenting abilities (both in terms of problems with the parenting abilities of perpetrators and how experiencing family violence may adversely affect the parenting abilities of survivors), and that family violence is present across socioeconomic statuses and ethnic groups.

All lawyers practicing family law should obtain training about family violence. Such training is compulsory for family law mediators and arbitrators, and for parenting coordinators.

2. Statutory Context and Case Law

Both the *FLA* and the *Divorce Act* define "family violence" and expressly require the court to consider whether it is present and its effect. This is a change from the former *Divorce Act*, which did not expressly address family violence.

Importantly, both Acts state that family violence "includes" the enumerated types of conduct. This means that the types of family violence listed in the definition are not exhaustive, and other behaviours may constitute family violence as well. The conduct does not have to be criminal in order to constitute family violence. For example, see *E.J.M. v. J.R.M*, 2019 BCSC 2466 for a review of types of conduct that may constitute family violence, and *Primeau v. L'Heureux*, 2018 BCSC 740, which determined that failing to pay child support can constitute family violence in some situations.

(a) *FLA*

"Family violence" and the related term "family member" are defined in s. 1 of the *FLA*:

> "family violence" includes
>
> (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
>
> (b) sexual abuse of a family member,
>
> (c) attempts to physically or sexually abuse a family member,
>
> (d) psychological or emotional abuse of a family member, including
>
> (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
>
> (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
>
> (iii) stalking or following of the family member, and
>
> (iv) intentional damage to property, and
>
> (e) in the case of a child, direct or indirect exposure to family violence.

A "family member" is defined in s. 2(1) and includes a person's spouse or former spouse, a person with whom the person is living or has

lived in a marriage-like relationship, and the person's child.

(b) *Divorce Act*

Family violence is defined in s. 2(1) of the *Divorce Act* as follows:

> **family violence** means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person—and in the case of a child, the direct or indirect exposure to such conduct—and includes
>
> (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;
>
> (b) sexual abuse;
>
> (c) threats to kill or cause bodily harm to any person;
>
> (d) harassment, including stalking;
>
> (e) the failure to provide the necessaries of life;
>
> (f) psychological abuse;
>
> (g) financial abuse;
>
> (h) threats to kill or harm an animal or damage property; and
>
> (i) the killing or harming of an animal or the damaging of property.

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

Counsel should also familiarize themselves with the decision of the Supreme Court of Canada in *Barendregt v. Grebliunas*, 2022 SCC 22. These were some key statements:

- The suggestion that domestic abuse or family violence has no impact on the children and has nothing to do with the perpetrator's parenting ability is untenable (para. 143).
- Since family violence often occurs in private, it is "notoriously difficult" to prove claims of family violence. Therefore, "proof of even one incident may raise safety concerns for the victim or may overlap with and enhance the significance of other factors, such as the need for limited contact or support" (para. 144).
- The evidence shows most family violence is not reported (para. 145).
- Family violence findings by the court are "a critical consideration in the best interests analysis," and courts "must consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child" (para. 146). Any form of family violence poses "grave implications for the positive development of children" (para. 147).

Though *Barendregt* was a relocation case, its statements regarding family violence apply to all family law cases.

In your own practice, keep the following in mind:

- As counsel, be aware of your own biases. All lawyers bring their own life experiences, beliefs, and opinions into the practice of law. It is crucial to be aware of how they impact your work and relationships with your clients.
- Practice self-care and watch out for burnout and stress. Be mindful that working on cases involving family violence can trigger significant emotional distress for you as well as for others at your firm (for example, support staff). Never hesitate to seek help and support.
- Remember that there are community and frontline organizations with invaluable experience working with survivors of family violence. Consider referring your client to these organizations for support, safety planning, and other services.
- Be aware of the intersecting effects of family violence and other circumstances that may affect your client, such as financial hardship, being Indigenous, being an immigrant or a visible minority, or having a disability. Consider whether any aspects of your client's circumstances exacerbate their vulnerability, and any possible referrals to assist your client.
- Carefully consider how to work responsibly and ethically with a client who is a perpetrator of family violence or against whom there are claims of family violence.

There are further references to family violence in subsequent chapters in relation to specific topics, and a non-exhaustive list of suggested resources on family violence at the end of this chapter.

[§1.05] Trauma- and Violence-Informed Practice in the Family Law Context

Understanding trauma- and violence-informed practices is an essential skill for all lawyers. These materials provide a brief introduction based on the following resources:

- The *HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisers*, published by the Department of Justice Canada, available at https://www. justice. gc. ca/eng//fl-df/help-aide/index.html (the "HELP Toolkit").
- *Brief #7 of the Family Violence Family Law Project*, at the Centre for Research & Education on Violence Against Women & Children at Western University, available at https:// www.fvfl-vfdf.ca/briefs/ ("*FVFL Brief #7*").
- *Trauma- (and Violence-) Informed Approaches to Supporting Victims of Violence: Policy and Practice Considerations*, published by the Department of Justice Canada, available at https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/ rd9-rr9/p2.html ("*DOJ Supporting Victims*").
- *Decolonizing Family Law through Trauma Informed Practice*, by Myrna McCallum and Haley Hrymak, Rise Women's Legal Centre (https://womenslegalcentre.ca/wp-content/ uploads/2022/02/Decolonizing-Family-Law-RiseWomensLegal-Jan-2022-WEB.pdf) ("*Decolonizing Family Law*").
- *Are We Ready to Change? A Lawyer's Guide to Keeping Women and Children Safe in BC's Family Law System*, by Zara Suleman, Haley Hrymak, and Kim Hawkins, Rise Women's Legal Centre (https://womenslegalcentre.ca/wp-content/uploads/2021/05/Are-We-Ready-to-Change-Rise-Womens-Legal-May-2021.pdf) ("*Are We Ready to Change?*").

You are strongly encouraged to read these resources in full, as well as the resources listed at the end of this chapter.

1. What Is Trauma?

Trauma can be defined in various ways. For example, the HELP Toolkit explains that trauma is "the result of an individual's experience of an overwhelmingly negative event or series of events, such as violence" and that it is "both the experience of and a response to an overwhelming negative event or experience." Negative events include experiencing or being exposed to physical or psychological abuse or violence, threats of harm, and neglect leading to severe harm. There are various types of trauma, including trauma that arises from a single incident (also called "acute" or "type 1" trauma), and trauma that results from a pattern of abuse of an extended period (also called "complex" or "type 2" trauma). Trauma may also be intergenerational, historic, and collective, such as the impact of colonialism on Indigenous people. It is important to recognize that trauma experienced by individuals may intersect with and be compounded by the collective trauma of their communities. As noted in *Are We Ready to Change?* on page 10):

> The legacy of trauma and violence on the body, mind, and spirit do not disappear. They are not temporal or linear experiences. They influence the whole person, the whole community. The experience of trauma and violence impacts how a survivor moves in the world, and these impacts do not stop once the legal system is engaged. The legal system has been slow to engage this analysis even though front-line anti-violence workers, Indigenous communities, and trauma and violence informed specialists have been educating on these issues for decades.

Trauma can affect the physical and mental health of survivors, and its effects can be both immediate and long-term. As the HELP Toolkit explains:

> [P]eople react differently to trauma, depending on the nature, severity, frequency and duration of the abuse, their individual characteristics, and their access to support and resources. There is no "right" way for someone to act after experiencing trauma.

When trauma arises from violence in relationships of care (such as intimate partner violence or child abuse), its negative impacts are exacerbated because it affects identity formation and the survivor's sense of self. As stated in *FVFL Brief #7*, "experiencing and witnessing interpersonal violence is a leading cause of complex trauma and has been associated with poor physical and mental health, substance abuse, eating disorders, and poverty." Further, in the context of family violence or intimate partner violence, a gender lens is required for trauma- and violence-informed practices, as family violence is highly gendered; as noted in *DOJ Supporting Victims*, the majority of victims are women, while the majority of perpetrators are men. Furthermore, transgender people experience "alarming rates" of family violence (*DOJ Supporting Victims*).

2. Why Do Lawyers Need to Know about Trauma- and Violence-Informed Practice?

Researchers have described trauma as a "hidden epidemic" (*FVFL Brief #7*, page 2). This means that on the one hand, you are likely to encounter clients who have experienced trauma, but on the other hand, the prevalence of trauma is underestimated and trauma often goes unrecognized. Overlooking

trauma and its impact will undermine your ability to competently assist the client and may unintentionally harm the client further. For example, despite your best intentions, you may inadvertently misinterpret the client's behaviour, re-trigger traumatic events, or suggest that the client is to blame for their experiences.

A client who experienced trauma may behave and interact in ways that do not make sense to you or to others without knowledge about the impact of trauma. Trauma can result in neurological, psychological, and cognitive harms, all of which may impact your client's demeanour, behaviour, reactions, decision-making, communication and more. In turn, these may negatively impact your working relationship with the client, how your client presents in court (for example, when giving evidence), and your client's conduct in relation to the legal matter at hand. The HELP Toolkit provides useful examples of how trauma (specifically family violence) may impact your client and your working relationship with them. For example, your client may:

- repeatedly cancel meetings with you;
- not respond to phone calls or emails from you;
- over-consult you on issues including small life decisions;
- be uninterested in pursuing valid financial claims;
- be willing to agree to settlements without any negotiation;
- not follow through on an agreed-upon plan of action, without explanation; or
- act in other ways that could be perceived as difficult.

The HELP Toolkit also points out that your client may have difficulties with:

- concentrating on what you are saying, and processing and retaining advice and information;
- making decisions and providing meaningful instructions;
- being organized and keeping track of court dates;
- recalling specific details about their experiences or in a coherent chronological order;
- providing the information you require to proceed with the case;
- having realistic expectations about possible outcomes, which can result in a lack of satisfaction in what you or the legal system can offer them or their children;
- perceiving risk, with some clients being hyper-vigilant when there is no clear risk, while others may underestimate risk; or
- appearing unsympathetic, hostile, disengaged or untrustworthy, which negatively impacts how others respond to them.

Furthermore, the practices and procedures of the legal systems that survivors encounter may exacerbate the impacts of trauma. Common examples include having to recount traumatic experiences multiple times throughout the legal process, being in the same room as the abuser, and being treated as uncredible or overreacting. As *FVFL Brief #7* indicates (at page 10), the combined impacts of trauma and the realities of the legal system can lead to negative and unjust outcomes:

> The implications of understanding trauma from the point of view of family law is clear. Credibility of witnesses is generally gauged around the capacity to recall detail, to form a consistent and chronological narrative, and to maintain an appropriate (i.e. relatable) level of emotion in the recounting of events. Clients who change their narratives, remember things later, have a lack of affect in their presentation or, on the other hand, express rage or laughter, are all vulnerable to being discredited (Belknap, 2010). Survivors are expected to be able to function as if they had not experienced trauma while perpetrators have the advantage of being able to craft their narratives from a properly cognitively functioning brain. Perpetrators also operate from positions of greater control and power and are thus in better positions to make strategic choices. Research has shown how perpetrators engage in systems abuse, "manipulat[ing] legal, administrative and/or welfare systems in order to exert control over, threaten or harass a current or former partner" (Reeves, 2020, p. 92).

Another important reason for lawyers' education about trauma is that lawyers who work with survivors may experience vicarious or secondary trauma, and are at risk of post-traumatic stress disorder. This may occur, for example, through hearing the clients' stories and reviewing evidence. Although the legal community increasingly acknowledges the importance of protecting lawyers' mental health, damaging attitudes still exist, leading to shame, isolation, denial, and reluctance to seek support. *FVFL Brief #7* states that when vicarious trauma is not properly addressed, it can "provoke painful emotions and violent images that become associated with personal traumatic memories, sometimes disrupting core senses of trust, safety, control, esteem, and intimacy—all of which can affect a lawyer's competence" (page 11).

3. What Is Trauma- and Violence-Informed Practice ?

The HELP Toolkit explains that "trauma- and violence-informed approaches are policies and practices that recognize the connections between violence, trauma, negative health impacts and a person's behaviour."

Put differently, trauma- and violence-informed ("TVI") practices shift the question from "what's wrong with this person?" to "what happened (or might be happening) to this person?" (*DOJ Supporting Victims*).

Importantly, TVI practices are not designed to treat trauma; rather, they focus on delivering services in ways that reduce the risk of harming and re-traumatizing; empower survivors; and protect physical, psychological, and cultural safety. Further, service providers (including lawyers) who work from a trauma- and violence-informed perspective assume that any person they encounter may have experienced trauma and its effects.

These four key TVI principles inform the HELP Toolkit's practice tips, and can guide you:

- understand trauma and violence, and their impacts on people's lives and behaviours;
- create emotionally and physically safe environments;
- foster opportunities for choice, collaboration, and connection; and
- provide a strengths-based and capacity-building approach to support client coping and resilience.

The remainder of this section summarizes TVI practice tips from the HELP Toolkit. As explained above, this is an introductory summary only, and you should expand and regularly refresh your education and training in this area.

(a) Relationship With Your Client

- Inform yourself about community organizations and any other support resources and services and refer your client to them. Further, have community resources and materials in your office and/or waiting room and make them available for the client to take.
- Pay attention to verbal and non-verbal cues, both your client's and your own, and maintain an open and positive body language.
- Be aware that physical proximity or touching (including handshakes) can be troubling or frightening for some clients. For example, pay attention to how close you are sitting and whether you are leaning towards the client. Some clients may feel safer sitting close to the door.
- Be patient, listen carefully, and take time to build trust and rapport.
- Clients may have difficulties processing and retaining the information and advice you provide. Be patient and be prepared to repeat and rephrase without judgment or criticism.
- Remember that survivors may struggle to remember details and timelines of abuse. Check with the client to ensure that you understood them correctly.
- Ask the client how they are doing and offer breaks.
- Check with the client if they prefer to recount their experiences to you verbally or in writing.
- Carefully consider the client's safety when another person is in the meeting (e.g. a support person, friend, or family member). Whenever possible, raise the topic of family violence with the client alone. See the HELP Toolkit for practical tips on navigating these situations.

(b) Emails

- Consider the client's ability to process written information. Barriers may be related to language or learning disabilities, or the email may be too long, in which case consider shorter emails with fewer topics or questions. Be mindful of your word choices and tone (and potential misinterpretations).
- Offer the client a follow-up call or meeting to discuss the information in the email. This may help a client who finds the email overwhelming.
- For information about tech-safety, see HELP Toolkit Tab #10: Safety Planning.

(c) Virtual Meetings

- Ask your client if they need assistance accessing or using technology, and help find solutions.
- To help build rapport, use videoconference rather than a phone call if possible, and take extra time building rapport.
- Ensure that the client is alone and safe. For example, you can set up a safe word or signal for the client to use to tell you they are not alone, or you can ask "yes/no" questions like "Are you alone?" or "Are you at home

with your ex-partner?" Remember that the situation may change, so remind the client that they can end the meeting anytime.

- After the client speaks, pause rather than starting to speak immediately, so that you do not rush the client or speak over them.
- Remind clients about potential tech-safety risks (see HELP Toolkit Tab #10: Safety Planning).

4. Resilience

Though there may be challenges when working with clients who have experienced trauma, the authors of *Decolonizing Family Law* remind lawyers that there is also profound meaning and a capacity for growth in this work (at page 31):

> Just as lawyers can be affected by the traumas of others, the same can be said for witnessing resilience:
>
> > Vicarious resilience can include a profound sense of meaning in the lives of those working with survivors; increased empathy and compassion for other peoples' suffering and pain; increased knowledge and awareness of the sociopolitical context of violence; enhanced motivation for and commitment to engaging in social activism; enhanced self-esteem as a result of work with survivors; increased sense of hope that people can actually endure and overcome traumatic experiences and transform those experiences; and the development of a more realistic and less idealistic worldview [citing from *Vicarious Trauma and Resilience*, Course 96621, 2014 NetCE].
>
> The concept of vicarious resilience has been developed by psychotherapists as recognizing the helper's positive transformation and increased capacity for engaging in social justice efforts, when they are regularly exposed to the trauma of others in their practice. Vicarious resilience recognizes that we all have the capacity to overcome adversity — and sometimes it is as simple as being a witness to the resilience of our clients. Through witnessing our clients' experiences, we can learn the same adaptive strategies they have relied upon to overcome life's adversities, which ultimately serve to help us see the light, possibility, and hope for better days while bringing our worldview back into balance.

[§1.06] Initial Communications and Consultation

1. Screening for a Conflict of Interest

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

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

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

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

2. Completing the Intake Form

Having the client complete an intake form and send it to you in advance can help you prepare for the meeting. Using a standard client information form can also help you obtain relevant information about the file in a complete, methodical, and easily retrievable way. Appendix 1 contains a sample client intake questionnaire that is suitable for the first interview. See also the family practice interview checklist from the *Practice Checklists Manual* on the Law Society's website.

That said, always prioritize safety and trauma- and violence- informed practices, and keep in mind potential barriers to clients receiving and completing the intake form in advance.

3. Screening for Family Violence

As explained above, s. 8 of the *FLA* requires lawyers to screen for family violence. Screening for family violence must continue throughout your work with the client, as their circumstances and risk levels may change over time. Further, some clients may not disclose family violence or its full extent at the initial consultation. In other words, do not treat

screening as a one-time obligation to dispense with at the initial consultation.

The HELP Toolkit provides extensive guidance on screening for family violence, including how to raise the topic, and sample questions. However, counsel should also obtain initial and ongoing training on family violence and screening.

4. Addressing Common Misconceptions

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

(a) The Meaning of a "Spouse" and a "Common-Law Marriage"

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

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

In some cases, the parties disagree about the nature of their relationship, with one party claiming that there had been a spousal or marriage-like relationship while the other characterizes the relationship differently. (See e.g. *Weber v. Leclerc*, 2015 BCCA 492 and *Coad v. Lariviere*, 2022 BCCA 222 regarding the principles that courts should apply when assessing the nature of the relationship.)

(b) "Legal Separation"

There is no such thing as a "legal separation"; non-lawyers often use the term when they mean a separation agreement, or because they think there is some process that will make spouses "officially" separated. Separation occurs through the intentions, words, and actions of the parties, without a formal process or the involvement of lawyers. See *Der Woon v. Zadorozny*, 2020 BCCA 95 regarding determining the date of separation.

(c) Parenting Schedules and Child Support

Some clients believe that paying child support entitles the payor to time with the child, or, conversely, that a right to spend time with a child only exists when child support is paid. These are independent rights and obligations.

(d) Settlement During Litigation

Some people are unaware that commencing a court action does not preclude settlement without a trial.

(e) Effect of Misconduct

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

(f) Timing and Cost

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

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

5. Addressing Urgent Matters

At your first meeting with the client, determine whether there are any issues that you must address immediately. For instance, you may need to seek a protection order for your client or their children to address family violence concerns, an order restraining the disposition or dissipation of property, or an order to prevent the removal of a child from the jurisdiction. If steps must be taken to protect persons or property, you may need to commence litigation immediately. See §2.03(5) and §6.03.

6. Considering Immediate Plans

At your initial interview with the client you should also canvass any immediate plans the client might have that would alter the status quo or be prejudicial to the client's interests. Is the client about to leave the children with the other party, leave the family home, or leave the country? Is the client planning

on selling or moving assets? Such actions could substantially affect the outcome of the case.

7. Reviewing Limitation Periods and Time Limits

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

In family law, the most notable time limit applies to claims for spousal support and the division of property and debt. Under s. 198(2) of the *FLA*, these claims must be brought within two years of the date of separation (for unmarried spouses) and within two years of the date of the divorce or declaration of nullity (for married spouses). The limitations in s. 198(2) are suspended during any period that the parties are engaged in family dispute resolution with a family dispute resolution professional (see the definitions of these terms in s. 1 of the *FLA*), or a prescribed process (s. 198(5)).

Other limitation periods under the *FLA* include:

- An application to set aside an agreement about property or spousal support must be made within two years from the date the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application (s. 198(3)).
- Some limitations also apply to child support matters, such as seeking child support from a stepparent.

The *Limitation Act* also includes time limits that may apply in family law matters, such as time limits for claims to enforce or sue on a judgment.

8. Obtaining Instructions

A lawyer has a duty to recommend an appropriate and sensible course of action and must not promote frivolous and vexatious claims. Make sure to record your client's instructions in writing. If you are concerned about the instructions, it is good practice to not only discuss these concerns verbally with the client, but to also set out your concerns clearly in writing for your client before taking any further steps. If your client refuses to give you reasonable instructions and cannot be swayed from those instructions, you may wish to consider withdrawing from the case (see *BC Code* rule 3.7).

If you are writing a letter on your client's behalf, you should provide your client with a copy of the letter to review and approve before you send the letter. This practice ensures that there is no mistake about your instructions and that the client confirms the approach you are taking.

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

9. Additional Considerations

Consider whether any foreign jurisdiction might affect the case (for example, are there assets outside of BC, or significant ties with another jurisdiction? Is your client or their former spouse liable to pay taxes in another jurisdiction?).

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

Consider what records and documents might be relevant for the case, and whether the documents are readily available to your client. If they are not, consider how and when to obtain them (legally and safely). Examples of potentially relevant documents include tax documents, bank statements, school records, and medical records.

[§1.07] Financial Disclosure

Financial disclosure is vital in resolving claims for support or for division of property and debt. The parties must exchange financial information whenever such claims are at issue, regardless of how the matter is proceeding (i.e. whether by negotiation, mediation, arbitration or litigation). The obligation to disclose financial information continues beyond the initial exchange of information.

Your client may be unsure about the family finances, or may have been misinformed (often when the other party has been controlling the finances). If it is safe for your client, ask them to obtain copies of any documents relating to the family finances, such as bank account statements and credit card statements. If the client does not have access to the full particulars of accounts held by the other spouse, obtain any information that the client does have, such as the names of financial institutions where the other spouse has accounts. Ensure that your client is not using improper measures to obtain information (such as accessing the personal online accounts of the other party without that party's consent). Always ensure that your client is not compromising their safety when trying to obtain documents or information.

Ask the client to produce income tax returns for at least the last three years. The client should also produce all Canada Revenue Agency notices of assessment and notices of reassessment issued in connection with those tax years.

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

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

See also Chapter 7 for financial disclosure requirements under the SCFR.

[§1.08] Out-of-Court Dispute Resolution

Family law disputes are frequently resolved using methods other than litigation. This section begins by describing the relevant statutory provisions and then introduces the specific out-of-court dispute resolution processes in BC.

1. Statutory Processes

Both the *FLA* and the *Divorce Act* include provisions aimed at encouraging out-of-court resolution.

(a) *FLA*

The *FLA* contains various definitions relevant to out-of-court dispute resolution:

A "family law dispute" under the *FLA* means "a dispute respecting a matter to which the *FLA* relates" (such as parenting arrangements, supporting a child or spouse, and dividing property and debt) (s. 1).

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

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

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

Note that family dispute resolution professionals must screen for family violence and assess how any family violence could affect the safety and appropriateness of any family dispute resolution processes.

(b) *Divorce Act*

A "family dispute resolution process" is defined in the *Divorce Act* as "a process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law" (s. 2).

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

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

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

2. Mediation

Mediation is a dispute resolution process where a neutral professional manages the negotiation pro-

cess. Mediation is available whether or not court proceedings have commenced.

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

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

- When successful, mediation is less expensive than litigation and usually resolves matters more quickly than litigation.
- The mediation environment may assist the parties to focus more on the children's interests than they would in an adversarial trial setting.
- The persons who have decision-making power in mediation are the parties themselves, rather than the judge.
- Parties who resolve issues by mediation tend to return to mediation if future disputes arise.

Note that for these benefits to be meaningful, the mediation process must be fair and safe, with careful screening for family violence and power imbalances, and proper disclosure of information and documents.

Cultural differences may also affect how your client approaches dispute resolution. For example, some Indigenous communities may use circles to work through conflicts, some Muslim clients may want to resolve matters by applying Sharia law, and some orthodox Jewish clients may wish to resolve matters by applying Rabbinical law. However, it is important not to assume that certain clients would prefer certain processes.

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

(a) The Mediation Process

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

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

Mediation may be conducted in-person or virtually, depending on the process chosen by everyone involved. The mediator, parties, and counsel may all be in the same room, or alternatively have "shuttle mediation," in which each party is in a separate room with their counsel and the mediator "shuttles" between them. Mediation may also involve a combination of the two processes. The process should in each case prioritize safety.

Mediation does not displace the role of counsel. Lawyers should thoroughly prepare for the mediation (and prepare their client) in advance. As the mediation progresses and settlement proposals are discussed, counsel will evaluate

any potential settlement with the client and advise the client about their rights and obligations, and about the positive and negative consequences of proposed settlements.

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

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

(b) Independent Legal Advice

Many people attend mediation without a lawyer, and the resulting agreement is then generally subject to each party obtaining "independent legal advice," that is, advice from a lawyer whose role is to advise that party only. Clients in this situation will generally ask the lawyer to witness their signature on the agreement and sign a certificate of independent legal advice.

Often, the lawyer will have had no prior involvement in the file, so if you are consulted in such circumstances, you will have to obtain all the necessary information from the client in order to properly assess the agreement and advise the client about it. You will be required to offer your opinion about whether the agreement is fair, and how it compares to the results that might be achieved through litigation or another dispute resolution process. You will also need to explain how the agreement affects the client's rights and obligations in both the short and long term, and provide your opinion about whether the obligations imposed on the client by the agreement are practical, manageable, and appropriate in the circumstances.

When giving this advice, it is important to respect the mediation process through which the parties reached agreement, and the client's right to decide how they want to settle the dispute. However, it is also important to not just "rubber stamp" the agreement. Be alert to, and advise the client of, any unfairness and departure from the applicable laws. You will come across agreements that are so one-sided and so obviously unfair that you cannot recommend the agreement to the client, and you may in fact vigorously recommend against entering into the agreement. If your client insists on signing such an agreement, you should send the client a letter summarizing your opinion of the agreement. You may refuse to witness the client's signature on the agreement or to sign a certificate of independent legal advice.

To avoid disputes and misunderstandings about your role, it is good practice to explain your role to the client in advance, including informing the client in writing that you may decline to witness their signature of the agreement or to sign the certificate of independent legal advice.

3. Arbitration

Arbitration is a dispute resolution process where the parties agree to submit their dispute to a neutral third party (the arbitrator), and agree to be bound by the arbitrator's decision (the award). The arbitrator serves in a judge-like capacity and must observe the rules of natural justice and due process, as well as the procedural requirements of the legislation.

Arbitration offers some advantages as compared to litigation and mediation, including the following:

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

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

(a) The Arbitration Process

The arbitration process begins with executing an arbitration agreement appointing the arbitrator, setting out the terms of the arbitrator's services, and submitting the dispute to the jurisdiction of the arbitrator. The arbitrator and the parties will define the matters to be resolved, select the governing rules (for example, adopting the SCFR) and the order for hearing evidence and making closing arguments, and set dates for the hearing and any pre-hearing steps, such as exchanging documents. Arbitration hearings are generally formal, although they may be less so than court hearings,

The arbitrator must provide the award in writing. The award may be filed in the court registry and enforced in the same manner as a judgment or order of the court. The Supreme Court may set aside, change, suspend, or terminate an award. An award can be appealed to the Supreme Court on questions of law or mixed law and fact.

(b) Legislative Framework

Effective September 1, 2020, family law arbitrations are governed by provisions in the *FLA* (Part 2, Division 4–Arbitration).

4. Mediation-Arbitration (Med-Arb)

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

5. Collaborative Law

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

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

The collaborative process includes four-way meetings between counsel and their clients as well as meetings with the other professionals involved in the process. If successful, the process concludes with executing a separation agreement. The lawyers and the parties work with one another to make whatever disclosure and investigation may be necessary, manage conflict between the parties, and recruit the assistance of such third-party professionals as may be necessary to move negotiations forward. Note that if the process is not successful and either party begins court proceedings, the lawyers acting in the collaborative process must withdraw and cannot act for the parties in the litigation.

6. Parenting Coordination

Parenting coordination is a child-centred, hybrid dispute resolution process that combines elements of mediation and arbitration to resolve parenting disputes. This process can be engaged where the parties have a final order or separation agreement in place.

Parenting coordinators are family law lawyers, psychologists, registered clinical counsellors, social workers and mediators who have taken special interdisciplinary training on childhood developmental issues, attachment and family systems theories, conflict resolution, mediation and arbitration.

Under s. 15 of the *FLA*, parenting coordinators may only be appointed pursuant to a court order or a written agreement between the parties. They may be appointed for up to two years, and the appointment can be renewed by agreement or court order for further periods of up to two years each. Section 18 of the *FLA* and s. 6 of the *FLA Regulation* specify the issues that the parenting coordinator may make determinations about. Before advising clients about whether or not to propose or agree to parenting coordination, lawyers should consult the case law that has developed since this process was introduced under the *FLA* in 2013.

(a) The Parenting Coordination Process

The parenting coordination process begins after the order or agreement appointing the parenting coordinator is made and the parenting coordination agreement is executed. The parenting coordination agreement sets out the terms of the parenting coordinator's service

and the obligations of the parenting coordinator and the parties, defines the scope of the parenting coordinator's authority, and sets out the matters to be addressed and how the parenting coordinator can address them.

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

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

7. Family Justice Counsellors

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

8. Qualification Requirements for Mediators, Arbitrators, and Parenting Coordinators

The *FLA Regulation* sets out the qualification requirements for mediators (s. 4), arbitrators (s. 5), and parenting coordinators (s. 6). Both lawyers and other specified professionals (such as psychologists) can be accredited. The requirements for lawyers include the following (see the *FLA Regulation* for the complete requirements, including for non-lawyers):

- Mediators: a minimum of 80 hours of approved mediation skills training and a minimum of 14 hours of approved training in family violence (the *FLA Regulation* lists mandatory training topics). In addition, mediators must have "sufficient knowledge, skills and experience relevant to family law to carry out the mediatory function in a fair and competent manner."
- Arbitrators: a minimum of 40 hours of approved arbitration training and a minimum of 14 hours of approved training in family violence (the *FLA Regulation* lists mandatory training topics). In addition, arbitrators must have at least 10 years of full-time law practice (or the equivalent in part-time practice or as a judge or associate judge). Note that non-lawyers may only arbitrate parenting issues and limited child support issues.
- Parenting coordinators: all of the requirements to qualify as a mediator and as an arbitrator, plus 40 hours of approved parenting coordination training.

Lawyers who wish to qualify as mediators, arbitrators, or parenting coordinators have to request accreditation from the Law Society after completing the required training (for more information, see Law Society Rules 3-35(1), 3-36(1), and 3-37(1) and Family Law Alternate Dispute Resolution Accreditation on the Law Society's website.)

Appendix B, para. 2 of the *BC Code* sets out when a lawyer will be disqualified from acting as a family law mediator or as counsel for a party in the mediation. For example, the mediator must not have previously acted as counsel for one of the parties with respect to any matter that may reasonably be expected to become an issue during the mediation.

[§1.09] Further Reading

These materials survey family law in BC, but do not explore complexities in depth. Counsel practicing family law should develop further knowledge and stay current in the face of ongoing changes.

1. General Family Law Resources

The Law Society's *Practice Checklists Manual*, is available online (www.lawsociety.bc.ca). and includes checklists for conducting family law client interviews, preparing agreements, and managing court proceedings.

There are several helpful publications from the Continuing Legal Education Society of BC, listed below.

- *Family Law Sourcebook for British Columbia* (loose-leaf with online access). The *Sourcebook* is updated annually and provides authoritative guidance on substantive family law matters.
- *British Columbia Family Practice Manual* (loose-leaf with forms and precedents on

disk, and online access). The Practice Manual is updated annually and provides practical advice on all aspects of family law practice.

- *Annual Review of Law and Practice* (softcover). An annual publication summarizing the law in 33 practice areas.
- *Annotated Family Practice* (softcover). An annual publication that includes provincial and federal legislation and regulations on family law, including the rules of court for the Provincial Court and Supreme Court, practice directions and case annotations. This book provides annotated versions of the *FLA* and the Child Support Guidelines.
- *Desk Order Divorce: An Annotated Guide* (loose-leaf with forms and precedents on disk, and online access). A frequently updated publication that covers desk-order divorce in detail.
- *Family Law Agreements: Annotated Precedents* (loose-leaf with precedents on disk and online access). This is a frequently updated and essential reference for drafting marriage, cohabitation and separation agreements.

2. *Divorce Act* Resources

These resources address the changes to the *Divorce Act*:

- The Department of Justice's "The *Divorce Act* Changes Explained" at www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/index.html.
- The wikibook *JP Boyd on Family Law*: https://wiki.clicklaw. bc. ca/index. php?title=JP_Boyd_on_Family_Law.

3. Resources on Family Violence and Trauma- and Violence-Informed Practice

These are resources on the topics of family violence and trauma- and violence-informed practice (in addition to those referenced within the chapter):

- The Department of Justice Canada website (for numerous publications on family violence, at https:// www.justice. gc.ca/eng/cj-jp/fv-vf/index. html).
- *What You Don't Know Can Hurt You: The Importance of Family Violence Screening Tools for Family Law Practitioners* (2018 Report by the Department of Justice Canada, at https://www.justice.gc.ca/eng/rp-pr/jr/can-peut/index.html).
- *Domestic Violence in Immigrant and Refugee Populations: Culturally-Informed Risk and Safety Strategies* (2018 Report of the Canadian Domestic Homicide Prevention Initiative, at http://cdhpi. ca/sites/cdhpi.ca/files/Brief_4-Online-Feb2018.pdf).
- The Trauma Informed Lawyer Podcast, hosted by Myrna McCallum.
- *Trauma Informed Toolkit for Legal Professionals*, by the Golden Eagle Rising Society (https://www.goldeneaglerising.org/initiatives-and-actions/trauma-informed-toolkit-for-legal-professionals/
- The National Center on Domestic Violence, Trauma, and Mental Health's Trauma Informed Legal Advocacy Project (https://ncdvtmh.org/resources/legal/) (an American resource that includes practice scenarios and tips on preparing for court from a trauma- and violence-informed practice perspective).
- The VEGA project at McMaster University (https://vegaproject.mcmaster.ca) (evidence-based guidance and education resources).
- Reports and research by the FREDA centre (www.fredacentre.com/reports/).

Chapter 2

Introduction to Family Law Court Procedures[1]

This chapter provides an overview of family law case procedures in the Supreme Court and Provincial Court of British Columbia.

The *Supreme Court Family Rules* (the "SCFR"), govern family law procedures in the Supreme Court. The *Provincial Court Family Rules* (the "PCFR") govern family matters in Provincial Court. Note that in these chapters, rules may be referred to by number: for example, Rule 1-1 under the SCFR may appear as "SCFR 1-1," or Rule 1 of the PCFR may appear as "PCFR 1."

[§2.01] Which Statute to Apply?

In British Columbia, the *FLA* and the *Divorce Act* govern most family law matters. The *FLA* came into force on March 18, 2013, repealing and replacing the *FRA*. Pursuant to s. 252 of the *FLA*, however, the *FRA* continues to apply to property disputes that arose under the *FRA*. The *FRA* also applies to disputes over property agreements between married spouses that were made when the *FRA* was in force.

The applicable legislation will depend on the marital status of the parties, the issues to be resolved, and the court selected.

1. Marital Status

The *Divorce Act* only applies to married spouses or to formerly married spouses. The exception is that the court may grant leave to someone who is not a spouse to make applications regarding children under the *Divorce Act*.

The *FLA* applies to both married and unmarried parties. In addition, depending on the subject matter, other persons may also apply for orders under the *FLA*.

2. Issues to be Resolved

Both the *Divorce Act* and the *FLA* deal with the care of children, as well as child support and spousal support.

The *Divorce Act* governs divorce and the recognition of foreign divorce orders.

The *FLA* governs the division of property and debt between spouses. It also provides for protection orders, conduct orders, and various other matters that are described in subsequent chapters.

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

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

Many First Nations have enacted policies and bylaws, or have entered into agreements or treaties, that may affect family law issues. You should consult those when appropriate.

3. Court

The Supreme Court has jurisdiction to hear all matters under the *Divorce Act* and the *FLA*. The Provincial Court has jurisdiction to hear all matters under the *FLA* except for those set out at s. 193 (parentage, property, debt and pension matters, and matters related to children's property).

The Provincial Court does *not* have jurisdiction under the *Divorce Act*. The exception is that s. 4 of the *Provincial Court Act* permits certain Provincial Court registries to be "designated registries" of the Supreme Court, so that a Provincial Court judge at those locations can make interim parenting orders or support orders under the *Divorce Act*.

[§2.02] Choice of Court—Supreme Court or Provincial Court

The criteria governing the choice of the court in which to commence a family law case include the court's jurisdiction; the subject matter of the litigation; the legislation under which the litigation is brought; and the rules of each court about disclosure and enforcement of orders. This chapter only discusses the Supreme Court and Provincial Court of British Columbia.

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[1] **Magal Huberman** revised this chapter in July 2023, July 2022, June 2021, March 2020, February 2019 and July 2016. This chapter was previously revised by Scott Booth (2013); John-Paul Boyd (2005, 2006 and 2010–2013); Michael R. Eeles (1999–2004); and Paul M. Daykin (1998).

1. Jurisdiction

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

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

2. Disclosure and Discovery

Some mechanisms for disclosure are only available at the Supreme Court, including the examination for discovery of a party before trial, the examination of persons out of province, and the pre-trial examination of witnesses. These disclosure mechanisms may be essential for determining particular issues, such as complex financial issues, especially when a party is uncooperative. Therefore, counsel must consider whether the additional discovery mechanisms available in Supreme Court make that court the better choice for the case.

3. Enforcement

Part 15 of the SCFR deals with orders and their enforcement. A complete review of enforcement mechanisms under the SCFR is beyond the scope of these materials, and counsel should carefully review Part 15 for all enforcement options.

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

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

The Director of Maintenance Enforcement may enforce *Divorce Act*, *FRA*, and *FLA* support orders in both the Provincial Court and the Supreme Court under the *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 127 (the "*FMEA*"; note that not all enforcement mechanisms are available in both courts—see the *FMEA*). *FMEA* proceedings are usually brought in the Provincial Court.

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

The BC Supreme Court has the power to punish for contempt when an order of this court is breached. The Provincial Court also has the power to punish for contempt, but only in the limited circumstances set out in the *Provincial Court Act* (s. 27.2), or when the contempt occurs "in the face of the court"; for instance, refusing to give evidence, disobeying an order to attend in court, or disobeying an order to deposit documents with the court (see e.g. *G.A.C. v. I.C.*, 2006 BCPC 380, in which a party did not comply with orders to attend in court and to deposit her passports with the court).

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

[§2.03] Overview of Court Proceedings in Family Law Cases at the Supreme Court

This section reviews the overall structure of court proceedings at the BC Supreme Court. The structure of court proceedings at the Provincial Court is markedly different and is therefore reviewed separately later in this chapter. Note, however, that while the court processes are different between the two courts, the overall legal principles are the same. Therefore, as you read about urgent applications, variation of orders, and legislative provisions, keep in mind that these are also relevant at the Provincial Court level, albeit through different procedures and subject to the limits of the Provincial Court's jurisdiction.

1. Starting Family Law Cases at the Supreme Court

The SCFR govern "family law cases," defined as proceedings in which a party seeks an order under the *Divorce Act*, the *FLA*, or the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* as well as an annulment, an adoption, or relief under

trust or unjust enrichment claims that arise from a marriage-like relationship (SCFR 1-1(1)).

Most family law cases start when a party files a notice of family claim in Form F3 (SCFR 4-1(1)). However, several types of family law actions must be started by filing a petition in Form F73 under SCFR 17-1 (SCFR 3-1(2.2)). Filing an agreement with the court by requisition also starts a family law case (SCFR 3-1(4.1)).

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

Other claims, such as claims in tort, equity or under the law of trusts, may be brought in a family law case under SCFR 3-1(5) and 21-3(1), provided the claims are related to or connected with relief sought in the family law case. Similarly, under SCFR 3-1(5) and 21-3(2), other parties may be joined to a family law case when there is a common question of law or fact, or when the claims against the third parties are related to relief sought in the family law case.

A notice of family claim must be personally served on all named respondents; petitions must be personally served on all the named petition respondents (SCFR 4-1(2) and 17-1(3)).

A respondent must file a response to family claim in Form F4 within 30 days after being served with a notice of claim (SCFR 4-3(1)). If the respondent wishes to advance their own claims, they must also file a counterclaim in Form F5 within the same time period (SCFR 4-4(2)), and the claimant must then file a response to counterclaim in Form F6 within 30 days of being served with the counterclaim.

Petition respondents may file a response to petition in Form F74 (SCFR 17-1(4)). The time for responding to a petition varies depending on the residence of the petition respondent: on being served with a copy of the filed petition, residents of Canada must respond within 21 days, residents of the United States within 35 days, and residents of anywhere else within 49 days.

Filed responses to family claims and counterclaims, and responses to petitions, are served on claimants and petitioners by ordinary service under SCFR 6-2 at the address for service set out in the notice of family claim or petition.

Ordinary service is effected by leaving the document at the person's address for service; mailing to the address for service; faxing to the fax number for service, if provided; or emailing to the email address for service. Note SCFR 6-2(3) for when service by each method is deemed to be effected.

Note that effective September 1, 2023, new requirements apply regarding addresses for service, including a requirement for all parties to provide an email address for service.

Some family law matters may involve respondents outside of the BC. In those cases, SCFR 6-5(1) permits service of notices of family claim and petitions outside of British Columbia without leave of the court, if the court has jurisdiction in the family law case under any of the following:

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

A party may contest the jurisdiction of the BC Supreme Court over the matters in dispute, regardless of whether service took place in BC or elsewhere. A party that contests the jurisdiction of the BC Supreme Court must file a jurisdictional response in Form F78 (SCFR 18-2(1)). Filing a jurisdictional response does not constitute submitting to the jurisdiction of the court (SCFR 18-2(5)), provided that within 30 days after filing the jurisdictional response, the party contesting the jurisdiction of the court takes one of the steps listed in SCFR 18-2(5), such as applying to dismiss or stay the action on the basis of lack of jurisdiction.

2. Interim Orders

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

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

3. Final Orders

When a family law case is undefended (usually when a respondent fails to file a response to family claim) a party may apply for a final order at trial or

by requisition under SCFR 10-10(2) (SCFR 10-10(1)). See §8.05.

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

4. Form F8 Financial Statements

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

5. Urgent Matters

Matters may arise that must be addressed more quickly than the rules of court normally permit. Such matters can arise before or after proceedings have commenced. In family law cases, urgent matters typically involve protecting persons or property. Urgency may be apparent at the initial client meeting, or it may arise later on.

(a) Protection of Persons

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

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

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

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

(b) Preservation of Property

Typically, the client will want to prevent property from being dissipated, encumbered, or sold pending settlement or trial, whether the assets are held jointly or in the other party's name alone. Such property may include bank accounts and investments, the contents of safety deposit boxes, chattels and other movables, and real property. When property is at issue, a lawyer may be negligent if the lawyer fails to secure the client's interest in the family property, even if a cause for urgency is not evident.

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

- File a certificate of pending litigation under s. 215 of the *Land Title Act* (married and unmarried parties).
- File an entry under the *Land (Spouse Protection) Act* (married and unmarried spouses). Entries under the *Land (Spouse Protection) Act* are obtained through an administrative process and may be obtained without commencing proceedings.
- Apply for court orders:
    - Orders restraining the use, sale or encumbrance of property under s. 91 of the *FLA* (married or unmarried spouses).
    - Orders protecting and preserving property under SCFR 12-1 and 12-4, or under s. 39 of the *Law and Equity Act* (married and unmarried parties).

Applications to protect property are discussed further in Chapter 6, §6.04(7).

(c) Urgent Responses to Steps in the Litigation

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

(d) Injunctive Relief Under the SCFR

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

(e) Conduct Orders

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

- orders regarding communications between the parties;
- orders regarding a residence, including requiring a party to pay expenses for the

residence (such as mortgage payments and taxes), requiring a party to supervise the removal of belongings, and prohibiting a party from terminating utilities for the residence; and

- orders requiring a party to do or not do something in relation to a purpose listed in s. 222.

While conduct orders may regulate the conduct of the parties and some financial matters, they are not intended to replace protection orders under s. 183 or orders for the protection of property under s. 91. They may be made in addition to these orders or on their own. See s. 228 for enforcement of conduct orders.

(f) Applying for Orders

Urgent applications can be brought without notice to the other party (SCFR 10-9(6)) or on short notice to the other party (SCFR 10-9(2)). In proceedings without notice, counsel have a duty to disclose all facts known to them that may affect the granting of the relief sought, whether those facts favour their client's application or not.

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

Applications are discussed in more detail in Chapter 6.

6. Variation of Orders

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

The test to vary an order depends on the subject matter of the order and the legislation it was made under. Later chapters of these materials set out specific tests and legislative provisions for varying orders on specific subject matters. In addition to these specific tests, note the following:

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

Section 254 of the *FLA* says that the coming into force of the *FLA* is not a change of circumstances for the purposes of applications to change or suspend orders.

Applications to vary an order of the BC Supreme Court are made by a notice of application in Form F31 in the proceeding in which the order was made (SCFR 10-1(1), 10-5(1)(a) and 10-6(2)). Serve the application with supporting affidavit material, and if applicable, a financial statement in Form F8. Note the different service requirements for applications to vary interim and final orders.

For variation of extraprovincial orders for support, see Chapter 4.

7. Divorce Proceedings

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

- the spouses having lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding (but note that the spouses can resume cohabitation for the purpose of attempting reconciliation for no more than a total of 90 days—consecutive or not—during that year, without having to start the one-year separation period anew);
- adultery, meaning sexual intercourse occurring during the marriage with a person who is not the other spouse; or
- physical or mental cruelty of such a kind as to render the continued cohabitation of the spouses intolerable.

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

An application for divorce on the basis of adultery or cruelty may only be brought by the spouse who did not commit the adultery or cruelty. In addition, adultery or cruelty may not be used to establish marriage breakdown if there was "condonation or connivance" by the applicant (*Divorce Act*, s. 11(1)(a) and (c); but see the exceptions in ss. 11(1)(c) and 11(3)). In *McPhail v. McPhail*, 2001 BCCA 250, the Court of Appeal stated that, because a finding of cruelty bears a stigma, it should be avoided when the divorce can be granted on the basis of separation for at least one year and the finding of cruelty serves no purpose (see also *Aquilini v. Aquilini*, 2013 BCSC 217, which extended the reasoning in *McPhail* to adultery). The courts have granted divorces on the basis of cruelty where the parties had not been separated for at least one year (see *Paheerding v. Palihati*, 2009 BCSC 557 and *Kaler v. Dhanda*, 2002 BCCA 631).

To obtain a divorce order, the applicant must prove the existence of the marriage (by filing a certificate of the marriage or a certificate of the registration of the marriage), the reason for marriage breakdown, and that "reasonable arrangements" are in place for the support of any children of the marriage (s. 11(1)(b)). Child support in accordance with the Child Support Guidelines is presumed to be "reasonable arrangements." If the support arrangements are different than the Child Support Guidelines, evidence should be adduced about how they are reasonable.

As with service of all notices of family claim, the notice of family claim in a divorce proceeding must be personally served on the respondent by someone other than the claimant (SCFR 6-3(2)(a)). An affidavit of personal service in Form F15 will be required to prove service if no response is filed (SCFR 6-6(1)(a); see SCFR 6-5 regarding service abroad, including proof of service).

The affidavit of service must show the means by which the person effecting service identified the respondent. If the respondent is not known to the person effecting service, identity may be confirmed by examining the respondent's driver's licence or other photo identification; the server should also be provided with a photograph of the respondent to confirm identity, which will then be attached as an exhibit to the affidavit of personal service. When no response has been filed, the registry currently requires that if the person to be served is identified by a photograph, then the supporting affidavits must include a statement by a person who is personally familiar with the respondent that the person in the photograph is the respondent. This situation often arises when the only claim is for a divorce and the claimant applies for a desk order. (See also §8.05 regarding undefended divorces.)

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

In a family law case in which a claim is made for a divorce together with one or more other claims, the court may grant the divorce and direct that the order for divorce alone be entered. The court may then adjourn the hearing of all other claims or grant judgment on the other claims and direct that a separate order dealing with them be entered at a later time (SCFR 15-2(2)).

Section 22 of the *Divorce Act* deals with the recognition of foreign divorces. A divorce granted in another country is recognized if it was made by a "competent authority," and either spouse was a resident in that country for at least one year immediately before the divorce proceedings commenced.

[§2.04] Overview of Court Proceedings in Family Law Cases at the Provincial Court

Note: The information in this section is based on the PCFR and the commentary in the online document "Proposed Provincial Court Family Rules Explained," available on the Government of British Columbia's website (https://www2.gov.bc.ca/gov).

1. Developments in the PCFR

The PCFR came into force on May 17, 2021, significantly changing the previous rules, procedures, and forms. The PCFR apply to actions commenced both before and after they came into force (see PCFR 196–198 and the Appendix to the PCFR).

These materials provide a general overview of the PCFR. However, counsel practicing in Provincial Court should fully familiarize themselves with the PCFR and remain up to date with developments in their implementation.

2. Application of the PCFR

The PCFR apply to matters under the *FLA* (except property matters) and to matters under the *Family Maintenance Enforcement Act*. The PCFR do not apply to Part 3 of the *FLA* (parentage), except as necessary to determine another family law matter over which the Provincial Court has jurisdiction (PCFR 4). Other matters to which the PCFR do not apply include adoption and child protection. See PCFR 4–5 for a complete list of matters to which the PCFR do and do not apply.

3. Selecting the Correct Registry

PCFR 7 sets out how to select the correct registry:

- If there is an existing case with the same parties, use the registry in which the existing case is located.
- If the matter involves children, you must commence proceedings at the registry closest to where the children live most of the time.
- If the matter does not involve children, you must commence proceedings at the registry closest to your client's place of residence.

Despite this, a party seeking a protection order or an order about a priority parenting matter may apply at any registry, with permission of the court (PCFR 7(3)), which can be obtained by applying for a case management order (both "priority parenting matter" and "case management order" are defined later in this material).

4. Types of Registries

The PCFR provide for different types of registries. The types of registries are as follows, together with the registries that currently belong in each type:

- Early Resolution Registries: Victoria and Surrey.
- Family Justice Registries: Kelowna, Nanaimo, and Vancouver (Robson Square).
- Parenting Education Registries: All other registries in BC.

The category that a given registry falls into may change over time, and depending on the types of orders you are seeking, each type of registry may require different procedures. It is therefore crucial to identify the type of registry in which your matter will be or has already commenced.

5. Overview of Terminology and Steps

The PCFR introduced a variety of terms and steps that did not exist under the previous Provincial Court rules and do not exist under the SCFR. This section sets out some of the key new terms, definitions, and steps. Subsequent sections then describe the sequence of steps and procedures that apply at each type of registry, depending on the types of orders you are seeking. It is crucial to have a clear grasp of the terminology in order to ensure that you are following the correct procedure for your case.

"**Case management orders**" are an important class of orders that the court may make to manage the case and move it forward more efficiently.

Case management orders include orders about the following:

- relating to the management of a court record, file or document, including access to a file;
- correcting or amending a filed document, including the correction of a name or date of birth;
- setting a specified period for the filing and exchanging of information or evidence, including a financial statement in Form 4;
- specifying or requiring information that must be disclosed by a person who is not a party to a case;
- requiring that a parentage test be taken (under s. 33 of *FLA*);
- requiring access to information in accordance with s. 242 of the *FLA* (which governs orders about searchable information, such as a party's address);
- recognizing an extraprovincial order other than a support order;
- waiving or modifying any requirement related to service or giving notice to a person, including allowing an alternative method for the service of a document;
- waiving or modifying any other requirement under the PCFR, including a time limit set under the PCFR or a time limit set by an order or direction of a judge, even after the time limit has expired;
- allowing a person to attend a conference or hearing using electronic communication, including by telephone or video;
- adjourning a court appearance;
- respecting the conduct of a party or management of a case, including pre-trial and trial processes and evidence disclosure, as set out in PCFR 112(1)(i);
- relating to a report under s. 211 of the *FLA*;
- adding or removing a party to a case, including leave to intervene under s. 204(2) of the *FLA*;
- respecting the appointment of a lawyer to represent the interests of a child or a party;
- settling or correcting the terms of an order made under these rules; and
- cancelling a subpoena.

"**Consensual dispute resolution**" is defined in PCFR 2 as follows:

- mediation with a family law mediator who is qualified as a family dispute resolution professional in accordance with s. 4 of the *FLA Regulation*;
- a collaborative family law process conducted in accordance with a collaborative participation agreement; or
- facilitated negotiation of a child support or spousal support matter with a child support officer employed by the Family Justice Services Division of the Ministry of Attorney General.

See s. 4 of the *FLA* and §1.07 for who can qualify as a family dispute resolution professional.

Some registries mandate participation in consensual dispute resolution. However, a family dispute resolution professional conducting consensual dispute resolution or a needs assessor (a family justice counsellor conducting a family needs assessment) may determine that consensual dispute resolution is inappropriate for the case, and exempt the parties from participation (PCFR 18).

PCFR 20 authorizes the family dispute resolution professional to require financial disclosure from the parties.

A "**family justice manager**" is a non-judge decision maker who is appointed pursuant to the requirements of the *FLA* and the *Provincial Court Act*. This new role was created in order to increase the availability of judges for hearings and trials. Family justice managers may make orders on limited matters specified in the PCFR, such as specified procedural and case management orders. PCFR 58 allows parties to apply to a judge to review orders made by a family justice manager (note that as of the time of writing, no family justice managers have been appointed yet).

A "**family law matter**" means a case about one or more of the following:

- parenting arrangements, including parental responsibilities and parenting time;
- child support;
- contact with a child;
- guardianship of a child; and
- spousal support.

This is a very important definition, because it triggers different requirements at each type of registry.

Relatedly, an "**order about a family law matter**" means any of the following (PCFR 24):

- a new order about a family law matter;
- an order to change or cancel all or part of an existing final order about a family law matter; or
- an order to set aside or replace all or part of an agreement about a family law matter.

A "**family management conference**" is an informal, time-limited (30–60 minutes) conference that is typically the first court appearance. The parties must attend the conference and the judge may take any of the following steps (PCFR 36):

- assist the parties to identify the issues to be resolved;
- explore options to resolve the issues;
- make case management orders or give directions based on information provided by or on behalf of the parties to ensure that a file is ready to proceed to the next step in the process;
- make interim orders to address needs until the parties resolve their family law matters;
- make orders by consent or in the absence of a party (if one of the parties does not attend the conference); or
- make any other orders or directions as appropriate.

The parties must attend the family management conference, and their lawyers may also attend it (PCFR 43 and 44).

PCFR 43–57 expand on PCFR 36 regarding the conduct of family management conferences and the types of orders that the court may make, which include orders for completion of registry-specific requirements (PCFR 49), conduct orders pursuant to the *FLA* (PCFR 53), and directions about the next steps that the parties must take (PCFR 56). The court may require a party to provide information, evidence, and submissions at the family management conference for the purposes of the conference (PCFR 46).

Family management conferences may be conducted by either a judge or a family justice manager, but the PCFR limit the types of orders that family justice managers can make (see PCFR, Part 4, Division 4).

A "**family needs assessment**" is a meeting between a family justice counsellor and each party individually, in which the family justice counsellor obtains information from the party and provides, based on

their assessment of the case, the following (PCFR 16):

- assistance with identifying legal and non-legal needs;
- information about resolving issues, including how to resolve family law matters and other issues out of court, and how to apply for a court order;
- a referral to or an exemption from a parenting education program;
- referrals to other resources, including where and how to seek legal advice, access legal information, access resources for issues that are not legal in nature, and access resources for children dealing with family changes;
- assessment of whether consensual dispute resolution is not appropriate;
- assessment of any risk of family violence; and
- referrals to other resources for individuals and families experiencing or concerned about family violence.

Note that when a family justice counsellor conducts a family needs assessment, they are referred to as a "needs assessor" (PCFR 2).

A "**parenting education program**" is defined in PCFR 2 as an educational program that is designed to support informed and child-focused decisions and that is approved by the Family Justice Services Division of the Ministry of Attorney General.

A "**priority parenting matter**" means any of the following matters (PCFR 2):

- giving, refusing or withdrawing consent, by a guardian, to medical, dental or other health-related treatments for a child, if delay will result in risk to the child's health;
- applying, by a guardian, for (a) a passport, licence, permit, benefit, privilege or other thing for a child, if delay will result in risk of harm to the child's physical, psychological or emotional safety, security or well-being, or (b) travel with a child or participation by a child in an activity, if consent to the travel or activity is required and is alleged to have been wrongfully denied;
- relating to change in location of a child's residence, or a guardian's plan to change the location of a child's residence, if (a) no written agreement or order respecting parenting arrangements applies in respect of the child, and (b) the change of residence can reasonably be expected to have a significant impact on the child's relationship with another guardian;
- relating to the removal of a child under s. 64 of the *FLA*;
- determining matters relating to interjurisdictional issues under s. 74(2)(c) of the *FLA*;
- relating to the alleged wrongful removal of a child under s. 77(2) of the *FLA*; and
- relating to the return of a child alleged to have been wrongfully removed or retained under the *Hague Convention on the Civil Aspects of International Child Abduction*.

6. Overview of Preliminary Requirements by Registry Type

(a) Early Resolution Registries: Part 2 of the PCFR

In these registries, the parties must try to resolve matters by agreement before filing an application about a family law matter. Accordingly, the party seeking to resolve a family law matter must take the following steps before filing an application about a family law matter (PCFR 10):

- file a notice to resolve a family law matter (Form 1);
- provide a copy of Form 1 to each other party;
- participate in a needs assessment;
- complete a parenting education program; and
- participate in at least one consensual dispute resolution session.

The registry will refer the parties to the needs assessments and consensual dispute resolution steps after Form 1 is filed.

If the parties do not resolve all or some of the family law matters during the early resolution stage, then a party who has complied with the early resolution requirements may file an application about a family law matter, which commences court proceedings (described further below). The first step in the proceedings will typically be a family management conference.

The other party may file a reply to an application about a family law matter only after participating in a needs assessment, completing a parenting education program, and participating in at least one session of consensual dispute resolution (PCFR 11).

There are exceptions to the early resolution requirements. The requirements do not apply in the following circumstances (PCFR 12):

- the case is only about support and the party applying for support has assigned their support rights to the government;
- the file is transferred to a non-early resolution registry;
- the party is only applying for any of the following orders: (a) an order under Part 5 of the PCFR, meaning a case management order, protection order, order about a priority parenting matter, order about relocation, or consent order; or (b) an enforcement order under Part 10 of the PCFR.

The requirements also do not apply to a party who is the government, a minister, or public officer (PCFR 13).

PCFR 17 sets out the circumstances in which a needs assessor may exempt a party from completing a parenting education program:

- the party has already completed the parenting education program in the two years before the date of the needs assessment;
- the family law matter is related only to spousal support;
- every child involved in the family law matter has reached 19 years of age;
- the party cannot access an online version;
- the parenting education program is not offered in a language in which the party is fluent;
- the party cannot complete an online version due to literacy challenges; or
- the party cannot complete the parenting education program due to a serious medical condition.

Importantly, if a party is applying for orders about a family law matter and for a protection order or an order on a priority parenting matter, then the application for a protection order or the order on a priority parenting matter may proceed before complying with the early resolution requirements (PCFR 14). However, with respect to any orders about a family law matter, the party will still have to comply with these requirements before filing the application about a family law matter.

If one party complies with the early resolution requirements but the other does not, the compliant party may proceed with an application about a family law matter (PCFR 21) and the non-compliant party may not participate unless allowed by the court (PCFR 22).

(b) Family Justice Registries: Part 6 of the PCFR

Unlike in early resolution registries, a party in a family justice registry may file and serve an application about a family law matter without having to comply with preliminary steps as required in early resolution registries. However, unless an exception applies or an exemption is granted, each party must do the following before the registry will permit the parties to proceed with a family management conference (PCFR 89):

- participate in a needs assessment; and
- complete a parenting education program.

There are exceptions to the family justice registry requirements. The requirements do not apply in the following circumstances (PCFR 90):

- the case is only about support and the party applying for support has assigned their support rights to the government;
- the file is transferred to a non-early resolution registry;
- the party is only applying for any of the following orders: (a) an order under Part 5 of the PCFR, meaning a case management order, protection order, order about a priority parenting matter, order about relocation, or consent order; or (b) an enforcement order under Part 10 of the PCFR.

The requirements also do not apply to a party who is the government, a minister, or a public officer (PCFR 91).

The parenting education program is not required in some circumstances (PCFR 94(3)):

- the party has already completed the parenting education program in the two years before the date of the family management conference;
- the family law matter is related only to spousal support; or
- every child involved in the family law matter has reached 19 years of age.

PCFR 94 sets out the requirements and process to apply for an exemption from the parenting

education program. The party seeking the exemption must submit a notice of exemption from parenting education program (Form 20) to the Family Justice Services Division of the Ministry of Attorney General. The grounds for exemption are as follows (PCFR 94(1)):

- the party cannot access an online version;
- the program is not offered in a language in which the party is fluent;
- the party cannot complete an online version due to literacy challenges;
- the party cannot complete the parenting education program due to a serious medical condition; or
- a consent order is filed that resolves all issues involving children.

In order to demonstrate completion of the parenting education program requirement, a party has to file a certificate of completion from the provider of the parenting education program, or an approved notice of exemption (Form 20) if an exemption was granted (PCFR 94(4)).

After a party has completed the family justice registry requirements, that party may request to attend a family management conference by filing a referral request (Form 21). The registry will then inform the parties of the procedure for scheduling the conference (PCFR 95 and 96).

(c) Parenting Education Registries: PCFR Part 7

All registries, other than early resolution registries and family justice registries, are parenting education registries. At parenting education registries, a party may file and serve an application about a family law matter without having to comply with preliminary steps. However, unless an exception applies or an exemption is granted, each party must complete a parenting education program before attending a family management conference about a family law matter (PCFR 100). The exceptions and exemptions are similar to those in the family justice registries.

Under PCFR 100(3), the requirement to attend a parenting education program does not apply in any of these circumstances:

- the case is only about support, and the party applying for support has assigned their support rights to the government;
- the party has already completed the parenting education program in the two years before the date of the family management conference;
- the family law matter is related only to spousal support; or
- every child involved in the family law matter has reached 19 years of age.

The requirements also do not apply to a party who is the government, a minister, or public officer (PCFR 101).

PCFR 101(1) sets out the requirements and process to apply for an exemption from the parenting education program requirement. The party seeking the exemption must submit a notice of exemption (Form 20) to the Family Justice Services Division of the Ministry of Attorney General. The grounds for exemption are as follows:

- the party cannot access an online version;
- the parenting education program is not offered in a language in which the party is fluent;
- the party cannot complete an online version due to literacy challenges;
- the party cannot complete the parenting education program due to a serious medical condition; or
- a consent order is filed that resolves all issues involving children.

In order to demonstrate completion of the parenting education program requirement, a party has to file a certificate of completion from the provider of the parenting education program, or an approved notice of exemption (Form 20) if an exemption was granted (PCFR 102).

After a party has completed the parenting education requirement, that party may request to attend a family management conference by filing a referral request (Form 21). The registry will then inform the parties of the procedure for scheduling the conference (PCFR 103).

7. Applications About Family Law Matters

Part 3 of the PCFR governs applications about family law matters (Form 3). A party who has completed the applicable registry requirements (early resolution, family justice, or parenting education registry), or who is not subject to preliminary requirements, may file an application about a family law matter (Form 3; PCFR 24), which has to be served by personal service (PCFR 27; see Part 12, Division 4 about service requirements).

The party served with Form 3 may file, within 30 days of service, a reply to an application about a family law matter and a counter application (Form 6, which contains both the reply and the counter application; PCFR 28 and 30). The registry is responsible for serving these documents on the first party, and must do so within 21 days of filing (PCFR 33).

If a counter-application is made, then the first party has 30 days from the date of service to file and serve a reply to a counter application (Form 8; PCFR 34).

Please refer to PCFR 25, 26, 28(4), and 30 for additional documents that must be filed with applications for certain orders.

If a party does not file a reply to an application about a family law matter, that party is not entitled to receive notice of any further proceedings and the court may make orders in the absence of that party (PCFR 31), unless the court direct otherwise (PCFR 32). PCFR 32 also authorizes the court to issue a summons to a party who has not filed a reply to an application about a family law matter.

After the application about a family law matter and reply (and if applicable, the counter application and reply) have been filed and served, the registry in which they were filed must provide information to the parties about how to schedule a family management conference (PCFR 37).

If no reply has been filed within 30 days of service of the application about a family law matter, then the registry must provide information about how to schedule a family management conference to the party who filed the application about a family law matter (PCFR 38).

The family management conference may proceed in the absence of a party who has not filed a reply or who does not attend (PCFR 45).

8. Applications About Other Orders

Part 5 of the PCFR, which applies in all registries (PCFR 59), provides for a different process when the orders sought are one of the following (which do not fall within the definition of a "family law matter"):

- case management orders;
- protection orders;
- orders about priority parenting matters;
- orders about relocation; and
- orders by consent, without a hearing.

The following is a brief description of the application process for each of these types of orders. Make sure to refer to the applicable rules for the complete procedure and requirements. While there is a different form for applying for each of these orders, the response of the other party should be in Form 19.

(a) Case Management Orders (PCFR 63–65)

The party seeking a case management order must file and serve an application for a case management order (Form 10) and any supporting evidence or materials at least seven days before the hearing date.

If the party wishes to apply without notice or without a court appearance (that is, by written materials only), the application must be made by Form 11. The court may grant the order, give directions for further evidence or appearances, require that notice be given to the other party, or reject the application with reasons.

(b) Protection Orders (PCFR 66–74)

If a party is seeking both a protection order and an order about a family law matter, the application for a protection order may be made before taking any of the steps required by early resolution, family justice, or parenting education registries (PCFR 66).

A party applying for a protection order, or to change or terminate an existing protection order, must file an application about a protection order (Form 12). If the application is made without notice, it must also include a statement of the reasons for applying without notice (PCFR 67 and 68). Service of applications with notice must be personal service and comply with PCFR 68.

The evidence at the hearing may be oral or by affidavit (PCFR 69).

Given the importance of protection orders, pay attention to the requirements of PCFR 70–74 regarding the form of the order.

Note that there are no limitations on subsequent applications for protection orders, including when a prior application was dismissed, or a protection order has expired or was changed or terminated (PCFR 74).

(c) Priority Parenting Matters (PCFR 75–79)

If a party is seeking both an order about a priority parenting matter and an order about a family law matter, the application about a priority parenting matter may be made before taking any of the steps required by early resolution, family justice, or parenting education registries (PCFR 75).

A party applying to make, change, or cancel an order about a priority parenting matter must file and serve an application about a priority parenting matter (Form 15) and any supporting evidence or documents (PCFR 76) at least seven days before the hearing days, or on shorter notice (or without notice) if permitted by the court (PCFR 77 and 78).

The evidence at the hearing may be oral or by affidavit (PCFR 79).

(d) Orders About Relocation (PCFR 80)

PCFR 80 applies to applications under the *FLA* (Part 4, Division 6) for an order prohibiting the relocation of a child when there is already an order or a written agreement about parenting arrangements or contact with the child. The party applying for this order must file and serve an application for an order prohibiting the relocation of a child (Form 16), a copy of the existing order or written agreement, and additional documents specified in PCFR 80(2).

PCFR 80 does not apply when there is no existing order or written agreement about parenting arrangements or contact with the child (PCFR 80(3)).

(e) Consent Orders (PCFR 81-85)

Parties applying for a consent order must file an application for a consent order (Form 17), together with a draft of the proposed consent order and any other applicable documents (PCFR 81). An exception is that if the application is for a case management order by consent, the application form to be used is Form 10 rather than Form 17 (PCFR 83).

The parties may apply for a consent order at any time (PCFR 85).

PCFR 82 and 84 set out the court process for considering applications for consent orders.

9. Family Settlement Conferences

Part 8 of the PCFR sets out the rules for family settlement conferences. The court may direct the parties to attend a family settlement conference. Only judges (not family justice managers) may conduct family settlement conferences, and the purpose of the conference is to assist the parties to resolve matters by agreement (PCFR 108).

At the conference, the judge may mediate the issues in dispute, make consent orders, make conduct orders under the *FLA*, direct the parties to attend another settlement conference or another procedure, order disclosure of financial or other information in order to prepare for a hearing or trial, and give a non-binding opinion about the likely outcome if the parties proceed to a hearing or trial (PCFR 108).

10. Interim Applications

The PCFR provide for two procedures in which interim orders can be made. First, interim orders may be made at the family management conference (PCFR 36). Second, if a party requires interim orders after a family management conference has already taken place, that party may request to schedule a court appearance by filing and serving a request for scheduling (Form 39), at least seven days before the date requested for the appearance (PCFR 156).

11. Trial Procedures

Part 9 of the PCFR sets out the rules that apply to trials at all registries (PCFR 109), including pre-trial steps and the trial process. While a complete discussion of these rules is beyond the scope of these materials, Chapter 7 contains a brief introduction to pre-trial procedures and rules on expert reports.

Division 5 of Part 9 applies to the informal trial pilot project, which launched in May 2022 and currently takes place at the Kamloops Registry (PCFR 6). The informal trial process aims to give the judge "a facilitative role to direct, control and manage the conduct of the trial" (PCFR 124) and to that end, it modifies the trial process and the rules of evidence in a number of ways. For example, the parties require permission from the judge to call witnesses (other than themselves); the judge, rather than the parties or their lawyers, asks the witnesses questions (though the parties or their lawyers may suggest questions for the judge to ask and can question expert witnesses directly); and the judge may admit evidence that does not comply with the rules of evidence. The informal trial process can only take place if the parties consent and the judge agrees that the informal trial process is appropriate. As counsel, therefore, you may be asked to advise a client on whether to consent to the informal trial process.

[§2.05] Costs

This section addresses costs from a family law perspective. For a general discussion of costs, see the *Practice Material: Civil*.

1. Jurisdiction of the Court

Costs are available in BC Supreme Court proceedings, but not in Provincial Court proceedings. This means that your client will not receive costs in Provincial Court proceedings, even if successful. The

exception is that if the evidence at trial includes expert reports and one of the parties calls the expert for cross-examination, but the judge determines that calling the expert to attend at trial was unnecessary, the judge may order that party to pay to the other "the reasonable costs associated with that expert's attendance" (PCFR 117(3) and 120(6)).

2. Who Is the Successful Party

As in other civil matters, the successful party in family law proceedings at the BC Supreme Court is generally entitled to costs. Many family law cases, however, involve multiple issues (such as parenting arrangements, support, and property division), and success may be different on each issue. This raises the question of who, if anyone, is the successful party, which the courts have answered by defining "success" as "substantial success." Substantial success is 75% or higher, but this is "meant to serve as a rough and ready guide when looked at all the disputed matters globally" and the court need not "descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter" (*Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45).

Despite the general rule that the successful party is entitled to costs, an award of costs is discretionary and the court may deny a successful party their costs, for example, due to their conduct in the litigation or otherwise (see e.g. *A.D.J. v. F.J.*, 2022 BCSC 1974 and *K.M.F. v. A.S.*, 2022 BCSC 1878; see also *Q.T. v. C.J.H.*, 2023 BCCA 119, confirming the discretionary nature of costs and the limited scope of appellate intervention in a family law matter).

Note that some Supreme Court decisions have declined to order costs to the successful party when the issue in dispute was parenting arrangements. However, the general rule is that the successful party is entitled to costs, including with respect to contested parenting issues (see *S.J.C. v. S.-J.C.A.*, 2010 BCCA 31).

3. Calculation of Costs and the Family Tariff

While costs in civil matters are based on "units," the calculation is different in family law matters. The SCFR, Appendix B, contain a table with a set amount of costs for each step in Supreme Court family matters (each step is called an "item" in the table, and Appendix B if often called the "tariff"). For some items, the court can order one of three set amounts, depending on whether the case involved "ordinary difficulty," or more/less than ordinary difficulty. For other items, there is only one set amount. If the court does not specify the level of difficulty, then costs will be calculated based on "ordinary difficulty."

In addition to the tariff items, a party can claim disbursements.

The tariff does not apply to special costs, which are calculated based on the actual costs incurred by the party. For examples of special costs orders in family law matters, see *B.T.D. v. R.C.D.*, 2022 BCSC 2057 and *Barrand v. Limongelli*, 2022 BCSC 1858 (special costs ordered); *K.B. v. J.B.*, 2016 BCSC 1904 (special costs denied).

See the *Practice Material: Civil* for a discussion of offers to settle and double costs.

Chapter 3

Parenting Arrangements and Care of Children[1]

References in this chapter to the "former *Divorce Act*" describe the *Divorce Act* prior to the coming into force of amendments under *An Act to Amend the Divorce Act*…, S.C. 2019, c. 16. References to the "new *Divorce Act*" or simply the "*Divorce Act*" describe the *Divorce Act* after the amendments came into force (effective March 1, 2021, unless otherwise stated).

As of the time of writing, the Attorney General of BC is undertaking a comprehensive review of the *FLA*, including its provisions for parenting arrangements. Counsel should keep up to date on changes to the legislation.

[§3.01] Applicable Legislation

Parenting arrangements and caring for children may be governed by both the federal *Divorce Act* and the provincial *FLA*, depending on the parties' marital status and the court in which the orders were made:

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

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

The former *Divorce Act* had a different framework from the *FLA* and used different terminology with respect to parenting arrangements. The former *Divorce Act* used the terms "custody" and "access" for parenting arrangements; the *FLA* uses the terms "guardianship," "parental responsibilities," "parenting time," and "contact." The new *Divorce Act* uses language that is similar to the *FLA*'s language, including the terms "decision-making responsibility," "parenting time," and "contact," but importantly, note that the *Divorce Act* does not use the term "guardianship." Counsel likely will continue to encounter many orders and agreements made under the former *Divorce Act* and should be familiar with both the prior and amended legislation.

[§3.02] Parenting Arrangements and Care of Children under the *FLA*

The *FLA* uses the concepts of "guardianship," "parenting responsibilities," "parenting time" and "contact" to address parenting arrangements and the care of children.

The core principle of the *FLA* is that "[i]n making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only" (s. 37). Section 37(2) lists the factors that the court must consider in determining the best interests of the child:

(a) the child's health and emotional well-being;

(b) the child's views, unless it would be inappropriate to consider them;

(c) the nature and strength of the relationships between the child and significant persons in the child's life;

(d) the history of the child's care;

(e) the child's need for stability, given the child's age and stage of development;

(f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

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

(h) whether the actions of a person responsible for family violence indicate that the person may be im-

[1] **Magal Huberman** revised this chapter in July 2023, July 2022, March 2020, February 2019 and July 2016. It was previously revised by Scott Booth (2013); John-Paul Boyd (2005, 2006 and 2010–2013); Michael R. Eeles (1999–2004); and Paul M. Daykin (1998).

paired in his or her ability to care for the child and meet the child's needs;

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

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

This is not an exhaustive list and the court can consider any other relevant factor.

When family violence is present, then the court must also consider the following (for the purpose of assessing s. 37(2)(g) and (h)):

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

(b) how recently the family violence occurred;

(c) the frequency of the family violence;

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

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

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

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

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

(i) any other relevant matter.

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

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

When considering the best interests of the child under ss. 37 and 38, keep in mind the definition of "family violence" (s. 1 of the *FLA*; also see §1.04).

1. Guardianship

(a) Parents as Guardians

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

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

- the parent is appointed guardian by an agreement made between all of the child's guardians (*FLA*, s. 39(3)(a));
- the parent regularly cares for the child (*FLA*, s. 39(3)(b));
- the parent is appointed guardian by court order (*FLA*, s. 51); or
- s. 30 of the *FLA*, dealing with assisted reproduction, applies to the parent.

Case law has been developing about what constitutes "regularly" caring for the child under s. 39(3)(b) of the *FLA* (see e.g. *A.A.A.M. v. British Columbia (Children and Family Development)*, 2015 BCCA 220). This case law should be carefully reviewed when advising about whether a parent is a guardian.

Note that the term "parent" under s. 39 of the *FLA* only refers to persons who are parents pursuant to Part 3 of the *FLA* (Parentage), and it does not apply to stepparents.

(b) Court-Appointed Guardians

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

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

If the application is made in the Provincial Court, the applicant must comply with PCFR 26 and complete an affidavit in Form 5. In the Supreme Court, the applicant must comply with SCFR 15-2.1 and complete an affidavit in Form F101. Both affidavits require information relating to the applicant's relationship with the child, the applicant's history of caring for other children, and any civil or criminal proceedings relevant to the safety of the child. Recent protection order registry checks, criminal records checks, and child protection records checks must be provided with the affidavit.

(c) Standby Guardians

Under s. 55(1) of the *FLA*, a guardian who is facing permanent mental incapacity or terminal illness may appoint a person to be their child's "standby guardian." The appointing guardian remains a guardian, and the standby guardian must consult with the appointing guardian to the fullest extent possible regarding the care and upbringing of the child (*FLA*, s. 55(4)).

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

When making the appointment, the appointing guardian must only consider the best interests of the child and can only give the standby guardian the same parental responsibilities that the appointing guardian has with respect to the child (*FLA*, s. 56). The appointing guardian, while still capable, may revoke the standby guardianship appointment. If the appointing guardian does *not* revoke the standby guardianship appointment, then the standby guardian will continue as the child's guardian on the death of the appointing guardian, despite any other instrument, such as a will, that the appointing guardian had made, unless the appointment itself states otherwise (*FLA*, s. 55(5)).

(d) Appointment of Guardian in Case of Death

Under s. 53 of the *FLA*, a guardian may appoint a person to become the child's guardian if the appointing guardian dies (also called a "testamentary guardian"). The appointment can be made in a will or by completing a document called "Appointment of Standby or Testamentary Guardian" (Form 2 of the *FLA* Regulation). When a testamentary guardian is being appointed, the appointment takes effect on the death of the appointing guardian. As noted above, the form must be signed by the guardian and two or more witnesses, present at the same time, who sign in the presence of each other and the guardian.

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

(e) Death of a Guardian

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

If a child's **sole guardian** dies without having appointed a successor guardian and the surviving parent of the child is not a guardian of that child, that surviving parent does not become the child's guardian unless appointed by a court order (*FLA*, s. 54).

If a child has no guardian (or their appointed guardian is dead, incompetent at law to act as a guardian, or refuses to act), then s. 51 of the *Infants Act* provides for **default guardians**. It states that where a child otherwise has no guardian, the Director under the *Child, Family and Community Service Act* becomes the personal guardian of the child and the Public Guardian and Trustee becomes the property guardian of the child. Their guardianship continues unless and until another appropriate person is appointed by the court to become the guardian of the child in their place (*FLA*, s. 51).

(f) Pre-*FLA* Guardianship Agreements and Orders

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

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

2. Parental Responsibilities

Under s. 40 of the *FLA*, only a guardian may exercise "parental responsibilities" and have "parenting time" with a child. Unless an order or agreement provides otherwise, each guardian of a child may exercise all of the parental responsibilities in rela-

tion to the child, in consultation with the other guardians, unless consultation would be unreasonable or inappropriate. A guardian can apply for an order for the allocation of parental responsibilities under s. 45 of the *FLA*.

Parental responsibilities are listed in s. 41:

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

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

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

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

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

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

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

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

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

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

(k) subject to any applicable provincial legislation,

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

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

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

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

Your client may tell you that they want to have "sole guardianship" of the child. If the child already has additional guardians (usually under s. 39), then becoming the sole guardian entails termination of the guardianship of the other guardians under s. 51 of the *FLA*. Case authorities indicate that guardianship will be terminated in extreme cases only, and the court will first consider whether the issues can be addressed by allocating some or all of the parental responsibilities to one parent while maintaining the guardianship status of both parents (see e.g. *M.A.G. v. P.L.M.*, 2014 BCSC 126 and decisions citing it; see *J.M.G. v. S.G*, 2022 BCSC 1218 for judicial comments on the required evidence and notice when applying to terminate guardianship).

3. Parenting Time and Contact

The *FLA* describes the time a guardian spends with a child as "parenting time." During a guardian's parenting time, the guardian has the responsibility for making day-to-day decisions for the child, subject to any order or agreement allocating responsibility for certain decisions to another guardian. A guardian can apply for an order for parenting time under s. 45 of the *FLA*.

As with parental responsibilities and all other parenting arrangements, no particular parenting time arrangements are presumed to be in the best interests of the child, and in particular, there is no presumption of equal parenting time (s. 40(4)).

"Contact" with a child means contact between a child and a person other than the child's guardian. In other words, the term describes the time that a non-guardian has with the child. On application, a court may make an order respecting contact, including the terms and form of contact (s. 59(1)). The court may grant contact to any person who is not a guardian, including (but not limited to) a parent or grandparent (s. 59(2)). A person with contact does *not* have decision-making authority.

4. Parentage

Generally, the following apply for the purposes of BC law (*FLA*, s. 23):

- a person is the child of the person's parents;
- a child's parent is the person determined under Part 3 of the *FLA* to be that child's parent; and
- the relationship of parent and child and kindred relationships flowing from the parent-child relationship must be determined under Part 3 of the *FLA*.

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

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

Sections 34–36 address the recognition of extraprovincial orders that declare a person's parentage. For orders made in other provinces, s. 35 provides that the court must recognize the order unless evidence becomes available that was not available at the time the extraprovincial order was made, or that order was obtained by fraud or duress. For non-Canadian orders, s. 36 sets out when the court must recognize the order and when the court may decline to recognize it. On recognition, an extraprovincial order has the same effect as if made under s. 31.

5. Extraprovincial Matters Respecting Parenting Arrangements

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

Section 74 applies when orders about parenting matters may be made in more than one jurisdiction. The section provides that the BC court has jurisdiction only if the child is "habitually resident" in BC (s. 74(a)), or if enumerated circumstances apply (s. 74(b)). Sections 75 and 76 address recognizing and superseding extraprovincial orders; s. 77 addresses the wrongful removal of a child; and ss. 78 and 79 address extraprovincial evidence. See, for example, *J.K.S. v. M.L.L.A.*, 2022 BCSC 2238, in which the court determined that it had jurisdiction and dismissed the father's application to decline jurisdiction and to return the parties' young child to California (note that family violence played a significant role in this decision).

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

Under the new *Divorce Act*, the care of a "child of the marriage" is addressed by parenting orders with respect to decision-making responsibility, parenting time, and contact (under the former *Divorce Act*, the applicable terms were "custody" and "access").

A "child of the marriage" is defined in the *Divorce Act* as a child of two spouses or former spouses who, at the material time, is under the age of majority or is over the age of majority but unable to withdraw from the parents' charge (s. 2(1)). Adult children will typically continue to qualify as children of the marriage if they are unable to support themselves due to illness, disability, or full-time attendance at a university or college. The significance of the definition of "child of the marriage" for adult children usually relates only to whether child support must be paid, as adult children will generally not be subject to parenting orders. Stepchildren may also qualify as children of the marriage (s. 2(2) and *Chartier v. Chartier*, [1999] 1 S.C.R. 242, recently applied, for example, in *K.L.B. v. S.W.B.*, 2021 BCSC 1437).

The definition of "spouse" includes former spouses for the purpose of specified sections (s. 2(1)).

1. Who Can Apply for a Parenting Order

Either spouse, or "a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent" may apply to the court for a parenting order (*Divorce Act*, s. 16.1(1)).

Applicants for a parenting order who are not a spouse must first obtain leave from the court to make the application (s. 16.1(3)).

2. Jurisdiction to Make Orders About Parenting Arrangements

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

The BC Supreme Court has jurisdiction to determine parenting arrangements in a divorce proceeding commenced in BC. If the divorce has already been granted, a former spouse can start a corollary relief proceeding for a parenting order in the province where either former spouse is habitually resident or to which both parties consent (s. 4).

If an application is made for a parenting order (or to vary a parenting order) and the child in question is habitually resident in another province, the court may transfer the proceedings to that province (on the application of either party or the court's own motion; s. 6(1) and (2)). If the court is seized of an application for a parenting order, it also has jurisdiction regarding applications for contact orders for that child (s. 6.1(1)). The court in the province in which the child is habitually resident has jurisdiction to hear applications for contact orders and for variation of parenting orders or contact orders, provided that there are no pending variation proceed-

ings in another province, and unless the court is of the opinion that the court of another province is better placed to hear and determine the application (s. 6.1(2)).

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

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

3. The "Best Interests of the Child" Test

As in the former *Divorce Act*, the new *Divorce Act* provides that the court must take into consideration only the "best interests of the child" in making parenting orders or contact orders (s. 16(1)). A key change from the former *Divorce Act* is the addition of detailed factors that the court must consider when determining the best interests of the child. The legislation also specifies how these factors are to be applied. Counsel should closely follow case law developments in this area.

Section 16(3) provides that in determining the "best interests of the child," the court must consider all factors related to the circumstances of the child, including the following:

> (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
>
> (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
>
> (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
>
> (d) the history of care of the child;
>
> (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
>
> (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
>
> (g) any plans for the child's care;
>
> (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
>
> (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
>
> (j) any family violence and its impact on, among other things,
>
> > (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
> >
> > (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
>
> (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Section 16(2) aims to resolve potential conflicts between the mandatory s. 16(3) factors by providing for a "primary consideration":

> (2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

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

> (a) the nature, seriousness and frequency of the family violence and when it occurred;
>
> (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
>
> (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
>
> (d) the physical, emotional and psychological harm or risk of harm to the child;
>
> (e) any compromise to the safety of the child or other family member;
>
> (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
>
> (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
>
> (h) any other relevant factor.

"Family violence" under the *Divorce Act* means "any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes the other family member to fear for their own safety or for that of another person" and includes a child's direct or indirect exposure to that conduct (see s. 2(1) of the *Divorce Act* and §1.06).

The court will not consider past conduct of any person "unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order" (s. 16(5)).

In allocating parenting time, s. 16(6) provides that the court shall give effect to the principle that a child should have "as much time with each spouse as is consistent with the best interests of the child." In *Barendregt v. Grebliunas*, 2022 SCC 22, the court stated (at paras. 134–135) that this factor does not mean "maximum contact" (which was the language used in the former *Divorce Act*); rather, it is more "neutral and child-centric" and is better referred to as the "parenting time factor" (para. 135). Moreover, it does not create presumptions, such as in favour of shared parenting, equal parenting time, or regular parenting time (para. 134).

4. Types of Orders Under the Former *Divorce Act*

Under the former *Divorce Act*, the care of children was managed by orders for "custody" and "access." Since counsel will continue to see these terms in older orders, this section will briefly summarize these types of orders. Older orders using these terms are still valid, but a person who had "custody" under the former *Divorce Act* now has "decision-making responsibility," and a former spouse who had "access" now has "parenting time"; see §3.07.

(a) Joint and Sole Custody Orders

Custody under the former *Divorce Act* meant the right to have care of the child and to make decisions regarding the child. A "joint custody" arrangement meant that both parties participated in making decisions about the child, subject to any other terms that the court ordered. The child did not necessarily reside equally with each parent. A "sole custody" arrangement meant the parent with sole custody could make all the decisions regarding the child, subject to any rights and responsibilities granted to the non-custodial parent. In such an arrangement, the child typically resided primarily with the custodial parent and had "access" with the non-custodial parent.

(b) Access Orders

"Access" under the former *Divorce Act* generally referred to the time with the child that was allocated to the parent with whom the child did not primarily reside.

5. Types of Orders Under the New *Divorce Act*

In the new *Divorce Act*, the concepts of "decision-making responsibility," "parenting time" and "contact" replace the concepts of "custody" and "access" from the former *Divorce Act*.

(a) Parenting Orders

On application, the court may make a parenting order (ss. 16.1–16.4) to provide for the exercise of parenting time or decision-making responsibility with respect to any child of the marriage.

Either spouse, or a person other than a spouse who stands in the place of a parent (or intends to stand in the place of a parent) can apply for a parenting order respecting a child of the marriage.

"Parenting time" means the time that a child of the marriage spends in the care of the parent, even if the child is not physically with that person during that entire time (for example, when the child is in school) (s. 2(1)).

"Decision-making responsibility" means the responsibility for making significant decisions about a child's well-being, including in respect of health, education, culture, language, religion and spirituality, and significant extra-curricular activities (s. 2(1)). (Decision-making responsibility is similar to "parental responsibilities" under the *FLA*.)

Parenting orders may allocate parenting time and decision-making responsibilities between parties; may include requirements about communications between the child and the persons who have parenting time or decision-making responsibilities; and may provide for any other matters that the court considers appropriate (s. 16.1(4)).

Parenting orders may be made for a specified or indefinite period of time and "impose any terms, conditions and restrictions that [the court] considers appropriate" (16.1(5)).

The *Divorce Act* also expressly provides for specific terms that the court may order:

- supervision of parenting time (s. 16.1(8));

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

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

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

(b) Contact Orders

The court may order that a person other than a spouse (for example, grandparents or other family members) may have "contact" with the child (s. 16.5(1)).

Contact may be by way of visits or other forms of communications (s. 16.5(5)).

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

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

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

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

(c) Parenting Plans

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

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

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

[§3.04] Parenting Arrangements: Additional Practice Points

1. Parenting Schedules

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

2. Terms and Conditions in a Parenting Order

If there are concerns about a party's conduct or ability to care for the child, the order or agreement can include terms tailored to address these concerns. For example, a party may be required to complete parenting courses, attend specified counselling, refrain from consuming alcohol or other substances before and during parenting time, and refrain from driving with the child. The court may order that a person's parenting time or contact with the child be supervised by a third party, though this ordinarily

requires evidence that to do otherwise would put the child at risk of harm (see *F.K. v. M.K.*, 2010 BCSC 563 and later decisions regarding supervised access or parenting time, including *C.L.C. v. T.R.S.*, 2022 BCSC 260, and *C.A. v. P.B.*, 2021 BCSC 2095).

3. Evidence

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

In addition, see §7.05 regarding s. 211 reports and other reports concerning children.

[§3.05] Variation of Parenting Arrangements and Contact Orders

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

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

1. *Divorce Act*

On application by a former spouse, or a person other than a former spouse who is a parent of the child or who stands in the place of a parent (or intends to), the court can make an order varying an existing parenting order (s. 17(1)(b)).

On application by the person to whom the contact order relates, the court can make an order varying a contact order (s. 17(1)(c)).

Before varying an existing parenting or contact order, the court must be satisfied that there has been a "change in the circumstances of the child" since the existing order or most recent variation of that order (s. 17(5)). Case law decided under s. 17(5) in the former *Divorce Act* established that the "change" in the child's circumstances needed to be a "material change," meaning (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order" (*Gordon v. Goertz*, [1996] 2 S.C.R. 27).

Section 17(5.1) specifies that a former spouse's terminal illness or critical condition is a change in the circumstances of the child for the purposes of s. 17(5), and the court will make a variation order in respect of a parenting order with regard to the allocation of parenting time.

Section 17(5.2) specifies that a relocation of a child is a change in the circumstances of a child for the purposes of varying a parenting order or contact order. The fact that a request for relocation has been denied does not, in and of itself, form the basis for a variation order (s. 17(5.3)). Also, the coming into force of amendments under *An Act to Amend the Divorce Act* does not constitute a change in circumstances for the purpose of making a variation application.

If the required change is demonstrated, then the court may vary the initial order. Courts making variation orders have the same powers and obligations as when making the original order (s. 17(3)), meaning the same principles apply to the variation as to the original order respecting parenting or contact: the variation must be based only on the "best interests of the child," determined by considering all factors related to the circumstances of the child, including the mandatory factors in s. 16(3)), and giving primary consideration to the child's physical, emotional and psychological safety, security and well-being (s. 16(2)).

2. *FLA*

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

The applicable provisions of the *FLA* include the following:

- Section 47 of the *FLA* provides that a court may change, suspend or terminate an order

respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstance of the child including a change brought about because of a change in the circumstances of another person.

- Section 60 of the *FLA* provides that a court may change, suspend, or terminate an order respecting contact with a child if there has been a change in the needs or circumstances of the child.
- Section 215 of the *FLA* provides generally that a court may, on application by a party, change, suspend or terminate an order if there has been a change in circumstances since the order was made.
- Section 216 of the *FLA* provides that the court may change, suspend, or terminate an interim order if there has been a change in circumstances or if evidence of a substantial nature that was not available has become available.

[§3.06] Relocation and Mobility

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

Until 2013, when the *FLA* came into force, neither legislation dealt specifically with relocation, and the law on relocation developed through case law, most notably the Supreme Court of Canada's *Gordon v. Goertz*, [1996] 2 S.C.R. 27 and subsequent appellate decisions. However, the *FLA* and the *Divorce Act* now have extensive provisions governing relocation. Further, *Barendregt v. Grebliunas*, 2022 SCC 22 (discussed below in relation to the *Divorce Act*) is the first substantive treatment of relocation since *Gordon*, and counsel should carefully follow its impact on relocation cases.

1. Relocation and Change of Residence Under the *FLA*

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

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

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

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

Section 69 sets out the test to be applied by the court when determining whether to allow the relocation. The test depends on whether or not the parties have substantially equal parenting time.

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

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

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

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

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

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

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

2. Relocation Under the *Divorce Act*

The former *Divorce Act* had no specific provisions concerning relocation. As a result, those cases were decided based on principles developed in case law. One of the significant changes with the new *Divorce Act* is the introduction of specific provisions that introduce a new legal framework for relocation cases (ss. 16.9–16.96).

Among the key provisions are notice requirements, additional "best interests" criteria for the analysis, and a clarification as to who has the burden of proof. The following summarizes their overall structure.

Section 2(1) defines relocation:

> **relocation** means a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility—or who has a pending application for a parenting order—that is likely to have a significant impact on the child's relationship with
>
> (a) a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or
>
> (b) a person who has contact with the child under a contact order;

Overall, the general framework governing relocation resembles the *FLA*'s Division 6. It includes a requirement that, before relocating themselves or their child, the person must give notice to anyone else who has parenting time, decision-making responsibility or contact with the child, at least 60 days before the relocation (though in some circumstances, including where there is a risk of family violence, the court may waive or modify this requirement). The other party has a 30-day period after notice to object to the relocation.

Section 16.92(1) sets out additional factors the court must consider in determining the child's best interests in a relocation case, in addition to those set out in s. 16. For example, the court must also consider the reasons for the relocation and the impact of the relocation on the child.

The court is prohibited from considering whether the party seeking to relocate would do so without the child (s. 16.92(2)).

Unlike under the *FLA*, the party receiving the notice of relocation under the *Divorce Act* may object by serving a prescribed form (not available under the *FLA* procedure), or by bringing an application in court.

The burden of proof for a relocation case is also different under the *Divorce Act*. It is set out in s. 16.93:

- the relocating party has the burden of proof to show that the relocation is in the best interests of the child if "the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party" (s. 16.93(1));
- the party opposing the relocation has the burden of proof to show that the relocation is not in the best interests of the child if "the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child" (s. 16.93(2)); and
- in all other cases, both parties have the burden of proof to show whether the relocation is in the best interests of the child (s. 16.93(3)).

Note that if the order referred to in ss. 16.93(1) and (2) is an interim order, the court has discretion to depart from the legislated burden of proof (s. 16.94; see e.g. *Joseph v. Washington*, 2021 BCSC 2014).

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

Barendregt v. Grebliunas was decided under the former *Divorce Act* at trial (in 2019), but the

amendments to the *Divorce Act* had come into effect by the time the case was heard by the SCC, and the decision addressed both *Gordon v. Goertz* and the relocation provisions of the new *Divorce Act*. It established the following principles regarding relocation cases:

- The inquiry is contextual and case-specific.
- Even if the parents co-parented, other factors may make the relocation in the best interests of the child.
- The court should avoid "casting judgment" on the parent's reasons for moving, and they should be considered "only to the extent that they are relevant to the best interests of the child" (paras. 129–130).
- The court should not consider what either party would do if relocation is allowed or prohibited. (Though both the *Divorce Act* and the *FLA* prohibit consideration of what the *relocating* parent would do, this suggests a prohibition on considering the *non-relocating* parent's plans as well.)
- Family violence is an "important factor" in relocation cases (para. 147).

3. Change of Place of Residence Under the *Divorce Act*

Sections 16.7 and 16.8 apply to changes of place of residence that do not fall within the *Divorce Act*'s definition of "relocation" (meaning the change in the place of residence would not have a significant impact on the child's relationship with the other parent). An example would be a move to a residence in the same geographic area.

The moving parent has to give 60 days' notice to "any other person who has parenting time, decision-making responsibility or contact under a contact order" of the intention to move, with specified information. As with notice of relocation, the court may grant an exemption or modify the notice requirement, including due to a risk of family violence. Unlike relocation, there are no provisions for the person receiving the notice to object to the move.

[§3.07] *Divorce Act* Transition Provisions

Given that the former *Divorce Act* had been in force for over 20 years, it is important to understand how ongoing proceedings started under that legislation will conclude. Section 35.3 of the new *Divorce Act* provides that a proceeding started under the former *Divorce Act* which has not concluded on the date the new *Divorce Act* comes into force will continue under the new *Divorce Act*. This means the parties, counsel, and the court will have to continue the case under the new provisions, using the new terminology and applying any new or amended legal tests.

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

- persons who have "custody" under the former *Divorce Act* are deemed to have "parenting time" and "decision-making responsibility"; and
- persons who are spouses or former spouses who have "access" under the former *Divorce Act* are deemed to have "parenting time."

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

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

Section 35.7 provides that the coming into force of amendments under *An Act to Amend the Divorce Act* does not constitute a change of circumstances for the purpose of making a variation application.

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

[§3.08] The *Hague Convention on the Civil Aspects of International Child Abduction*

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

Under the *Hague Convention*, the removal or retention of a child is considered wrongful where it is in breach of rights of custody under the law of the jurisdiction in which the child was habitually resident immediately before the removal or retention, and where those custody rights were actually exercised. This definition does not require a court order to have been made. Under the Convention, each state has a Central Authority, which in BC is the Attorney General of BC (*FLA*, s. 80(3)). Counsel should contact the Central Authority whenever international abduction has occurred or is suspected, whether the client's child is abducted to or from BC. An in-depth discussion of the *Hague Convention* is beyond the scope

of these materials, but family law lawyers should familiarize themselves with its principles.

Section 80 of the *FLA* addresses international child abduction as well. Section 80(4) provides that the provisions of the *Hague Convention* have the force of law in BC. Section 80(7) also addresses situations in which there has been a wrongful removal of a child but the *Hague Convention* does not or might not apply (such as when the other jurisdiction involved is a country that is not a party to the *Hague Convention*). In such situations, the *FLA*'s provisions on Extraprovincial Matters Respecting Parenting Arrangements apply (*FLA* ss. 72-79; see §3.02(5) above).

Note that Canada has also signed the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*. Signing the convention indicates Canada's intention to become a party to the convention but does not yet constitute ratifying the constitution and becoming a contracting party to it.

Chapter 4

Child and Spousal Support[1]

[§4.01] Child Support

Child support is governed by the *Divorce Act* (s. 15.1) and the *FLA* (Part 7), as well as by the Federal Child Support Guidelines, SOR/97-175 (the "CSG"), which regulate child support under both the *FLA* and the *Divorce Act*. The principles governing child support under the *FLA* and the *Divorce Act* are similar. The new *Divorce Act* did not change the substantive law of child support but did change various procedural matters, as briefly noted at the end of this chapter.

Parties may also make agreements about child support. See Chapter 9 for a discussion of such agreements.

1. *Divorce Act*

Child support can be claimed under the *Divorce Act* as corollary relief in a divorce proceeding, or in a proceeding for corollary relief alone after the divorce is granted under the Act. At least one of the parties must be habitually resident in the province where the proceeding is brought (s. 4).

The amount of child support payable is presumed to be the amount provided for by the CSG (s. 15.1(3)). Under s. 15.1(5), the court may make an award of child support in a different amount where special provisions in an order or agreement directly or indirectly benefit a child, such that the CSG amount of support would be inequitable. The court may also make an award in a different amount with the consent of both parties under s. 15.1(7), provided that it is satisfied that reasonable arrangements have been made for the support of the child.

2. *FLA*

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

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

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

3. Tax Impact

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

4. Eligible Children

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

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

5. Persons Responsible for Child Support

(a) *Divorce Act*

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

- any child for whom they both stand in the place of parents; and

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[1] **Magal Huberman** revised this chapter in July 2023, July 2022, June 2021, March 2020, February 2019 and July 2016. It was previously revised by Scott Booth (2013); John-Paul Boyd (2005, 2006 and 2010–2013); Michael R. Eeles (1999–2004); and Paul M. Daykin (1998).

- any child of whom one is the parent and for whom the other stands in the place of a parent.

The leading case on whether a stepparent "stands in the place of a parent" is *Chartier v. Chartier*, [1999] 1 S.C.R. 242, which has often been applied in subsequent court decisions. *Chartier* states that the applicable period to determine whether the stepparent "stood in the place of a parent" is during the relationship of the parent and the stepparent, not post-separation. The determination is objective and the factors to be considered include the following:

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

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

(b) *FLA*

Under ss. 146 and 147, persons qualifying as parents or guardians are liable to pay child support, but the extent of that liability varies, as described below. For the purposes of Part 7 (which addresses child and spousal support), a "parent" includes the following:

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

"Stepparent" is defined as follows (s. 146):

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

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

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

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

6. Child Support Guidelines

The CSG set out rules for calculating income and child support, for income disclosure, and for apportioning children's special expenses between parents.

The CSG provide child support tables (Schedule I) setting out the amount payable based on province, the number of children support is paid for, and the payor's income. These tables are used to determine the base amount of support payable. (As of the time of writing, the child support tables were last updated in November 2017; child support owing before the 2017 update is calculated using the previous tables from 2011.)

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

(1) Determine the number of eligible children.

(2) Determine the guideline income of both parents (see CSG, ss. 15–20 and Schedule III).

(3) Determine the base amount of child support payable according to the child support tables (often called the "table" or "basic" amount). Consider whether any enumerated exceptions apply (these exceptions are described below).

(4) Determine which of the children's expenses qualify as special or extraordinary expenses within the meaning of ss. 7(1) and (1.1) of the CSG. These expenses typically include childcare expenses; medical, dental and health-related expenses not covered by insurance; extraordinary extracurricular activities; extraordinary educational costs; and post-secondary education costs.

(5) Determine the cost of qualifying special or extraordinary expenses, net of any third-party subsidies and any contributions made by the children.

(6) Allocate the special or extraordinary expenses between the parties in proportion to their respective guideline incomes. When the recipient also receives spousal support, the spousal support will be deducted from the payor's income and included in the recipient's income.

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

- Section 3(2)(b) allows the court to make a child support order in an amount different than the table amount where the child for whom support is paid is over the age of majority (19, in BC). (These cases typically involve adult children with a disability or who pursue post-secondary education.)
- Section 4 gives the court discretion to depart from the table amount where the income of the payor is over $150,000 per year, but only when the table amount would be "inappropriate" and there is "clear and compelling evidence" sufficient to rebut the presumption that the table amount is appropriate (*Francis v. Baker* (1999), 50 R.F.L. (4th) 228 (S.C.C.), and *Reid v. Reid*, 2017 BCCA 73). Courts typically apply this section when the income of the payor is significantly above $150,000 per year.
- Section 5 relates to persons who stand in the place of a parent (e.g. stepparents). In those cases, the court has the discretion to determine the appropriate amount of child support, taking into consideration the CSG and "any other parent's legal duty to support the child." The court may order a support amount less than the table amount, may find that no support is payable at all (*Sullivan v. Struck*, 2018 BCCA 256), or may treat a stepparent's obligations as a means of "topping up" support paid by a biological parent (*H.(U.V.) v. H.(M.W.)*, 2008 BCCA 177). Support by a stepparent should not serve to reduce the amount payable by a biological parent, only to supplement it if and as appropriate (*Sullivan v. Struck*, 2018 BCCA 256).
- Section 8 provides that in situations of "split parenting time," where each parent provides the primary residence of one or more of the children, the amount to be paid is the difference between the table amounts each parent would pay to the other for the care of the children in the other parent's care.
- Section 9 gives the court the discretion to depart from the table amount in situations of "shared parenting time," where each party has the children for 40% or more of the time. In such cases the amount of the child support order has to be determined by considering the factors listed at s. 9(a) to (c):

  (a) the amount set out in the application tables for each of the parents;

  (b) any increased costs to the payor resulting from the shared parenting time arrangement; and

  (c) the conditions, means, needs and other circumstances of each parent and of any child from whom support is sought.

  There is no presumption that child support in shared parenting time cases must be the table amount or less, although courts commonly reduce the table amount and often order the set-off amount (that is, the difference between the table amounts the parents would otherwise have to pay if they did not have shared parenting time). There is also no presumption that the set-off amount will be ordered; it is a starting point only. Parties must provide comprehensive evidence about the circumstances of the child at each household, as well as detailed financial information, including financial statements or budgets. See the leading case on s. 9, *Contino v. Leonelli-Contino*, 2005 SCC 63, and in BC, *B.P.E. v. A.E.*, 2016 BCCA 335 (among many other decisions on this topic).
- Section 10 allows the court to depart from the table amount where either party establishes that payment of the table amount would cause "undue hardship." Typically, payors invoke this section to attempt to reduce the amount of child support payable, but it also allows the recipient to ask for an amount higher than the table amount on the basis that the table amount is too low. The cases establish that the threshold to meet the "undue hardship" test is very high: the party claiming undue hardship must demonstrate not only that circumstances giving rise to hardship exist, but also that the resulting hardship is "undue" (*Van Gool v. Van Gool* (1998), 44 R.F.L. (4th) 314 (B.C.C.A.); *L.C.T. v. R.K.*, 2017 BCCA 64), and that the party's household has a lower standard of living than the other party's household, taking into account all the income available to the household (CSG, Schedule II). Even if the court finds

undue hardship, the court may still decline to reduce the amount of child support payable.

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

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

- Section 17 permits the court to consider the payor's income over the past three years, when fairness requires doing so, and to set a "fair and reasonable" amount of child support based on the pattern of and fluctuations in income and the receipt of non-recurring amounts (see e.g. *Dunnett v. Dunnett*, 2018 BCCA 262).
- Section 18 permits the court to include additional income when the spouse is a shareholder, director, or officer of a corporation, either by including pre-tax corporate income or by adding "an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income" (see e.g. *Hausmann v. Klukas*, 2009 BCCA 32).
- Section 19 lists situations in which the court may impute income. Imputing income means that support is set based on a higher income than the line 150 total income. For example, this might be done when the court determines that a spouse is intentionally under-employed (see e.g. *Barker v. Barker*, 2005 BCCA 177 and *Zilic v. Zilic*, 2021 BCCA 107).
- Section 20(1) of the CSG provides that the income of foreign payors is determined as if the payor was a resident of Canada. Where the payor lives in a jurisdiction with higher effective rates of income tax, the payor's income is the amount that the court determines to be appropriate taking the tax rate into account (s. 20(2)); where the payor lives in a jurisdiction with lower effective rates of income tax, income may be imputed pursuant to s. 19(1)(c). (See *Poussette v. Janssen*, 2023 BCCA 176 regarding the meaning of "effective rates of income tax" in this section.)

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

[§4.02] Spousal Support

The general principles governing spousal support are similar in the *Divorce Act* (ss. 15.2–15.3) and the *FLA* (Part 7, which deals with child and spousal support).

Recent amendments to the *Divorce Act* and other federal legislation have not changed the substantive law of spousal support, but introduced new provisions regarding interjurisdictional matters, access to information, and other significant procedural and administrative matters. These changes are briefly noted in §4.06 and 4.07, but a full discussion is beyond the scope of these materials.

Parties may make agreements about spousal support; see Chapter 9.

1. Jurisdiction and Limitation Periods

(a) *Divorce Act*

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

At least one of the parties must be habitually resident in the province where the proceeding is brought (s. 4).

(b) *FLA*

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

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

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

2. Tax Impact

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

3. Entitlement to Spousal Support

The determination of spousal support proceeds in two steps. First, determine whether the spouse has established entitlement to spousal support. If not, then the enquiry ends. If entitlement to spousal support is established, then the second step is to determine the amount (or quantum) and the duration of spousal support. The two most common bases for entitlement are compensatory (when one spouse is financially disadvantaged as a result of the relationship or the end of the relationship) and financial need; a third basis for entitlement, which is far less common, is an existing contract between the parties that requires one of them to pay spousal support to the other. Note that more than one basis for entitlement may be present.

(a) Objectives of Spousal Support

The objectives of spousal support are similar under both the *Divorce Act* and the *FLA*.

Section 15.2(6) of the *Divorce Act* provides that an order for spousal support should:

> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from breakdown of the marriage; and
>
> (d) in so far as is practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Along similar lines, s. 162 of the *FLA* states that in determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

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

(b) Case Law

The leading Supreme Court of Canada cases respecting entitlement to spousal support are *Moge v. Moge*, [1992] 3 S.C.R. 813, and *Bracklow v. Bracklow*, [1999] 1.S.C.R. 420. In these decisions, the court stressed that all four statutory objectives in s. 15.2(6) of the *Divorce Act* must be considered and that no one factor takes precedence over any other.

In *Moge*, the court addressed the "compensatory" basis for spousal support. The "compensatory" basis recognizes that marriage entails an economic merger that may visit lifelong consequences upon a financially dependent spouse that may not be adequately addressed by short-term orders for spousal support. The court used the term "compensatory support" in *Moge* to describe entitlement to spousal support based on the financial consequences suffered by a spouse as a result of decisions made in the marriage. These decisions may have resulted in a spouse giving up opportunities for post-secondary education and professional training, leaving or limiting a career to raise children, losing opportunities for advancement, and suffering diminished employability. All of these result in economic hardship to that spouse when the marriage ends. The purpose of compensatory support is to address these adverse consequences, to the extent possible.

The court recognized that even when both spouses worked during the marriage, one of them could still have suffered adverse economic consequences (for example, if one spouse's career took precedence over the other's) that would result in entitlement to spousal support. Accordingly, the court stated that "in the proper exercise of their discretion, courts must be alert to a wide variety of factors and decisions made in the family interest during the marriage which have the effect of disadvantaging one spouse or benefitting the other upon its dissolution."

In *Bracklow*, the court described three conceptual grounds for entitlement to spousal support:

(1) compensatory;

(2) non-compensatory, based on the recipient's financial needs; and

(3) contractual, based on an agreement to pay support.

The court found that both the *Divorce Act* and the *FRA* (the BC provincial legislation at the time) accommodated these models. The court held that where a spouse is financially dependent on the other following separation, support may be payable to address that need even without grounds for a compensatory award. The court also recognized that the spouses can create, modify or negate spousal support obligations by contract, as in a marriage agreement or a separation agreement (see Chapter 9 for a discussion of such agreements).

4. Quantum and Duration of Spousal Support

As with the objectives of spousal support, the factors to consider when determining the amount and duration of spousal support are similar under *Divorce Act* and the *FLA*.

Under section 15.2 of the *Divorce Act* the court has to consider these factors:

- the length of time the spouses have cohabited;
- the functions performed by the spouses during their cohabitation; and
- any order, agreement or arrangement relating to the support of the spouse or child.

Similarly, s. 161 of the *FLA* provides that the court must consider the "means, needs and other circumstances of each spouse," including:

- the length of time the spouses lived together;
- the functions performed by each spouse during the period they lived together; and
- an agreement between the spouses, or an order, relating to the support of either spouse.

While the legislation provides these general principles, the Spousal Support Advisory Guidelines (the "SSAG") address the actual calculations of amount and duration of spousal support. Although the SSAG are not legislated, they are routinely used for spousal support calculations, and in *Yemchuk v. Yemchuk*, 2005 BCCA 406, the Court of Appeal held that the SSAG generally reflect the law on spousal support and are a "starting point" and "a factor" in determining spousal support. In *Redpath v. Redpath*, 2006 BCCA 338, the Court of Appeal held that failure to consider the SSAG in determining spousal support was an appealable error.

It is important to remember that the SSAG do not address whether a spouse is entitled to spousal support; the SSAG only become relevant if entitlement has been established.

The SSAG provide two formulas for spousal support calculations: one for when no child support is payable, and another for when child support is payable. Both formulas generate a range of results for quantum (amount) and duration (how long support is paid).

The "without child support" formula is fairly straightforward. The amount of support payable is based on the difference between the incomes of the parties and the length of the relationship. Duration is calculated as 0.5 to 1.0 years per year of cohabitation, but will potentially be paid indefinitely in the case of marriages of 20 years or longer, or when the length of cohabitation plus the age of the recipient equals 65. "Indefinitely" does not necessarily mean permanently; rather, it means that no end date is set in the order or agreement, but spousal support may terminate later, by agreement or court order.

The "with child support" formula is more complex and varies depending on the child support arrangements. In general, the "with child support" formula divides the parties' disposable incomes, once statutory income deductions and the effect of government benefits and credits and taxes have been taken into account, including the tax impact of the payment and receipt of spousal support. Duration is calculated by reference to the dates the youngest child will begin or finish full-time school, and the length of cohabitation. Duration is potentially indefinite when the length of cohabitation plus the age of the recipient equals 65. Note that there are specific formulas for some situations, such as when the party with primary residence of the children has to pay spousal support to the other party (the "custodial payor formula") and when the parties' children are adults but remain entitled to child support.

The calculations for the "with child support" formula are complicated, as they require detailed knowledge of income tax, the rules for different types of income, and government benefits and credits. Support calculations under this formula require the use of software designed for the purpose. The software can also be used for the "without child support" formula.

It is critical to also review the "Spousal Support Advisory Guidelines: The Revised User's Guide." See also John Paul E. Boyd's technical paper on the SSAG, "Obtaining Reliable and Repeatable SSAG

Calculations," for a more detailed discussion. Both publications are available on the federal government's Spousal Support Advisory Guidelines website (www.justice. gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/s-p/p1.html).

5. Misconduct of a Spouse

Under both Acts, the court may not take into consideration any misconduct of a spouse in relation to the marriage (*Divorce Act* s. 15.2(5); *FLA* s. 166). The *FLA*, however, also contains the following exceptions:

> In making an order respecting spousal support, the court must not consider any misconduct of a spouse, except conduct that arbitrarily or unreasonably
>
> (a) causes, prolongs or aggravates the need for spousal support, or
>
> (b) affects the ability to provide spousal support.

6. Priority of Child Support Over Spousal Support

Both Acts provide that child support has priority over spousal support (s. 15.3 of the *Divorce Act*; s. 173 of the *FLA*). As a result, a spouse may be entitled to spousal support but receive a reduced amount or none at all if the payor's income is insufficient to meet both child support and spousal support obligations. In this situation, both Acts require the court to give reasons for ordering no spousal support or lower amounts, and subsequent termination or decrease of child support constitutes a material change of circumstances for the purpose of applying for spousal support or variation. The *FLA* also contains similar provisions regarding agreements (s. 173(2)).

[§4.03] Varying Child or Spousal Support

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

Spousal support may be varied if there is a material change in circumstances, such that if it had been known at the time of the original order, it would likely have resulted in a different order (*L.M.P. v. L.S.*, 2011 SCC 64, decided under the *Divorce Act*; *Jennens v. Jennens*, 2020 BCCA 59, *FLA*). The law that developed under the *Divorce Act* with respect to material changes generally applies to determining whether there has been a material change under s. 167(2)(a) of the *FLA* (see *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453).

Common changes of circumstances in applications to vary support include increases or decreases in the income of either spouse, changes in the residence of the children, and (for spousal support variations) retirement of the payor and re-partnering of the recipient (see e.g. *Boston v. Boston*, 2001 SCC 43, and *Rozen v. Rozen*, 2014 BCSC 2426, affirmed 2016 BCCA 303).

1. *Divorce Act*

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

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

For spousal support, the court must be satisfied that there has been a change in the condition, means, needs or other circumstances of the spouse since the making of the support order or variation order, and must take into consideration that change (s. 17(4.1)). If a variation order is made, the order should meet the same objectives as in an original application for spousal support (i.e. it should recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; apportion between the parties any financial consequences arising from the care of any child of the marriage over and above any child support obligation; relieve any economic hardship to the spouses arising from breakdown of the marriage; and promote each spouse's economic self-sufficiency) (s. 17(7)).

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

See *Miglin v. Miglin*, [2003] S.C.R. 303, for the principles on an application for a spousal support order that differs from the terms of a prior agreement between the parties. See also *Hall v. Hall*, 2021 BCCA 115, in the context of a separation agreement that set the amount of spousal support, subject to a material change of circumstances.

2. *FLA*

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

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

- a change in circumstances, as provided for in the CSG, has occurred since the order respecting child support was made;
- evidence of a substantial nature that was not available during the previous hearing has become available;
- evidence of a lack of financial disclosure by a party was discovered after the last order was made.
- Under s. 167(2) of the *FLA*, a court may change, suspend, or terminate a spousal support order, if at least one of the following arises:
- a change in the conditions, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
- evidence of a substantial nature was not available at the previous hearing and has since become available; or
- evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

[§4.04] Retroactive Child and Spousal Support

Child and spousal support may be varied retroactively, that is, varied with an effective date earlier than the date on which the order is pronounced or the date on which the application to vary was delivered. The leading cases on retroactive child support are *D.B.S. v. S.R.G.*, 2006 SCC 37; *Michel v. Graydon*, 2020 SCC 24; and *Colucci v. Colucci*, 2021 SCC 24.

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

The court usually limits the retroactive reach of a retroactive order to the date when effective notice of the recipient's intention to seek a variation of support was given, to a maximum of three years, unless there has been blameworthy conduct by the payor. The principles of *D.B.S* apply to retroactive spousal support as well, but the analysis and the weight to be given to each factor may be different (*Kerr v. Baranow*, 2011 SCC 10).

According to *D.B.S*, the court cannot make an initial child support order under the *Divorce Act* if the application was made after the child had ceased to be a "child of the marriage." So, even if no child support had been paid while the child was still a child of the marriage, the court could not order retroactive child support for that period if the initial application was made too late. However, in *Michel*, the Supreme Court of Canada established that the limitation in *D.B.S* only applies to initial applications under s. 15 of the *Divorce Act*. It does not apply to variation applications under s. 17. Further, the limitation in *D.B.S* did not preclude the provinces from enacting different provisions in the provincial child support legislation. In *Michel*, the matter proceeded under BC's *FLA*. The Supreme Court of Canada determined that the statutory scheme of the *FLA* and the wording of s. 152 of the *FLA* permits the court to vary a child support order retroactively, regardless of the status of the beneficiary (the child) at the time of the application, and even if the existing order is expired or terminated at that time.

While *Michel* dealt with an application by the recipient for retroactive increase of child support, *Colucci* dealt with an application by the payor to retroactively decrease child support and rescind significant arrears. At the time of the application, the children were no longer children of the marriage. The trial court granted the payor's application, but the appeal court allowed the recipient's appeal. The Supreme Court of Canada dismissed the payor's appeal, resulting in no reduction or rescission of arrears. In its decision, the court stressed the "informational asymmetry" between payors and recipients, which creates an obligation on the payor to provide full, frank, and timely financial disclosure. This disclosure is the foundation of the child support regime, and it is essential in order to place the parties on equal footing. further, when income had been imputed to the payor due to their initial lack of disclosure, they cannot then rely on late disclosure to claim a material change of circumstances and reduce the amount of child support.

On another point, *Hinz v. Davey*, 2022 BCCA 232 clarified that when the court replaces a term of an agreement regarding child support with a different order, that order can apply retroactively, not only prospectively.

[§4.05] Arrears of Child and Spousal Support

Arrears are unpaid amounts of support that were due pursuant to a court order or agreement. A payor in arrears who applies to cancel arrears must meet a high threshold, especially for arrears of child support. In *Colucci* (above), the Supreme Court of Canada confirmed

that reducing arrears is an exceptional measure that should only be used as a last resort.

Payors should not be encouraged to wait while arrears accumulate and then seek rescission of their arrears. Even if the court accepts that the payor's financial circumstances create hardship, the court will carefully consider alternatives to rescinding the arrears, such as temporary suspension of payments, periodic payments, and other creative payment arrangements.

[§4.06] Extraprovincial Orders

In this section, "extraprovincial orders" means orders from other provinces and orders from non-Canadian jurisdictions.

The BC *Interjurisdictional Support Orders Act* sets out a procedure for extraprovincial support matters that are not under the *Divorce Act*. It applies to non-*Divorce Act* support matters in which one party resides in BC and the other resides in another province or territory or "reciprocating jurisdiction" outside Canada.

The *Divorce Act* also contains provisions regarding inter-provincial support matters. The changes to the *Divorce Act* introduced a new, simplified application procedure for establishing or varying a support order under the *Divorce Act* when parties reside in different provinces, or one party resides in a province and one resides in a "designated jurisdiction" outside of Canada.

With respect to non-Canadian jurisdictions, these two Acts apply only to specified jurisdictions that have entered into reciprocal agreements with Canada or BC.

1. *Divorce Act* Provisions

Section 18.1 governs support orders under the *Divorce Act* when the former spouses reside in different provinces. Section 19 addresses situations in which one of the former spouses resides in a "designated jurisdiction," which is a jurisdiction outside of Canada that has arrangements for reciprocal enforcement of support orders with the province in which the other former spouse resides. Section 18 sets out relevant definitions.

The basic principle of the inter-provincial process (s. 18.1) is that filing, service, and sending of materials is done through a "designated authority" in each province (in BC, the Ministry of Attorney General). For example, if the applicant is in BC and the respondent is in Manitoba, then the applicant will file the required forms and documents with BC's designated authority, which will send them to Manitoba's designated authority. That designated authority will provide the materials to Manitoba's "competent authority," which is the court or another authorized entity, if applicable in that province, such as a provincial child support service (described later in this chapter).

If the competent authority is a provincial child support service, that service will calculate or recalculate support pursuant to ss. 25.01 or 25.1, respectively. If the competent authority is the court, then the court will serve the application materials on the respondent. The court may also require additional evidence from the applicant, which would be communicated through the designated authorities (s. 18.1(13)). Ultimately, the court may make, suspend, or rescind an order based on the materials submitted by the parties (s. 18.1(15)).

Section 19 applies when the applicant resides outside of Canada in a designated jurisdiction, and the respondent resides in Canada. The procedure is largely similar to that under s. 18.1 for inter-provincial applications. The application would be submitted through the "responsible authority" in the designated jurisdiction to the designated authority in the province in which the respondent resides.

Note the following about ss. 18–19:

- The procedures set out in these sections also apply to an initial application for a support order (not only for variation, suspension, or rescission) when the former spouses reside in different provinces or the applicant former spouse resides in a designated jurisdiction.
- In addition to these *Divorce Act* provisions, provincial law applies to the extent that it is not inconsistent with the *Divorce Act* (ss. 18.1(2) and 19(2)).
- Because terminology, forms, and documents may differ among provinces and between provinces and designated jurisdictions outside of Canada, the court must interpret them broadly (ss. 18.1(17) and 19(16)).

Section 19.1 addresses situations in which a Canadian court has made a support order under the *Divorce Act*, and one of the spouses resides in a designated jurisdiction outside of Canada and subsequently obtains an order in that designated jurisdiction that has the effect of varying the Canadian order. In order to enforce the order in these situations, s. 19.1 provides that the former spouse must apply for registration and recognition of the order. The application is made through the "responsible authority," who submits the application to the designated authority in the province in which the other former spouse habitually resides. That spouse will have the opportunity to oppose the registration and recognition of the order.

If the order from the designated jurisdiction is registered and recognized, it is recognized throughout

Canada and may be enforced in accordance with the laws of the applicable province.

2. *Interjurisdictional Support Orders Act*

The *Interjurisdictional Support Orders Act* ("*ISO*") governs applications for support, variation of support orders, and recognition of support orders when one party lives in BC and the other lives in a different province or in a specified country (called "reciprocating jurisdictions"). All other Canadian provinces and territories except Quebec also have in place such legislation. *ISO* does not apply to orders under the *Divorce Act*.

When the applicant is in BC, the process to vary the support order depends on whether the other jurisdiction requires a provisional order. If a provisional order is not required, the applicant submits prescribed forms to the designated authority for BC, who forwards them to the designated authority in the originating jurisdiction. In BC, the designated authority is the Ministry of Attorney General. The application will be heard in the originating court in the absence of the applicant, based on the forms supplied to that court, the law of the originating jurisdiction and the evidence of the respondent.

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

[§4.07] Other New Procedures

In addition to the new provisions described earlier in this chapter, the amendments to the *Divorce Act* introduced and amended various other procedures for child and spousal support. Some examples are provided here, but a full discussion of the changes is beyond the scope of these materials.

Sections 25.01 and 25.1 of the new *Divorce Act* authorize the federal Minister of Justice to enter into agreements with the provinces respecting calculation and recalculation of child support by a provincial child support service, in order to provide simpler, out-of-court procedures for these important steps. These agreements authorize the provincial child support service to make binding, enforceable decisions on the amount of child support payable, whether on an initial calculation or a recalculation. A former spouse who disagrees with a calculation or recalculation may apply for a court order within the timelines set out by the applicable province or the *Divorce Act* regulations (ss. 25.01(5) and 25.1(4)). If a spouse does not provide income information as required for a recalculation, the child support service may "deem" that spouse's income in accordance with the laws of the applicable province, and child support will be determined based on that deemed income (s. 25.1(1.2) and 2.1)).

For BC, see https://childsupportrecalc.gov.bc.ca for information on the child support recalculation service, including which cases qualify.

Amendments to the *Garnishment, Attachment and Pension Diversion Act* and the *Family Orders and Agreements Enforcement Assistance Act* were intended to improve information sharing from federal authorities to courts and provincial child support services, for the purpose of determining the income of payors.

Other amendments to the *Divorce Act* which are not yet in force will implement the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, an international convention for the cross-border recognition and enforcement of support orders. Canada has signed the convention, which expresses its intention to become a party to it, but has not yet ratified it and become a contracting party (see https://www.hcch.net/en/faq).

Chapter 5

Division of Property and Responsibility for Debt[1]

The division of property and debt falls within provincial jurisdiction. The *FLA* is the applicable legislation. The *Divorce Act* does not provide for these issues.

[§5.01] Overview of Division of Property and Debt Under the former *FRA*

Parts 5 and 6 of the former *FRA* governed the division of assets between spouses upon the breakdown of a marriage. Although Parts 5 and 6 of the *FRA* were repealed with the coming into force of the *FLA* on March 8, 2013, they continue to apply to cases started under the *FRA* prior to that date and to challenges to property agreements made between married parties while the *FRA* was in force (unless the parties agree to apply the *FLA*). Note that the Court of Appeal confirmed in *Bingham v. Bingham*, 2023 BCCA 69 that the transition provisions apply not only to separation agreements but to cohabitation or marriage agreements as well.

Because of the significant differences between the property division regimes of the *FRA* and the *FLA*, it is important to apply the correct legislation.

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

[§5.02] Overview of Division of Property and Debt Under the *FLA*

The provisions of the *FLA* regarding property and debt division apply both to married spouses and to unmarried spouses who have lived together in a marriage-like relationship for at least two years.

Three key terms in the property and debt division regime of the *FLA* are "family property" (s. 84), "excluded property" (s. 85), and "family debt" (s. 86).

"Family property" is broadly defined as all real and personal property as follows:

- *on the date the spouses separate*, property that is owned by a spouse, or the beneficial interest of a spouse in property (s. 84(1)(a)); and
- *after separation*, property acquired by a spouse or a beneficial interest in property acquired by a spouse, if that property or beneficial interest was derived from family property or the disposition of family property (as defined in s. 84(1)(a)) (s. 84(1)(b)).

Section 84(2) of the *FLA* provides a non-exhaustive list of specific examples of family property.

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

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

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

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

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

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

[1] **Magal Huberman** revised this chapter in July 2023, July 2022, March 2020, February 2019 and July 2016. It was previously revised by Scott Booth (2013); John-Paul Boyd (2005, 2006 and 2010–2013); Michael R. Eeles (1999–2004); and Paul M. Daykin (1998). Janet E. Murphy provided the content relating to land on reserves in 2002.

[§5.03] Unequal Division Under the *FLA*

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

(2) (a) the duration of the relationship between the spouses;

(b) the terms of any agreement between the spouses, other than an agreement described in s. 93(1) [*setting aside agreements on property division*];

(c) a spouse's contribution to the career or career potential of the other spouse;

(d) whether family debt was incurred in the normal course of the relationship between the spouses;

(e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

(g) the fact that a spouse, other than a spouse acting in good faith,

(i) substantially reduced the value of family property, or

(ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness;

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

Courts have repeatedly noted the high bar set by the requirement of "significant" unfairness. Determining whether equal division would be significantly unfair remains highly discretionary and dependent on the facts.

Recently, in *Singh v. Singh*, 2020 BCCA 21, the Court of Appeal reiterated: "The threshold for 'significant unfairness' is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division" (para. 134). The Court of Appeal also established that "any other factor" under s. 95(2)(i) refers to "a limited class, namely, the economic characteristics of a spousal relationship," and does not mean any factor without limitation (para. 138). See also *Banh v. Chrysler*, 2022 BCCA 74, in which the Court of Appeal allowed an appeal from an order that divided post-separation increases in value unequally. The court noted that the trial judge improperly relied on non-legislated factors, and that unequal division deprived the appellant of the post-separation growth in the value of her share of the property.

[§5.04] Excluded Property

An important issue raised by the provisions of the *FLA* is whether excluded property becomes family property if the owner spouse transfers it to the other spouse or into the joint names of the spouses (for instance, if the owner of excluded funds uses them to purchase a family home that is registered in the names of both parties). Relatedly, the status of two common law presumptions—the presumption of advancement and the presumption of resulting trust—has been controversial and uncertain.

The *Family Law Amendment Act, 2023* (Bill 17) resolved these issues when it came into force on May 11, 2023, but unless the parties agree otherwise, these amendments only apply to proceedings that began after that date, and to proceedings to set aside or replace an agreement on property division that was made after that date.

The *Family Law Amendment Act, 2023* (Bill 17) introduced the following:

- Section 81.1, which provides that the presumption of advancement and the presumption of resulting trust do not apply "in questions respecting the ownership of property as between spouses"; and
- Section 85(3), which provides that if property falls in the definition of "excluded property" then "the exclusion applies despite any transfer of legal or beneficial ownership of the property from a spouse to the other spouse." In other words, if a spouse transfers excluded property to the other spouse or to joint ownership, that property remains excluded (except for increases in value).

However, as these amendments do not apply to proceedings started or agreements made before May 11, 2023, counsel should continue to be familiar with the case law that developed prior to the amendments, including that the law has been uncertain. Some decisions maintained the presumption of advancement (for example, *V.J.F. v. S.K.W.*, 2016 BCCA 186), while others expressly rejected it (*H.C.F. v. D.T.F.*, 2017 BCSC 1226) or otherwise declined to apply it, on various grounds (see e.g. *Lahdekorpi v. Lahdekorpi*, 2016 BCSC 2143; *McManus*

v. McManus, 2019 BCSC 123; *Andersen v. Andersen*, 2021 BCSC 2598 and *Sophonow v. Sophonow*, 2021 BCSC 1863).

Another aspect of the law related to excluded property that was amended by the *Family Law Amendment Act* is the limited circumstances in which excluded property may be divided between the parties. Prior to the amendments, s. 96 of the *FLA* provided that:

> The Supreme Court must not order a division of excluded property unless
>
> (a) family property or family debt located outside British Columbia cannot practically be divided, or
>
> (b) it would be significantly unfair not to divide excluded property on consideration of
>
> (i) the duration of the relationship between the spouses, and
>
> (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

Section 96 continues in force but with changes to s. 96(b), which expand the circumstances in which the court may divide excluded property:

> The Supreme Court must not order a division of excluded property unless
>
> (a) family property or family debt located outside British Columbia cannot practically be divided, or
>
> (b) it would be significantly unfair not to divide excluded property on consideration of the duration of the relationship between the spouses and one or more of the following factors:
>
> (i) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of the excluded property;
>
> (ii) the terms of any agreement between the spouses respecting the excluded property, other than an agreement described in s. 93 (1) [setting aside agreements respecting property division], including but not limited to terms respecting the transfer of the excluded property;
>
> (iii) if the Supreme Court makes a determination under s. 95 (1) [*unequal division by order*] respecting significant unfairness, the extent to which the significant unfairness cannot be addressed by an unequal division of family property or family debt, or both.

As with ss. 81.1 and 85(3), the amendments to s. 96 do not apply to proceedings that began before the amendments received Royal Assent (May 11, 2023) or to proceedings to set aside or replace an agreement on property division that was made before that date, unless the parties agree otherwise. See *R.J.L. v. T.G.S.*, 2023 BCSC 3, for a pre-amendments example in which the court divided excluded property based on the length of the relationship and the spouse's direct contributions to the business that was the excluded property at issue.

[§5.05] Pensions and RRSPs

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

Note that the *Family Law Amendment Act* includes amendments to Part 6 of the *FLA*, which governs pension division. Some of these amendments have come into force on May 11, 2023 and others will come into force by regulation. Counsel should keep up to date about these amendments.

1. Pensions

Pension division is complex and counsel should seek expert assistance whenever needed. Guidance is also available from a number of CLE publications, including the *Family Law Source-book* and *Family Law Agreements—Annotated Precedents*. A full discussion of pension division is beyond the scope of these materials.

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

(a) Local Plans

The location of the head office of the employer or of the pension administrator's office does not determine whether the plan is "local." Rather, a "local plan" is defined in s. 110 of the *FLA* and includes the following circumstances:

- the plan is registered in another province and has members in BC;
- the plan is registered with the BC *Pension Benefits Standards Act*, S.B.C. 2012, c. 30; or
- the plan is, by its own terms or the terms of the legislation governing it, subject to Part 6 of the *FLA*.

FLA Part 6 sets out the mechanisms for dividing local plans between the member spouse (the spouse who owns the pension) and the non-member spouse (the spouse entitled to an interest in the member's pension). The division method depends on the type of the pension plan: defined contributions, defined benefits, or hybrid plans.

Defined contribution plans are like RRSP accounts to which the member, employer or both

have contributed. The accumulated amount will be available to the member on retirement to purchase an annuity, registered retirement income fund account or some other retirement payment vehicle, or to draw from as income. A defined contribution plan is divided by rolling over the non-member's share into another locked-in retirement vehicle, such as an RRSP, life income fund (LIF) or locked-in retirement account (LIRA). Alternatively, if the plan administrator consents, the non-member's share may be left in the plan and administered on the same terms and conditions that apply to members.

Defined benefit plans provide a fixed income on retirement, as determined by a formula (usually a multiple of years of service and a percentage of the plan's earnings). A defined benefit plan is divided by making the non-member spouse a limited member of the plan who is entitled to their proportionate share of the pension. The limited member may receive their benefits through a separate pension (that is, monthly pension payments) or direct the plan to transfer their share to a locked-in retirement vehicle, such as a LIF or LIRA. The limited member can begin receiving pension income or direct the transfer of their share only after the member becomes eligible to commence their pension.

A **matured defined benefits pension** (a pension paying benefits as a result of the member's retirement) is divided by a benefit split administered by the plan, and the non-member spouse becomes a limited member of the plan. The non-member will begin receiving benefits upon being registered as a limited member.

There are also **hybrid plans** that combine features of defined benefits and defined contribution plans. Their division is addressed in s. 116 of the *FLA*.

The *Division of Pensions Regulation*, B.C. Reg. 348/2012, outlines the formulas for determining the non-member spouse's share of a local plan. Section 1 provides that the commencement date for calculating the non-member's share of the pension is the date specified in the order or agreement (typically the date when the relationship between the parties began, within the meaning of the *FLA*).

(b) Extraprovincial Plans

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

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

(c) Plans Exempt From Part 6

Some pension plans must be divided according to legislation other than the *FLA*. Dividing pensions of federal employees created by specific statutes (such as the *Public Service Superannuation Act*, the *Canadian Forces Superannuation Act*, or the *Royal Canadian Mounted Police Superannuation Act*) is governed by the federal Pension Benefits Division Act, S.C. 1992, c. 46, Schedule II. This schedule provides a complete code for the division of such pensions on marriage breakdown and does not allow division under provincial property laws.

Make sure to seek expert assistance about the mechanisms for division for the particular type of pension at issue and the appropriate wording of orders or agreements.

2. Canada Pension Plan

Canada Pension Plan credits accruing during the parties' cohabitation may be equalized between them upon application to the Plan. These provisions also apply to unmarried parties who qualify as "common-law partners" within the meaning of the *Canada Pension Plan*, R.S.C., 1985, c. C-8, s. 2(1). The parties may waive the equalization of their credits (*FLA*, s. 127).

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

3. RRSPs

RRSPs can be divided on a tax-deferred basis under the rollover provisions of the *Income Tax Act*. In this procedure, funds are transferred directly from the RRSP of one spouse to the RRSP of the other; the transfer requires a specific form, executed by the respective financial institutions. The rollover allows for RRSP division without the immediate tax

consequences of withdrawals from the RRSP. Note that the rollover can only be done if the RRSP division is pursuant to a written separation agreement or a court order.

[§5.06] Property on Reserve Lands

When real property located on a First Nations reserve is at issue, complex issues arise and counsel must be careful to identify the applicable legislation and any limitations on the ability of the court to make orders respecting the property. Below is a brief introduction to some of the issues that may arise, but if the case involves real property on reserve lands, it is best practice to seek advice from a lawyer who has experience in this area of law.

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

In general, the provisions of the *FLA* dealing with ownership and possession of land do not apply to land on reserve, based on the principle that provincial legislation cannot infringe on areas assigned exclusively to federal jurisdiction by virtue of s. 91 of the *Constitution Act, 1867* and the doctrine of paramountcy (*Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, and *Darbyshire-Joseph v. Darbyshire-Joseph*, 1998 CanLII 3522 (B.C.S.C.)). For the same reason, the court cannot make an order under s. 90 of the *FLA* for exclusive occupancy of property on reserves (see *Paul v. Paul*, [1986] 1 S.C.R. 306).

However, in limited circumstances described in s. 210 of the *FLA*, a court may be able to make orders concerning land on a reserve. Section 210 of the *FLA* states that a treaty First Nation (defined in the *Interpretation Act*, s. 29.1, as a First Nation that has a final agreement) has standing in certain proceedings under Part 5 of the *FLA* concerning property division, if provided for in its final agreement. For this section to apply, the proceeding must be one in which the treaty First Nation is entitled under its final agreement to make laws restricting alienation of its treaty lands, a parcel of those lands is at issue, and at least one spouse is a member of the treaty First Nation. In such a proceeding, the court must consider evidence and representations about the laws of the treaty First Nation concerning the alienation of its treaty lands.

The federal *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 (the "*FHRMIRA*") concerns family homes situated on First Nation reserves and matrimonial interests or rights with respect to structures and lands situated on those reserves. It applies both to married spouses and to those who meet the definition of common-law partners under the *Indian Act* (meaning they have lived together in a marriage-like relationship for at least one year), but only if at least one of the spouses is a First Nation member or an Indian within the meaning of the *Indian Act*.

The first part of the *FHRMIRA* states that a First Nation has the power to make its own laws about the use, occupation and possession of family homes on First Nation reserves, and the division of any value or interests in lands and structures on reserves as between spouses, both during the spouses' relationship and upon relationship breakdown or the death of a spouse.

The second part of the *FHRMIRA* sets out provisional rules about these issues. The provisional rules apply to a First Nation if that First Nation does not have its own laws, or until it makes its own laws. Under s. 12 of the *FHRMIRA*, the provisional rules do not apply to certain First Nations that have signed the Framework Agreement under the *Framework Agreement on First Nation Land Management Act*, S.C. 2022, c. 19, s. 121 or have self-government arrangements. Therefore, you will need to ascertain whether the First Nation has enacted its own laws or whether the provisional rules apply to it.

The provisional rules cover three main areas: emergency protection orders, occupation of the family home, and division of the value of the family home. The following sections briefly summarize the orders that can be made, but the application process can be complex and is beyond the scope of these materials.

1. Emergency Protection Orders

Sections 16–19 of the *FHRMIRA* address emergency protection orders. Emergency protection orders are made to address family violence and may include exclusive occupation of the family home by the applicant and a requirement that the other spouse and any other specified person vacate the family home.

2. Occupation of the Family Home

Sections 20–21 of the *FHRMIRA* address occupation of the family home. Both partners have the right to be in the family home during the relationship, whether or not the partner is Indigenous (s. 13). However, the court may order that one of the spouses have exclusive occupation of the home, based on the considerations listed at s. 20(3). In addition, a surviving spouse may occupy the home for up to 180 days following the death of the other, and the court may also make an order for exclusive occupation by the surviving spouse (s. 21), based on the considerations listed in s. 21(3).

3. Dividing the Value of the Family Home

Sections 28–33 of the *FHRMIRA* address dividing the value of the family home. When a relationship breaks down, each partner is entitled (on application pursuant to s. 30) to one-half of the value of the "interest or right" held by either of them in the family home, as well as additional amounts calculated pursuant to ss. 20(2) and 20(3). Section 20 also addresses how values are to be determined, and provides for varying the amounts payable to either spouse if such payment would be unconscionable (s. 29).

The decision in *J.F.L.M. v. S.N.M*, 2021 BCSC 596 indicates that when the property that was situated on reserve has been sold and only the funds from the sale proceeds are at issue, the *FHRMIRA* will not apply because there is no interest in land on reserve to address.

[§5.07] Property Agreements

Under the *FLA*, the court may not make an order dividing family property or family debt where parties have a written agreement respecting the division of that property or debt, unless the court first sets the agreement aside (s. 94(2)). See Chapter 9 for more on this topic.

[§5.08] Pets

The *Family Law Amendment Act, 2023* (Bill 17) includes new provisions regarding "companion animals." Companion animals will be defined in amendments to s. 1 of the *FLA* and the addition of s. 3.1. Section 97, which deals with the court's jurisdiction to give effect to property division, will apply to "companion animals," and ss. 92, 96, and 97 of the *FLA* will be amended to include specific provisions regarding ownership and possession of companion animals, including the jurisdiction of the court to make orders and the ability of parties to enter into agreements about these issues. As of the time of writing, these amendments have passed third reading and will come into force by regulation.

Chapter 6

Interim Applications in Family Law Matters[1]

[§6.01] Introduction

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

The Supreme Court has jurisdiction over all matters in interim applications; the Provincial Court may only hear interim applications on those matters that are within its jurisdiction (see §2.02). Section 216 of the *FLA* and ss. 15.1(2), 15.2(2) and 16.1(2) of the *Divorce Act* provide for interim orders.

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

In the Supreme Court, associate judges and judges in chambers hear applications for interim orders under the SCFR. The jurisdiction of associate judges is set out in Practice Direction 50, and includes the jurisdiction to make orders for interim corollary relief under the *Divorce Act*, interim orders under the *FLA*, interim restraining orders, and orders for exclusive possession of the family home under the *FLA*. An associate judge does not have inherent jurisdiction, including equitable jurisdiction to grant restraining orders that are not specifically authorized by statute. A judge has jurisdiction over all matters.

[§6.02] Application Procedures

In Supreme Court proceedings, SCFR 10-1 to 10-9 govern interim applications.

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

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

(SCFR 7-1(3))

For applications that do not fall within one of these exceptions, a judge or associate judge may waive the requirement for a JCC on the application of the party. See SCFR 7-1(5) and Family Practice Direction FPD-18 for application requirements, and SCFR 7-1(4) for the circumstances in which the court may waive the JCC requirement.

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

Under SCFR 10-6(3), the notice of application filed by the applicant may not exceed 10 pages and must:

- describe the orders sought, or attach a draft order;
- summarize the factual basis of the application;
- set out the legal basis for the orders sought, including all statutory provisions, rules, and case authorities that the applicant intends to rely on;
- list affidavits and other documents relied upon;
- set out the applicant's time estimate for the hearing;
- set out the date and time for the hearing of the application (subject to subrules (4) and (5) regarding applications longer than two hours and the dates the court hears particular applications);

[1] **Magal Huberman** revised this chapter in July 2023, July 2022, March 2020, February 2019 and July 2016. It was previously revised by John-Paul Boyd (2005, 2006, 2012 and 2013); Scott Booth (2013); Carolyn Christiansen (2010 and 2011); Kerry L. Somerville (2004); Tracey L. Jackson (1998–2001); Nancy Cameron (1996); and Frank Kraemer and Nancy Cameron (1995).

- set out the place for the hearing in accordance with SCFR 10-2, which is normally the registry in which the underlying action is brought; and
- provide the data collection information required in the appendix to the form.

As noted in *Dupre v. Patterson*, 2013 BCSC 1561, "Counsel who come to court with application materials that do not comply risk having their applications at least adjourned, with potential cost consequences, until proper materials are filed" (at para. 56). See also *J.M.G. v. S.G.*, 2022 BCSC 1218, in which the court dismissed an application brought by a deficient notice of application and found that the deficiencies amounted to lack of notice to the respondent.

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

The timelines for service and which application materials must be served depend on the type of application. The applicant must serve each of the parties (and every other person who may be affected by the orders sought) with a copy of the filed notice of application and a copy of the filed version of each of the affidavits and documents referred to in the notice of application that have not already been served on that person. Additional materials must be served for specific types of applications, such as applications brought under SCFR 11-3.

SCFR 10-6(7) sets out the timelines for serving application materials: for interim applications, at least eight business days before the date set for the hearing; for a summary trial, at least 12 business days; and at least 21 business days for applications to change, suspend, or terminate a final order, or to set aside or replace an agreement filed with the court (note that these and other applications specified in the SCFR must be personally served). "Business days" are defined in SCFR 1-1(1), and the calculation of time is governed by the *Interpretation Act*. Always check the applicable timelines and service requirements.

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

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

- set out the application respondent's position on each order sought;
- summarize the factual and the legal basis on which the orders sought should not be granted;
- list the affidavit and other materials relied upon in opposition to the relief sought; and
- set out the application respondent's time estimate.

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

The applicant must file an application record with the registry, combining all documents the court will need to refer to, bound in a ring binder or in some other form of secure binding (SCFR 10-6(14)). See SCFR 10-6(14) and (16) for required contents.

The applicant must file the application record between 9:00 a.m. on the business day that is three full business days before the date set for the hearing and 4:00 p.m. on the business day that is one full business day before the date set for the hearing (or on an earlier day if ordered by the court).

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

[§6.03] Applications Without Notice and on Short Notice

Special rules apply to applications brought without notice or on short notice: see SCFR 10-8 (when no notice is required) and 10-9 (urgent applications), and Supreme Court Family Practice Direction FPD-6 (for applications on short notice).

When proceeding without notice, the application material should explain why the applicant is not giving notice. For example, there may be safety concerns or urgency, or there may be a concern that notice will result in the dissipation of assets. Take care to bring applications without notice only when necessary. If the court declines to make an order without notice, the court may direct that the application be brought on regular notice, or grant leave to bring the application on short notice.

Counsel have a duty in proceedings without notice to inform the court of all material facts known to them that will enable the court to make an informed decision, including facts that are adverse to the interests of the client or lessen the likelihood of the order being made.

If the court grants an order on an application brought without notice, the order will usually be limited in scope and will be either time-limited, with a date on which the applicant may apply to extend the order on notice to the respondent, or will contain a term allowing the application respondent to apply to set aside the order on short notice to the applicant.

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

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

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

1. Interim Orders Regarding Care of Children and Parenting Arrangements

See the *Divorce Act*, s. 16.1(2), with respect to interim parenting orders, and s. 16.5, with respect to interim contact orders.

See the *FLA*, ss. 45 and 52, with respect to orders allocating parental responsibilities, parenting time and contact (whether interim or final); and s. 216 with respect to interim orders generally.

A non-final order about the care of children may have a profound effect upon the final outcome of a family law proceeding. When the matter finally proceeds to trial, it is sometimes very difficult to alter the arrangements established by an interim order, despite case authorities emphasizing that the trial judge is not bound by the interim order.

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

Affidavits should contain relevant, accurate and coherent evidence. See Appendix 3 for a summary of what details to include in affidavits for different kinds of applications. In addition to identifying information about the parties and the children, affidavits may include the following, depending on the circumstances of the case and the orders sought:

- a brief history of the parents' relationship;
- a history of the child's care during the relationship and since separation;
- the individual needs of the child, including any health or educational problems;
- the nature and strength of the relationship between the child and the significant persons in their lives;
- the existing and proposed living arrangements of the parties and the children;
- details concerning the children's day care, schools, schedules, eating, discipline, etc.;
- details concerning the spouse's schedule either away from home or at work or in the evenings;
- any concerns about the other parent that are related to the best interests of the children;
- the views of the children, if the children are mature enough to express their views; and
- occurrences and/or patterns of family violence.

Lawyers should explain to their clients that the focus of the evidence and the analysis is on the best interests of the child, and not the parents' interests. Lawyers should ensure that the contents of the affidavits are related to the applicable factors in the governing legislation (e.g. s. 16 of the new *Divorce Act*; ss. 37 and 38 of the *FLA*).

Depending on the circumstances, it may be preferable to wait until an expert report has been prepared regarding the needs and views of the children and the appropriate parenting arrangements before proceeding with an interim application (see §7.05 for more on those reports). However, the court should exercise caution when relying on contested aspects of an expert report that have not yet been tested at trial. For a detailed discussion of this issue, see *Ellis v. Alvarez*, 2023 BCSC 544, in which the court stated that "when a party seeks to rely on a s. 211 report on an interlocutory application, the court should at least consider whether it is appropriate to rely on contested aspects of the report absent additional procedural safeguards" such as cross-examination of the expert.

2. Interim Support for a Spouse or Child

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

The Child Support Guidelines apply to interim applications as they do to final applications. Applications for interim spousal support orders tend to rely more heavily on the short-term need of the proposed recipient, whereas the basis for the proposed recipient's entitlement to support is usually scrutinized more thoroughly at trial (see e.g. *Chwilkowski v. Tylicka*, 2022 BCSC 732). The application materials should still set out the necessary evidence to establish entitlement to spousal support on any basis that applies to the client.

Applications for interim support for a spouse or child are heard in chambers. As a year or more often passes before a matter finally proceeds to trial, the financial effect of an interim support order can be significant. It is essential to obtain as much financial disclosure as possible before proceeding with an interim support application. Without proper financial disclosure, it is impossible to determine the needs and means of the proposed recipient and the capacity of the proposed payor to pay. When a party fails to provide proper financial disclosure, counsel may rely on the provisions of s. 213 of the *FLA* and SCFR 5-1(28).

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

It is possible to obtain an order for interim support that applies retroactively. See e.g. *Hiemstra v. Hiemstra*, 2006 SCC 37; *L.S. v. E.P.*, 1999 BCCA 393; and *Kerr v. Baranow*, 2011 SCC 10. However, the court will often adjourn a claim for retroactive support to trial, and limit interim support orders to interim ongoing support.

Leave is required to appeal an interim order of a BC Supreme Court judge to the Court of Appeal. The threshold for granting leave is extremely high; for a recent discussion, see *McMillan v. McMillan*, 2023 BCCA 144 (leave granted).

See Chapter 4 for a general discussion of support.

3. Appointment of an Expert by the Court

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

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

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

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

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

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

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

Part 13 of the SCFR also includes rules regarding experts appointed by one or both of the parties, and general rules that apply to all types of expert reports and expert evidence. See also §7.04.

4. Protection Orders

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

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

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

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

(a) a provision restraining the family member from

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

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

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

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

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

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

(c) directions to a police officer to

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

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

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

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

(e) any terms or conditions the court considers necessary to

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

(ii) implement the order.

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

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

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

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

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

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

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

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

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

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

British Columbia has a central registry for protection orders. It is prudent to advise the client to have copies of the order with them, as well as in their vehicle and at the locations that the opposing party is restrained from attending (such as their home and place of work).

Protection orders must be in a specified form and separate from any other orders, even if additional orders were sought in the notice of application and granted at the same time. At present, the court registry, rather than counsel, drafts protection orders (practice may vary between the Supreme Court and Provincial Court and among different registries).

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

- The accused must have had knowledge of the order at the time of the breach. If the accused did not, then the breach itself is not a criminal offence. If the respondent was present when the order was made, ensure that the order

states that. If the respondent was not present, ensure prompt service in person and proof of service. Make sure to consult SCFR 15-1(2.1) and (2.2) regarding service of protection orders.

- The standard of proof for a breach is the criminal standard of "beyond a reasonable doubt." Vague terms are therefore problematic. For example, prohibiting the person from attending "near" a certain location may be too vague; a specified distance would be preferable.

Clients obtaining a protection order should be advised of these issues and should not be given a false sense of safety merely because they have obtained a protection order. Community organizations can help with general safety planning; familiarize yourself with local organizations so you can refer your clients to such services.

5. Exclusive Occupancy

Section 90 of the *FLA* provides for the exclusive occupancy of a family residence by one spouse, or the exclusive use of property stored there by one spouse. This relief is not available in the Provincial Court. Note that exclusive occupancy orders are for the family residence, not other property (*Wang v. Sigouin*, 2017 BCCA 372).

The test for exclusive occupancy requires the applicant to prove that shared use of the family residence is a "practical impossibility," and that, on the balance of convenience, the applicant is the preferred occupant (see e.g. *MacDonell v. MacDonell*, 2021 BCCA 471, *Pelley v. Pelley*, 2014 BCSC 473). The practical impossibility test is objective (see *Priebe v. Baker*, 2022 BCSC 306; *Glowacki v. Nesbeth*, 2021 BCSC 535). When there are children, "the principal factor in determining which party to grant exclusive occupancy to must be the best interests of the children" (*Pelley v. Pelley*).

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

- the conduct of the parties, such as the presence or absence of a serious dispute complicated by such matters as violence;
- the respective economic positions of the parties (see e.g. *Ferguson v. Ferguson*, 2014 BCSC 216);
- the mental and physical health of a spouse (*P.F. v. J.T.F.*, 2021 BCSC 1506);
- whether alternative living arrangements are available in the home to modify or minimize contact between the parties; and
- the parties' past acquiescence to sharing the home despite the tensions between them (see e.g. *Glowacki v. Nesbeth*).

Section 90 of the *FLA* does not apply to homes situated on First Nations reserve lands because of the division of powers set out in ss. 91 and 92 of the *Constitution Act, 1867* (see *Paul v. Paul*, [1986] 1 S.C.R. 306). However, if the home is situated on First Nations reserve lands, and at least one of the parties is a First Nation member, the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c. 20 applies. See §5.06 for a discussion of orders that may be made under that legislation.

6. Conduct Orders

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

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

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

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

7. Restraining the Use, Disposition or Encumbrance of Property

Only the Supreme Court can make orders preserving property. The lawyer who does not take steps to ensure that assets are preserved may be negligent.

The following steps may be appropriate to preserve property, depending on the property at issue, which party has access to and control over the property, and the circumstances as a whole:

- filing, concurrently with the commencement of proceedings, a certificate of pending litiga-

tion against real property under the *Land Title Act*;

- filing an entry under the *Land (Spouse Protection) Act*, whether litigation has commenced or not;
- obtaining an order under s. 91 of the *FLA* restraining the use, disposition or encumbrance of assets; and
- obtaining an order protecting and preserving property under SCFR 12-1 and 12-4 or s. 39 of the *Law and Equity Act*.

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

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

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

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

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

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

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

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

8. Interim Distribution of Assets and Sale of Property

(a) Interim Distribution

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

> If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund:
>
> (a) family dispute resolution;
>
> (b) all or part of a proceeding under this Act; or

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

Section 89 can be an important tool when your client cannot afford services they need to deal with their family law matter, such as paying for expert reports. See for example *Etemadi v. Maali*, 2021 BCCA 298 and *R.D. v. R.S.D.*, 2023 BCSC 6 for applicable principles.

(b) Interim Sale of Property

Supreme Court Family Rule 15-8 allows the court to make an order for the sale of property in a family law case where it appears necessary or expedient. The court may also make directions for the purpose of effecting a sale, which can include requiring payment of the purchase price into court or to trustees or to other persons (SCFR 15-8(1) and (3)). This issue often arises when a party wants to sell the former family home and the other party opposes the sale. The court's willingness to order the sale of property before trial is limited. The onus is on the applicant to show that the sale of the property before trial is necessary or expedient (see *Reilly v. Reilly* (1992), 44 R.F.L. (3d) 72 (B.C.C.A.); *Tomic v. Tough*, 2013 BCCA 355; *West v. McMillan*, 2022 BCSC 1264; and *R.S.L. v. T.G.S.*, 2023 BCSC 3).

9. Pre-Trial Examination of Witnesses

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

10. Appointing a Receiver or Receiver Manager

Under SCFR 12-2, the court may appoint a receiver. A receiver's duties might include taking in rents from family property or taking possession of such property to preserve it pending trial. A party should only apply to appoint a receiver when there is a real danger of the assets in dispute being dissipated by the spouse who controls them. The court will weigh the balance of convenience in deciding whether to grant the order. For example, if historically one spouse has managed the assets without notable loss, the right of that spouse to manage may continue.

See Appendix 3 on the details to include in an affidavit in support of the application. See also s. 39 of the *Law and Equity Act* for related relief.

11. Security for Costs

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

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

A judge may also order security for costs under the court's inherent jurisdiction.

12. Applications for Findings of Contempt

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

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

Contempt is a remedy of last resort. It supplements the remedies for non-compliance set out in SCFR (such as SCFR 15-4, 21-5 and 21-6) and the *FLA*. The conduct must generally be repeated and ongoing before the court will find a party in contempt.

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

Once a finding of contempt has been made, the application moves to a sentencing phase. Under SCFR 21-7, the court may punish contempt by an order of committal or by imposition of a fine, or both.

Chapter 7

Pre-Trial Investigation and Preparation[1]

[§7.01] Discovery and Disclosure of Documents

Section 212 of the *FLA* gives the court authority to order disclosure of information by parties at any stage of the proceeding, in accordance with the SCFR or the PCFR. This chapter focusses on procedures under the SCFR.

Under the *FLA*, a party to a family law dispute must make "full and true" disclosure of information required to resolve the dispute (s. 5). Note that this obligation applies regardless of whether there is a court proceeding. The *FLA* also contains provisions which permit the court to make disclosure orders (s. 212) and to penalize incomplete, false, or misleading disclosure in a number of ways, including fines and drawing adverse inferences (s. 213).

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

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

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

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

Counsel should not request documents in a rote, "one size fits all" manner. Rather, in making and responding to requests for documents, counsel should carefully balance the advantages and disadvantages, including the probative value of the documents, any safety concerns about releasing information in certain documents, the privacy and sensitivity of the information in the documents, and costs. For a discussion about the production of counselling records in family law matters, see e.g. *Ellis v. Alvarez*, 2023 BCSC 544.

[§7.02] Financial Disclosure

Supreme Court Family Rule 5-1 requires disclosure of financial information in family law cases in which a party seeks an order for support under the *Divorce Act* or the *FLA*, an order regarding property and debts under Part 5 of the *FLA*, the review or variation of a support order, or an order under the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (SCFR 5-1(2)).

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

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

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

[1] **Magal Huberman** revised this chapter in July 2023, July 2022, June 2021, March 2020, February 2019 and December 2016. It was previously revised by John-Paul Boyd (2013); Sandra L. Dick (2012); Carolyn Christiansen, (2010 and 2011); John-Paul E. Boyd (2005 and 2006); Kerry L. Somerville (2004); Cindy J. Lombard (1997 and 2001); Catherine M. Greenall (1996); and Frank Kraemer and Jodie Werier (1995).

1. Content of the Form F8 Financial Statement

Form F8 contains 6 parts:

Part 1: Income

Part 2: Monthly Expenses

Part 3: Property (Assets and Debts)

Part 4: Special or Extraordinary Expenses

Part 5: Undue Hardship

Part 6: Income of Other Persons in Household

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

2. Attachments

A party who serves a Form F8 must attach the relevant "applicable income documents" defined at SCFR 5-1(1). These income documents include personal income tax returns and related Canada Revenue Agency notices of assessment and reassessment, property assessments, corporate financial statements and tax returns, pay stubs, and other documents listed in Form F8. The required attachments include the documents that must be disclosed under s. 21 of the Child Support Guidelines.

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

At the Provincial Court, financial statements are in Form 4. PCFR 25, 28 and 30 require parties to file financial statements when either party applies for child support (provided that the party's income information is required by the Child Support Guidelines) or for spousal support.

3. Enforcement and Disclosure

In addition to the powers of the court pursuant to ss. 212 and 213 of the *FLA*, SCFR 5-1(28) lists the enforcement mechanisms available when a party fails to comply with a requirement under SCFR 5-1, including ordering that a Form F8 and applicable income documents be filed, dismissing an application, striking out a responding document, drawing an adverse inference against the party, punishing for contempt of court, imposing a fine, and attributing income in an amount the court considers appropriate.

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

4. Agreement on Income

Where the only issue is child support, financial disclosure under the SCFR or the Child Support Guidelines will not be required when the parties are able to agree on the payor's income and sign and file an agreement to that effect in Form F9 with the required attached documents (SCFR 5-1(8)).

5. Particulars

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

6. Disclosure of Business Interests

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

7. Practice Tips for Completing Financial Statements

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

The client must indicate on the statement whether they anticipate any significant changes in the information provided.

(a) Income and Monthly Expenses

Income and expenses may be estimated, with care. The client should indicate when an amount is an estimate and be able to explain the basis for it.

Reported income and expenses are presumed to reflect current amounts. If an amount will vary, or if an expense will be incurred in the future, then say so. Ensure that the party's sources of income are clear.

If an expense is paid by someone else (including by a corporation), indicate who pays the expense.

Pay attention to any disparities in a party's reported annual income, annual expenses, assets, and debts.

(b) Value of Assets

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

For property values, use the appraised value when it is known, and the assessment authority's value pending an appraisal. Indicate the source of the value.

If current values are not available for bank accounts, investments, and RRSPs, then use the most recent available statement and include the statement date. Values are otherwise assumed to be current.

The value of a defined benefit pension plan is usually unknown, unless an actuary or the plan administrator has valued it. The value of defined contribution plans can be drawn from the party's most recent statement. Indicate the source and date of the information.

The value of a private business interest is usually unknown unless it was just purchased, there is a buy-out price fixed by a contract, or the business has been valued. Otherwise, report the value of the business as "unknown."

Indicate whether each asset is in the client's name only or is held jointly with other persons, and when each asset was obtained.

If there is any excluded property or claim for excluded property, complete the applicable table in the Form F8.

(c) Debts

List the entire amount of any joint and personal debts, indicating for each debt whether it is joint or personal.

Distinguish between those debts brought into the relationship, incurred during the relationship, and incurred after separation, by indicating when the debt was incurred.

[§7.03] Examinations for Discovery

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

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

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

The court may order a self-represented party to retain a lawyer to conduct the examination for discovery of the other party, or exclude a party from attending the discovery of the other party (see *Schuetze v. Pyper*, 2021 BCSC 1620 and *A.B. v. Henry*, 2021 BCSC 2562).

[§7.04] Expert Witnesses and Reports

1. General

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

Part 13 of the SCFR sets out the rules regarding expert evidence. Some of the rules under this part apply to all experts, whereas some only apply to specific types of expert evidence. At the Provincial Court, see PCFR 116 and 117 regarding reports pursuant to s. 211 of the *FLA* and PCFR 120 regarding expert reports other than expert reports pursuant to s. 211.

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

Unless the court otherwise orders, an expert report (other than a s. 211 report) must be served on every party at least 84 days before trial, along with written notice by the party that intends to introduce the expert's report at trial or, if a jointly appointed expert, by each party who intends to tender the report at trial (SCFR Rule 13-6).

If a party intends to introduce an expert's report to respond to an expert witness, that responding report must be served at least 42 days before trial under SCFR 13-6(4), along with written notice that the responding report is being served under SCFR 13-6.

Supreme Court Family Rule 13-6(9) requires that after the appointment of the expert or after the trial date has been obtained, whichever is later, the party who is required to serve the expert report must promptly inform the expert of the trial date and that the expert may be required to attend for cross-examination at the trial.

At the Provincial Court, a party must file and serve an expert report at least 60 days before the report is introduced, unless a shorter period is allowed by the court. See PCFR 120(2), (3), and (5) for additional requirements and deadlines for expert reports and evidence (other than s. 211 reports).

At the Supreme Court, a s. 211 report must be filed and served by the author at least 42 days before the trial. At the Provincial Court, the author must file the report in court and serve it on the parties at least 30 days before the trial.

Counsel should arrange for appropriate experts so that the best evidence with the most probative value is presented. Counsel should request the curriculum vitae of any proposed expert and ensure the expert has the requisite qualifications and experience, not only generally but also in respect of any particular issue that the case presents. When the proposed expert's profession is governed by a regulatory or governing body (e.g. physicians, psychologists, accountants), counsel should ensure that the expert is a member in good standing of the applicable body. Further, counsel should familiarize themselves with any applicable Codes of Conduct, Practice Standards, and Practice Checklists of the expert's governing body.

Counsel have a duty to the client to ensure that proper retainer arrangements are made with each expert. It should be clear at the outset who will be responsible for paying the expert—either the law firm or the client—and how much the expert's report is likely to cost. If counsel will be paying the expert, it is prudent to have sufficient funds in trust from the client, in advance. Otherwise, counsel should assist the client in making arrangements directly with the expert. If the client does not have sufficient funds to pay the expert, consider a court application for an interim distribution of assets to finance the report.

2. Property and Financial Experts

Property and financial experts commonly include the following:

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

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

[§7.05] Reports and Assessments Regarding Children

1. Reports Under s. 211

Under s. 211 of the *FLA*, the court may appoint a person to assess and report on any or all of the needs of a child, the views of a child, and the ability of a person to meet the child's needs, for the purposes of a proceeding under Part 4 (Care of and Time with Children). The author of the report must be a family justice counsellor, a social worker, or another person approved by the court (s. 211(2)(a)), usually a psychologist or registered clinical counsellor. Although these reports are prepared under the *FLA*, they can also be used when parenting arrangements will be determined under the *Divorce Act*. The assessor's recommendations in the s. 211 report are not binding on the court; rather, the court will consider the report in the context of the evidence as a whole, and may accept or reject any portion of the report (see e.g. *K.W. v. L.H.*, 2018 BCCA 204).

A report can be obtained by agreement or by court order. Although the threshold for ordering a report is "quite low" (*A.J.B. v. J.M.*, 2019 BCSC 2335, at para. 20), ordering it is not automatic and the applicant for the report "must establish that it is necessary and in the best interests of the child" (*A.J.B.* at para. 22). Although reports can be appropriate in some cases, counsel should consider with the client whether they are necessary given the parties' respective positions, the issues at hand, the potential benefits of the report, the intrusiveness of the evaluation process, and the costs. The court may order that one party pay the costs of the report or that the parties share the costs (s. 211(5)).

Section 211(1) permits the court and the parties to define the scope of the report and the issues to be addressed. At present, the two most common types

of reports pursuant to s. 211 are a comprehensive investigation into all matters concerning the care of the children, and a report limited to assessing the views of the children.

For a comprehensive report, the author typically observes the children with each parent; interviews each parent; interviews the children independently (when appropriate); interviews collateral witnesses (such as teachers, care providers, and the parents' new partners); reviews court materials and other documents; and might conduct psychological testing of the parents (if the assessor is qualified to do so). The report sets out the information gathered, the author's observations and analysis, and recommendations about parenting arrangements.

In contrast, a "views of the child" report is limited to reporting the views of the child, and does not include recommendations about parenting issues. Such reports about the views of the children can be "evaluative," meaning that the author will not only report what the child said but also provide an opinion on, for instance, whether the child was unduly influenced or has independent views on the issues. Alternatively, these reports can be "non-evaluative," with the assessor simply reporting what the child said and what the assessor observed, but such reports would not be considered expert reports under s. 211 because they do not "assess" any matter. Note that "evaluative" and "non-evaluative" are not legislated terms but are often used by counsel and the court.

A party challenging the information or conclusions in a s. 211 report should call the author for cross-examination at trial. The Court of Appeal noted in *K.M.W. v. L.J.W.*, 2010 BCCA 572 that "[t]he facts stated in the investigator's report are *prima facie* evidence of their truth" (at para. 50). Counsel for the party disputing these facts has the onus to adduce evidence to refute them and to call the author of the report for cross-examination. A party may also retain an expert to prepare a report critiquing the s. 211 report; however, such reports are expensive and the test for admissibility is stringent (see *T.E.A. v. R.L.H.C.*, 2018 BCSC 2515 and *N.M.M. v. C.W.P.*, 2022 BCPC 41).

Note that s. 211 reports are among the issues currently under review in the Attorney General of BC's review of the *FLA*; practitioners should keep up to date on any changes.

2. Non-Evaluative Views of the Child Reports

Non-evaluative reports can be agreed to by the parties or ordered by the court under ss. 37(2)(b) and 202 of the *FLA*, which require the court to consider the child's views and permit the court to admit reliable hearsay evidence of a child who is absent or to give any other direction the court considers appropriate concerning the receipt of a child's evidence.

Non-evaluative views of the child reports are limited to reporting what the child has told a neutral third-party interviewer. Because they do not offer an opinion, these reports may be prepared by anyone with special training in interviewing children, including lawyers, social workers, family justice counsellors and psychologists. See the website of the BC Hear the Child Society (hearthechild.ca) for a roster of professionals that meet its training requirements for preparing these reports.

Given the growing recognition of the importance of hearing from children and considering their views when making orders that would significantly impact their lives, counsel should consider early on in the proceedings whether and how evidence about the views of the children can be presented to the court.

[§7.06] Identifying and Interviewing Witnesses

Identify potential witnesses early in the proceeding, and obtain the particulars of each witness, that witness's relationship to the parties, and the witness's contact information. There is no property in a witness, which means that you may speak to adverse witnesses if you wish, so long as they are willing to talk to you, you first identify who you are and whom you represent, and you otherwise comply with sections 5.3 and 5.4 of the *BC Code*. That said, counsel must notify an opposing party's counsel when the lawyer is proposing to contact an opposing party's expert; such notification prompts discussion between counsel about the permissible scope of such contact at law (see the Annotations to section 5.3 and the Ethics Committee opinion summarized in the Summer 2014 *Benchers' Bulletin*).

In some cases, such as cases about the care of children, it is advisable to speak to all of the relevant witnesses as soon as possible. Witnesses can give counsel a sense of the strength of the client's case and of the issues that the other side may raise. Aside from being a valuable source of information, credible and reliable witnesses can lend considerable weight to the client's position at trial. Counsel should cultivate a good working relationship with all witnesses. Counsel should also carefully consider the potential consequences to the parties and the children of obtaining evidence from each potential witness.

If a witness is not responsive, consider obtaining an order for pre-trial examination under SCFR 9-4. Note the restriction on pre-trial examination of the other party's expert under SCFR 9-4(2).

[§7.07] Interrogatories and Notices to Admit

Interrogatories and notices to admit are another form of discovery in family law cases at the Supreme Court. Depending on the case, they may be an efficient and inexpensive way to obtain evidence relating to financial information and admissions on allegations. SCFR 9-3 provides that a party may serve interrogatories on any other party, or on a director, officer, partner, agent, employee or external auditor of a party, if the party consents or if the court grants leave. SCFR 9-6 deals with notices to admit (admissions).

The family rules on interrogatories and admissions mirror the civil rules, so see also the discussion of interrogatories and admissions in the *Practice Material: Civil*.

[§7.08] Asset Schedules ("Scott Schedules")

Scott Schedules set out property and debts. Their purpose is to list assets and debts in a clear and concise format that can be easily referenced by counsel and the trial judge. A Scott Schedule is usually prepared after there has been an examination for discovery and when the full particulars of all assets and debts are available. It includes the following items:

- a listing of each significant asset, with a description;
- brief particulars of the acquisition or disposition of each asset, including the date of acquisition and the value at that date;
- the value of each asset, if known;
- the position of one or both parties regarding ownership and apportionment; and
- reference to the exhibit to be filed in support of a particular item on the Scott Schedule.

Shortly before trial, counsel should provide the Scott Schedule to opposing counsel for review and to identify areas of agreement and dispute. Opposing counsel may provide a Scott Schedule as well, and one or both of the schedules may be presented at trial. The presiding judge at a trial management conference (discussed further below) may also direct the parties to exchange Scott Schedules by a set date prior to the trial.

[§7.09] Securing Trial Dates and Pre-Trial Procedures

1. Supreme Court

(a) Notice of Trial, Trial Brief, Trial Record and Trial Certificate

Trial dates may be booked pursuant to a court order (for example, an order made at a judicial case conference) or by either party through the registry. However, you must complete subsequent steps to secure the trial date:

- One of the parties must file a notice of trial within 30 days after booking the trial date. The filing party must serve a copy of the filed notice of trial on the other party promptly after it has been filed (SCFR 14-2).
- Effective September 1, 2023, the claimant must file a trial brief at least 56 days before the scheduled trial date and serve a copy on each of the other parties, and each other party must file a trial brief at least 49 days before the trial date and serve a copy on each of the other parties (SCFR 14-2.1).
- The party who filed the notice of trial must file a trial record (SCFR 14-4) at least 14 days but no more than 28 days before the first day of the trial, and serve a copy of the filed trial record on the other party promptly after filing.
- Each party must file a trial certificate at least 14 days but no more than 28 days before the first day of the trial (SCFR 14-5). However, as long as one of the parties files the trial certificate, the trial date will remain secure.

(b) Trial Management Conference

A trial management conference ("TMC"), if required, must be held at least 28 days before the scheduled trial date, unless the court otherwise orders (SCFR 14-3). (Effective September 1, 2023, a TMC is required only if ordered by the court or, unless the court otherwise orders, when more than 15 days have been reserved for trial, any party is not represented by a lawyer or may not be represented by a lawyer at trial, or a party requests a TMC by filing a requisition not less than 42 days before the trial date.)

If reasonably practicable, the judge who will preside at the trial should conduct the TMC. The lawyers for each party must attend, and each party must also attend unless the party is represented by a lawyer at the TMC and the party (or an individual authorized by the party) is readily available for consultation during the TMC (SCFR 14-3(4) and (6)).

At a TMC, the judge may consider and make orders on a large range of topics. Subjects of orders might include attendance at a settlement conference; amendments to pleadings; plans for conducting the trial; admissions of fact;

admitting documents; time limits on direct examination and cross-examination of witnesses and opening or closing statements; expert reports; adjournment of the trial or the TMC; and any other matters that may assist in making the trial more efficient, resolving the family law case, or furthering the object of the SCFR.

Under SCFR 14-3(11), the court may *not* hear applications at a TMC that require affidavit evidence.

(c) Case Planning Conference

Effective September 1, 2023, at any time after a judicial case conference has been held in a family law case, a party may request a case planning conference or the court may direct that one take place. Case planning conferences are intended to bring the parties together at an early stage of the litigation to talk about how the case will proceed. See new Part 7.1 of the SCFR for details.

2. Provincial Court

(a) Trial Preparation Conference (PCFR 111-113)

The court may order the parties to attend a trial preparation conference. Unrepresented parties must attend the conference. When a party is represented, counsel must attend the conference, and the party must either attend or be available for consultation (for example, by phone).

The judge at the trial preparation conference has broad authority to make orders about the conduct of the trial and steps to be taken before the trial, including the time required for the trial, pre-trial disclosure, pre-trial applications, and adjourning the trial. The judge may also make orders about how the views of a child will be heard, and orders about alternative ways to question parties when family violence is an issue (PCFR 112). If possible, the judge who conducts the conference should also conduct the trial (PCFR 113).

(b) Trial Readiness Statement (PCFR 110)

Each party must file and serve a trial readiness statement (Form 22). If a trial preparation conference is to take place, filing and service must be done at least seven days before the conference. Otherwise, filing and service are to take place as ordered by the court.

Chapter 8

Alternatives to Full Trial[1]

This chapter focuses on procedures under the SCFR that are designed to encourage settlement even though litigation has commenced, or to have a matter adjudicated without a full trial. For details on the procedures in the Provincial Court, see the PCFR.

[§8.01] Judicial Case Conference

Under SCFR 7-1, the parties to a family law case are generally prohibited from serving a notice of application and affidavits on the opposing party unless a judicial case conference ("JCC") has been held and the presiding judge has released the parties from the JCC program.

Certain applications may be brought even though a JCC has not been conducted. They include applications for an order respecting protection of property under s. 91 of the *FLA*, applications for a consent order, applications made without notice, and applications to change a final order.

A party may apply to be relieved from the JCC requirement in the circumstances set out in SCFR 7-1(4). The application should be made by requisition pursuant to Family Practice Direction—*Applications Made by Requisition* (FPD-18).

JCCs are conducted in a less formal setting compared to applications and trials. The proceedings are recorded, but no party can access the recording without a court order (SCFR 7-1(19)). The purpose of the JCC is to assist the parties, at an early stage in the litigation, in narrowing the issues, finding areas of agreement, and canvassing the appropriateness of alternatives to litigation to resolve the dispute. JCCs may be used to schedule dates for trials and pre-trial events, such as examinations for discovery, applications, or the exchange of documents. At a JCC, a judge or associate judge can give a non-binding opinion on the probable outcome of a hearing or trial (SCFR 7-1(15)(o)).

Counsel should ensure that their clients understand that the presiding judge or associate judge may seek the clients' participation and input during the JCC. Counsel should also ensure that their clients understand that the judge at the JCC can only make orders by consent (except for procedural orders).

Counsel should canvass the issues and any possible resolution to them with their clients and each other in advance of the JCC to maximize the utility of the JCC. Even if a resolution is unlikely, counsel should prepare goals for the JCC, which can include attempting to reach interim consent orders (for example, interim parenting arrangements), consent orders for disclosure, and orders about the next steps in the case.

At the conclusion of the JCC, the parties, their counsel, and the presiding judge or associate judge will sign a case management plan prepared by the court clerk setting out any orders and directions made at the JCC.

In addition to the mandatory JCC requirement, the parties can request, or the court may direct, that another JCC take place at any point in the proceedings.

While a JCC brief is not required under the SCFR, it is good practice to prepare one, focussing on the issues in the proceedings, the issues that counsel aims to address at the JCC, and any relevant facts.

See also Family Practice Direction—*Judicial Case Conferences* (FPD-12).

[§8.02] Settlement Conference

The purpose of a settlement conference is to explore the possibilities for settlement with the assistance of a judge on a without-prejudice basis (SCFR 7-2(1)). Like a JCC, a settlement conference is a relatively informal meeting of the parties and their counsel before a judge. Proceedings at a settlement conference are recorded, but are not available to anyone without a court order (SCFR 7-2(2)). The judge will attempt to resolve the dispute through mediation and may provide the parties with their perspective of the appropriate outcome for the case.

The parties may request a settlement conference by jointly filing a requisition in Form F17, or a judge or associate judge (including at a TMC or JCC) may direct the parties to attend a settlement conference (SCFR 14-3(9)(a) and 7-1(15)(n)).

To get the most out of the conference, the lawyer should thoroughly prepare by reviewing pertinent affidavits, financial statements, pleadings, and discovery transcripts well ahead of the conference. Counsel should prepare a settlement conference brief and be prepared to provide a statement of the facts and the applicable law. The court's views of each party's prospects of success can be quite sobering to the litigants, and may encourage them to adopt more flexible positions that will be necessary to reach settlement.

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[1] **Magal Huberman** revised this chapter in July 2023, July 2022, June 2021, March 2020, February 2019 and November 2016. It was previously revised by John-Paul Boyd (2005, 2006 and 2013); Sandra L. Dick (2012); Carolyn Christiansen (2010 and 2011); Kerry L. Somerville, (2004); Cindy J. Lombard (1997 and 2001); Catherine M. Greenall (1996); and Frank Kraemer and Jodie Werier (1995).

[§8.03] Summary Trial

The summary trial procedure available under SCFR 11-3 gives litigants in a family law case a way of obtaining a quicker final disposition of a proceeding without the expense and delay of a full trial. Evidence may include affidavit evidence, interrogatory evidence, evidence from examinations for discovery, admissions and expert evidence.

Summary trials are not suitable for all family law matters. Under SCFR 11-3(11), the court may dismiss the summary trial application if the issues raised by the summary trial application are not suitable for disposition under this rule, or the summary trial application will not assist the efficient resolution of the family law case.

Under SCFR 11-3(15), on the hearing of a summary trial application, the court may grant judgment unless the court is unable on the whole of the evidence before the court on the application to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application. Accordingly, summary trials may not be appropriate in disputes over parenting arrangements or contact, or when there are serious issues of credibility or disputes about critical facts that cannot be resolved on the materials. However, the fact that parenting arrangements or contact are at issue, or the existence of credibility issues, does not automatically preclude the possibility of a summary trial—the court will determine whether it can resolve the issues on the materials presented and whether it is in fact necessary to resolve them in order to adjudicate the matter (see e.g. *Dowell v. Hamper*, 2019 BCSC 1266 and the subsequent decision at 2019 BCSC 1592). Note that when the court is unable to determine an issue without oral evidence, the parties run the risk of incurring the expense of the summary trial only to have it rejected and remitted to the trial list.

A summary trial application must be heard at least 42 days before the scheduled trial date (SCFR 11-3(3)). The evidence permitted on a summary trial application is outlined in SCFR 11-3(5) and includes affidavits, admissions, and answers to interrogatories.

Notice and supporting documents for a summary trial application must be served at least 12 business days before the date set for hearing. The responding person then must file and serve within 8 business days after service of the application documents.

A party may bring an application for a summary trial of a discrete issue or of all of the issues in the proceedings (SCFR 11-3(2)). The court will decide whether or not to allow a summary trial on some issues only. For example, the court may agree to hear an application for a divorce and adjourn all other matters to a "regular" trial (see SCFR 15-2(2)).

[§8.04] Offers to Settle

Offers to settle are governed by SCFR 11-1. They must comply with the formal requirements of SCFR 11-1(1) and may not be disclosed to the court until after all the issues, except for costs, have been determined. Depending on the terms of the offer and the outcome of the proceedings, the court may do any of the following regarding costs (SCFR 11-1(5)):

- deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would have otherwise been entitled in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- award double costs of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- award to a party, in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made; and
- if the party who made the offer obtained a judgment as favourable as, or more favourable than, the terms of the offer, award to the party the party's costs in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle.

Because of this rule, offers to settle can be powerful tools to promote settlement. The party making the offer must make a proposal that is reasonably capable of acceptance and falls within the range of probable outcomes at trial. The party receiving the offer must review the proposal carefully in light of the potential liability for costs or double costs.

[§8.05] Undefended Family Law Cases

An undefended family law case is defined (SCFR 1-1(1)) as a family law case to which one of the following applies:

(a) the family law case is a joint family law case and no party has filed a notice of withdrawal;

(b) no response to family claim has been filed;

(c) a response to family claim was filed but has been withdrawn or struck out;

(d) a response to family claim and a counterclaim have been filed but the notice of family claim and any response to counterclaim have been

(i) withdrawn, or

(ii) struck out, discontinued or dismissed; or

(e) all claims other than a claim for divorce, if any, have been settled, the parties have filed a statement to that effect signed by the parties or their lawyers, and the claim for divorce, if any, is not contested.

If the case is undefended, pursuant to SCFR 10-10 a party may apply for a final order by filing a requisition with the materials listed at SCFR 10-10(2), by trial or (effective September 1, 2023) by summary trial.

The option to apply by requisition in accordance with SCFR 10-10(2) is usually called a "desk order," which means that the materials are submitted to the court and reviewed by the judge, rather than having a hearing in court with the attendance of counsel and the parties. The following materials must be filed (SCFR 10-10(2)):

- a requisition in Form F35 setting out the order sought;
- a draft of the proposed order (this must be in the form required under SCFR 15-1(1));
- proof that the case is an undefended family law case (when a response has been filed, proof is typically obtained by the parties or their counsel filing a signed statement; when no response has been filed, proof is typically obtained by requisition requesting the registry search the file for a response to family claim or counterclaim);
- a certificate of pleadings, in Form F36, certifying that the pleadings and proceedings are in order;
- if necessary, proof of service of the notice of family claim or counterclaim under which judgment is sought;
- a child support affidavit in Form F37, if appropriate (that is, if the family law case includes a claim for divorce and there is a child of the marriage, or if the family law case includes a claim for child support);
- if a divorce is sought, an affidavit in Form F38 sworn by the party applying for the divorce; and
- if corollary relief is sought under the *Divorce Act* (parenting arrangements, child support, or spousal support), Form F102.

The pleadings must be in order, and any supporting affidavits must be properly sworn and filed. The court registry staff will review the documents. If there are any errors or omissions, the registry will issue a rejection notice setting out what needs to be corrected. Any irregularity must be corrected before the registrar will sign the certificate. Once all of the materials are in order and the certificate of pleadings is signed, the registry staff will put them before a judge who reviews them in private chambers.

It is good practice to give written notice to the other party that unless that party responds within a set period, you will apply for a final order. Include in your notice the terms of the proposed final order.

Under SCFR 10-10(5), if the court is satisfied that it is appropriate to apply for an order by way of requisition, the court may give any directions it considers will further the object of the SCFR and may, without limitation:

- make an order or grant judgment without the attendance of lawyers or the applicant;
- direct the attendance of lawyers or the applicant; or
- direct that further evidence be presented.

Additional materials are required when a divorce order is sought in an undefended family case (either alone or with other relief). When a divorce is sought, the claimant must file a registration of divorce proceeding form together with the notice of family claim. This form is then transmitted to the Central Divorce Registry in Ottawa to ensure that divorce proceedings have not already been instituted or concluded in BC or another province. No divorce order will be granted until the registry has received confirmation that no other divorce proceeding has been commenced (SCFR 15-2(1)).

When there are children of the marriage, the court has a duty, before granting a divorce, to satisfy itself that reasonable arrangements have been made for the support of the children of the marriage, and to stay the granting of the divorce until such arrangements are made (s. 11(1) of the *Divorce Act*). Accordingly, the affidavit in Form F38 must set out the particulars of the arrangements made for the care and support of the children. The applicant also must swear and file a child support affidavit in Form F37, and if the amount of child support sought differs from the applicable Child Support Guidelines table amount, the applicant must provide an explanation.

Unless the court otherwise orders, the party entering the order for divorce must, promptly after the order is entered, serve a copy of the entered order on each of the other parties that have an address for service, and if any of the parties does not have an address for service, mail a copy of the entered order to that party's last known address (SCFR 15-2(4)).

Chapter 9

Family Law Agreements[1]

[§9.01] Introduction to Family Law Agreements

Agreements are an important tool for resolving disputes or potential disputes. They give control to the parties, avoid the emotional and financial cost of prolonged litigation, and can be adapted to suit the parties' specific circumstances and needs. These are the most common types of family law agreements:

- marriage agreements, which are usually made by spouses in anticipation of marriage (sometimes referred to as pre-nuptial agreements) but can also be made during the marriage;
- cohabitation agreements, made by parties who live together or are planning on living together without necessarily marrying;
- separation agreements, made on the breakdown of a married or unmarried spousal relationship; and
- agreements regarding parenting arrangements and financial issues made by parties who have not been in a spousal relationship (for example, agreements between parties who have not cohabited but have a child together, or agreements regarding assisted reproduction).

Family law agreements are governed by legislation and by common law principles of contract law. Common law principles apply to the extent that their application is consistent with the legislation.

Sections 65 and 68 of the now-repealed *FRA* allowed the court to vary agreements involving property in limited circumstances. Those provisions will continue to apply to family law agreements made by married spouses before the *FLA* came into force. (The *FLA*'s transition provisions are discussed in the next section.)

The *FLA* governs agreements entered into after it came into force, and is the focus of this chapter.

For guidance on drafting techniques for family law agreements, refer to *Family Law Agreements—Annotated Precedents* (Vancouver: CLEBC).

[1] **Magal Huberman** revised this chapter in July 2023, July 2022, March 2020, February 2019 and July 2016. It was previously revised by John-Paul Boyd (2012 and 2013); Scott Booth (2013); Pamela Rowlands (2010 and 2011); Karen A. Iddins (2004 and 2005); Keith Bowman (2002); and Diane M. Bell (1996–2001).

[§9.02] Transition From the *FRA* to the *FLA*

The *FLA* came into force on March 18, 2013, replacing the *FRA*. The *FLA* contains transition provisions for agreements that were made before the *FLA* came into force, agreements about care of and time with children, and about property division.

Section 251 provides that if an agreement (or order) made before the *FLA* came into force provides a party with custody or guardianship, that party is a guardian of the child under the *FLA* with parental responsibilities and parenting time, and if the agreement provides the party with access only, the party has contact with the child under the *FLA*.

Section 252 concerns agreements respecting property division. It provides that, unless the parties agree otherwise, a proceeding to enforce, set aside, or replace an agreement respecting property division, where the agreement was made before the *FLA* came into force, must proceed under the *FRA*:

> (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [*Property Division*] of this Act.
>
> (2) Unless the spouses agree otherwise,
>
> (a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
>
> (b) a proceeding respecting property division started under the former Act
>
> must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

In other words, for married parties who made an agreement about property division prior to March 18, 2013 (including marriage agreements or cohabitation agreements: *Bingham v. Bingham*, 2023 BCCA 69), the *FRA* continues to apply to applications to vary or set aside those agreements, unless the parties agree to proceed under the *FLA*. For married spouses who make an agreement after March 18, 2013, or for unmarried spouses who make an agreement dealing with property and then apply to vary or set aside that agreement, the *FLA* applies. In all circumstances, the parties must fall within the applicable definition of "spouse" and the applicable limitation period.

Counsel should carefully review the circumstances of the case to determine which act and time limitations apply (see *Halliday v. Halliday*, 2015 BCCA 82 for some of the numerous problems arising from confusion about these issues).

This chapter addresses agreements made under the *FLA*. For agreements governed by the *FRA*, and for varying such agreements, refer to CLEBC and other source material.

[§9.03] Statutory Framework—*FLA*

The *FLA* expressly encourages out-of-court dispute processes to resolve family law disputes, including through the use of agreements. Subject to some exceptions, the *FLA* treats married spouses and unmarried spouses (if they meet the definition of "spouses" in s. 3(1)(b)) in the same way, so parties in either type of relationship can use agreements to resolve property matters.

The following sections of the *FLA* deal with agreements:

- s. 1 defines a "written agreement" as an agreement in writing and signed by all parties;
- ss. 6 and 7 deal with agreements generally;
- ss. 44, 50 and 58 deal with agreements concerning parenting and contact with children;
- ss. 92, 93, 94, and 127 deal with agreements and setting aside agreements relating to property and debt; and
- ss. 148, 163, and 164 deal with agreements and setting aside agreements relating to child support and spousal support.

Section 6 of the *FLA* contains general provisions regarding agreements. It provides that two or more persons may make an agreement to resolve a family dispute, or with respect to matters that may become the subject of a family law dispute in the future (s. 6(1)). The agreement is binding on the parties whether or not there is consideration, the agreement was made with the involvement of a family law dispute resolution professional, or the agreement was filed with a court (s. 6(3) and (4)). These general provisions are subject to other provisions of the *FLA* that govern when an agreement will be treated with deference by the courts (discussed later in this chapter).

1. Agreements About Parenting Arrangements and Child Support

Agreements about parenting arrangements and child support are binding only if the parties make the agreement after separation, or if they make the agreement when they are about to separate for the purpose of that agreement being effective on separation (ss. 44 and 148).

Under both the common law and legislation, the courts have a duty to protect the rights and interests of children. Accordingly, if the court determines that an agreement about parenting arrangements is not in the best interests of the children, then the court must set it aside or replace it with an order (s. 44(4)).

The court may set aside an agreement about child support that deviates from the Child Support Guidelines. The court may order child support in a different amount from the Child Support Guidelines, if agreed upon by the parties, only if the court is satisfied that reasonable arrangements have been made for the support of the children. The court will take the Child Support Guidelines into consideration in assessing the reasonableness of the arrangements. In addition, the court may consider that an agreement between the parties about their financial duties, or about the division or transfer of property, benefits the child directly or indirectly, or that special provisions have otherwise been made for the benefit of the child, such that applying the Child Support Guidelines would be inequitable.

2. Agreements About Spousal Support

The *FLA* provides that if the spouses already have an agreement in writing about spousal support that is signed by both parties and witnessed by at least one other person, then the court will not make an order for spousal support unless the agreement is first set aside under s. 164. The agreement may be set aside for lack of fairness in making the agreement, on consideration of the factors in s. 164(3), or for being "significantly unfair" on consideration of the factors in s. 164(5). The court may decline to set aside an agreement under s. 164(3) if, based on the evidence, it would not replace the agreement with an order that is substantially different from the agreement (s. 164(4)). The court has the discretion to apply s. 164 to an unwitnessed written agreement (s. 164(6)).

The *FLA* provisions on setting aside agreements about spousal support largely codified the Supreme Court of Canada decision in *Miglin v. Miglin*, 2003 SCC 24, which is the leading decision on this issue.

In *Miglin*, the court held that when a party applies for spousal support that is different from the terms of a pre-existing agreement, the court should look at the circumstances surrounding the agreement in two stages: first, at the time the parties formed the agreement, and second, at the time of the application. The court should give the agreement the greatest weight in the following circumstances:

- The agreement was negotiated and signed in circumstances free of oppression, coercion, financial and emotional pressure or other vulnerabilities. The court will not, however, presume an imbalance of power between the spouses, and will take into account any professional assistance received by the parties.
- The terms of the agreement substantially comply with the objectives of the *Divorce Act*. However, the agreement will not necessarily be set aside for noncompliance alone if the agreement reflects the parties' expecta-

tions of their marriage and future circumstances.

- The agreement continues to reflect the parties' intentions and is in substantial compliance with the objectives of the *Divorce Act* at the time of the application. If the applicant is relying on a change in circumstances to set aside the agreement, the applicant must show that the new circumstances were not reasonably anticipated by the parties when the agreement was made. Spouses will be presumed to anticipate reasonably foreseeable changes, such as a change in health, the job market, parental responsibilities, housing markets, and the value of assets.

The balance of this chapter deals with property agreements between spouses, the area where family law agreements can have the most significant long-term effect. Note that in *Anderson v. Anderson*, 2023 SCC 13, the Supreme Court of Canada stated that although the general principles from *Miglin* are useful, its specific framework was developed under the spousal support provisions of the former *Divorce Act* and was never intended for all types of family law agreements. Rather, courts should approach agreements based on the applicable statutory framework. The statutory framework in BC for agreements on property and debts division is the *FLA*, as explained in the next sections.

[§9.04] Making Agreements About Property and Debt Under the *FLA*

Section 92 of the *FLA* allows spouses (married or unmarried) to make agreements about the division of property and debt:

> 92 Despite any provision of [Part 5] but subject to s. 93, spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:
>
> (a) divide family property or family debt, or both, and do so equally or unequally;
>
> (b) include as family property or family debt items of property or debt that would not otherwise be included;
>
> (c) exclude as family property or family debt items of property or debt that would otherwise be included;
>
> (d) value family property or family debt differently than it would be valued under s. 87.

If an agreement meets the requirements of s. 93(1), then under s. 94 the court may not make an order respecting the division of property and family debt without first setting aside that agreement under s. 93:

> 94 (1) The Supreme Court may make an order under this Division on application by a spouse.
>
> (2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an agreement described in s. 93(1), unless all or part of the agreement is set aside under that section.

Section 93(1) requires that the agreement be in writing, signed by each spouse, and witnessed by at least one person (though the court may exercise its discretion under s. 93(6) to apply s. 93 to an unwitnessed written agreement).

Sections 92, 93, and 94 need to be read together. In summary, they permit parties to draft agreements that do not follow the statutory division of property. If the agreement meets the requirements of s. 93(1) (or s. 93(6) applies), the court may not make an order regarding the property or debt that is subject to the agreement unless the court first sets aside all (or the relevant provisions) of the agreement under s. 93(3) or (5). The bases for setting aside an agreement under s. 93 are discussed further below.

[§9.05] Setting Aside Agreements About Property and Debt Under the *FLA*

Section 93 of the *FLA* governs the court's authority to set aside an agreement (or part of an agreement) about dividing property and debt, or to replace it with an order.

Section 93 requires the court to consider the agreement in two steps:

- first, whether there was unfairness in the making of the agreement, or a lack of procedural fairness; and
- second, whether there is significant unfairness in the operation of the agreement, or a lack of substantive fairness.

The first step of the test requires the court to consider whether the agreement was procedurally fair when it was made, based on s. 93(3). The second step requires the court to consider whether the agreement is "significantly unfair" considering the factors in s. 93(5).

1. Procedural Fairness Under s. 93(3)

Section 93(3) reads as follows:

> On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
>
> (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;

(b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;

(c) a spouse did not understand the nature or consequences of the agreement;

(d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

Historically, the procedural fairness bases for challenging family law property agreements were those provided by the common law defences to contracts. Section 93(3) of the *FLA*, in essence, codifies the common law procedural fairness bases for setting aside agreements (see e.g. *Rick v. Brandsema*, 2009 SCC 10). If the party challenging the agreement is successful in demonstrating one of the grounds set out in s. 93(3), then the court may set aside the agreement or replace it with an order. However, the court may decline to do so, even if one of the grounds of s. 93(3) has been proven, "if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement" (s. 93(4)).

See *Bartch v. Bartch*, 2019 BCSC 1643, for a discussion of these sections. The court in *Bartch* set aside a separation agreement under s. 93(3) on the basis that it was made by an unfair process, and it could not be upheld under s. 93(4) because the court would replace it with an order that was substantially different from the terms in the agreement. See also *Y.L. v. G.L.*, 2020 BCSC 808 for the principle that the court should consider the s. 93(3) factors holistically, not in isolation from one another.

2. Substantive Fairness Under s. 93(5)

Under s. 93(5), even if an agreement is procedurally fair, it may be set aside for a lack of substantive fairness, if the court finds the agreement is "significantly unfair" on consideration of three listed factors. Section 93(5) reads as follows:

> Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
>
> (a) the length of time that has passed since the agreement was made;
>
> (b) the intention of the spouses, in making the agreement, to achieve certainty;
>
> (c) the degree to which the spouses relied on the terms of the agreement.

The "significant unfairness" threshold is a higher threshold for judicial intervention and demonstrates greater deference to properly negotiated agreements (see e.g. *Asselin v. Roy*, 2013 BCSC 1681, where the court considered this threshold and stated that the *FLA* was intended to achieve greater certainty for parties and limit judicial discretion, compared to the old *FRA*; for a more recent discussion of s. 93(5), see e.g. *T.A. v. B.A. Estate*, 2018 BCSC 1273 (setting aside a marriage agreement)).

When assessing whether an agreement is "significantly unfair," consider case law under s. 95 (unequal division of property and debt), as this provision also includes a "significant unfairness" test (see e.g. *Jaszczewska v. Kostanski*, 2016 BCCA 286).

3. The Role of Independent Legal Advice

There is no express requirement for independent legal advice in the *FLA*. In fact, s. 6 of the *FLA* specifically states that an agreement is enforceable absent the involvement of a family dispute resolution professional. However, courts will consider whether the parties obtained independent legal advice in determining whether an agreement was procedurally fair. The provision of independent legal advice improves the likelihood that an agreement will be enforced, since it assists in addressing claims of duress, undue influence, unconscionability, and the factors set out in s. 93(3) of the *FLA*.

Pitfield J. described the important role of independent legal advice in family law agreements in *Gurney v. Gurney*, 2000 BCSC 6 at para. 29:

> In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of the agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the agreement in all of the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the agreement as opposed to pursuing some other course.

Citing *Gurney,* the court stated in *Bradshaw v. Bradshaw*, 2011 BCSC 1103, that independent legal advice in the family law context "ensures that the spouses are fully aware of their statutory and common law rights and obligations" and "redresses or at least minimizes disparity of bargaining power between [spouses]" (at para. 49). See also *B.L.S. v. D.J.S.*, 2019 BCSC 846 and *Y.L. v. G.L.*, 2020

BCSC 808. However, independent legal advice is not mandatory (see e.g. *C.C. v. S.P.R.*, 2022 BCSC 1817).

4. Common Law Principles

The following are common law bases for challenging the procedural fairness of an agreement. In addition, fundamental common law principles about contract formation apply to family law agreements, to the extent their application is consistent with the legislation (for example, parties must have the capacity to contract and there must be certainty of subject matter and identification of the parties). This chapter does not consider when the court may disregard or set aside agreements on the basis of those fundamental contractual issues.

(a) Mistake

A mistake occurs when a party misunderstands the facts underlying an agreement, or fails to understand that a material term of an agreement is not accurately recorded. Such a mistake must be substantial and go to the "root" of the contract. A mistake can be mutual or unilateral. Where it is unilateral and made by only one party, the mistaken party must establish that the other party had some indication of the mistake and either proceeded being willfully blind or intentionally prevented the mistaken party from becoming aware of the mistake (*Frolick v. Frolick*, 2007 BCSC 84).

(b) Duress

Duress occurs when threats of violence or actual violence are used to induce a person to consent to the agreement (*Saxon v. Saxon* (1976), 24 R.F.L. 47 (B.C.S.C.), aff'd [1978] 4 W.W.R. 327 (B.C.C.A.)). Threats of suicide may also constitute duress (*G.C.G. v. M.J.T.*, 2016 BCSC 1277), and duress can be economic (see e.g. *C.M.M. v. D.R.M.*, 2014 BCSC 2123).

(c) Undue Influence

Undue influence occurs when there is a special relationship of trust or confidence between two parties, giving one party influence over the other, which that party uses to that party's own advantage. (See *Saxon v. Saxon* (1976), 24 R.F.L. 47 (B.C.S.C.), aff'd [1978] 4 W.W.R. 327 (B.C.C.A.); and *Donnelly v. Weekley*, 2017 BCSC 529.)

(d) Unconscionability

Similar to duress and undue influence, unconscionability refers to situations of unequal bargaining power. The test for unconscionability is set out in *Klassen v. Klassen*, 2001 BCCA 445 at para. 59. The elements required for such a finding are "proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left [the weaker party] in the power of the stronger" and "proof that the purchase was made from the ignorant party at a considerable undervalue."

(e) Non-Disclosure

An agreement may be set aside because of a failure to disclose significant assets. In *Rick v. Brandsema*, 2009 SCC 10, the court found that spouses have a duty to make full and honest disclosure of all relevant financial information when negotiating agreements, and that agreements made with full and honest disclosure were more likely to be respected by the court. In determining whether to intervene when the duty of disclosure has not been met, the court will consider the extent of the defective disclosure, the degree to which it was deliberate, and the extent to which the agreement's terms vary from the goals of the relevant legislation (*Brandsema* at para. 49).

As an initial step for disclosure when negotiating agreements, have each party prepare a financial statement using a Form F8 financial statement (see §7.02).

[§9.06] Limitation Periods

It is crucial to identify limitation periods: failure to do so may lead to missed limitation deadlines and a professional negligence claim.

The time limits for setting aside an agreement are set out in *FLA* s. 198(3):

> Despite [s. 198(2)], a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

The limitation period is therefore delayed in that it does not run until the spouse discovers (or reasonably ought to have discovered) the grounds for the application. This is the case despite the requirement in s. 198(2) that claims for spousal support and debt must be brought within two years of the date of separation (for unmarried spouses) and within two years of the date of the divorce or declaration of nullity (for married spouses).

[§9.07] Wills and Estates Considerations

Family law matters often intersect with wills and estates considerations, so it is important to be aware of these issues and to identify them for the client. That said, counsel should refer the client to a lawyer experienced in wills and estates law for advice on issues such as estate planning following separation or in anticipation of cohabitation or marriage, or the effect of the death of a separated spouse on the division of family property. That other lawyer's advice should then be taken into account in the family law case so that the client's family law case and estate planning are resolved consistently.

The definition of a "spouse" under the *Wills, Estates and Succession Act*, R.S.B.C. 2009, c. 13 ("*WESA*") excludes separated spouses. This is because s. 2(2) states:

> (2) Two persons cease being spouses of each other for the purposes of this Act if,
>
> (a) in the case of marriage, an event occurs that causes an interest in family property, as defined in Part 5 of the *Family Law Act*, to arise, or
>
> (b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

Once a person ceases to be a spouse under *WESA* they no longer have rights to make a claim to vary the will under Part 4, Division 6 of *WESA*. A separated spouse is also not entitled to make a claim for a spousal proportion of the estate on intestacy under Part 3. It is therefore particularly important to determine whether a couple has truly separated for family law purposes. In assessing this question, see s. 3 of the *FLA* and case law considering separation (see e.g. *Ishebabi v. Temu*, 2015 BCSC 1321 and *Jaszczewska v. Kostanski*, 2015 BCSC 727).

One of the changes under the *FLA* is that a former spouse can start an action under Part 5 of the *FLA* after the death of the other spouse, as long as the action is brought within the time limitations set out in the *FLA* (see *Howland Estate v. Sikora*, 2015 BCSC 2248).

Under *WESA*, a marriage no longer revokes a will. When acting for a client who intends to get married, counsel should find out if the client has a will and plans to revise it in light of the marriage. Similarly, counsel should check whether a client who has recently separated from their spouse has a will, and advise the client to make a will or change an existing will.

Under ss. 170(g) and 171 of the *FLA*, support orders can be made binding on the estate of the payor. See the *Family Law Sourcebook for British Columbia*, Chapter 13 for a discussion and case law on this issue.

[§9.08] Minutes of Settlement and Consent Orders

As an alternative to, or in conjunction with, a separation agreement, the parties may resolve issues by way of minutes of settlement.

Minutes of settlement record the settlement of a family law case. Minutes of settlement can also record the terms agreed upon at mediation. They often record a general outline of the settlement with the expectation that the terms will be stated in more detail in a subsequent separation agreement or a consent order based on the minutes.

Minutes of settlement should deal with each claim made in the case so that nothing is left for further litigation. There is a risk that the settlement may unravel if, for instance, specific points have not been addressed, or if the terms are so broad that the parties disagree about their meaning or operation.

When minutes of settlement or a written agreement are to be followed by a consent order, keep in mind the intertwining doctrines of *res judicata*, merger and election. Care should be taken in drafting all these documents to ensure the continuation of terms from the minutes or written agreement that are intended to continue operating after the order is made. Further, bear in mind that consent orders and agreements that are vague or uncertain may be difficult if not impossible to enforce.

Parties who agree on the terms of an order may obtain an order by consent without a court appearance. Affidavit evidence will be required where a term requires the court to exercise discretion, particularly with respect to child support, or when a divorce is sought. A consent order cannot be appealed, nor can a court vary the property provisions absent a successful defence based on the common law of contracts (*Partridge v. Partridge*, 2018 BCSC 1687).

Chapter 10

Judgments and Enforcement of Orders and Agreements[1]

[§10.01] Form of Judgments and Orders

Orders submitted to the courts must comply with the Rules of that court—the PCFR in Provincial Court and the SCFR in Supreme Court.

In the Supreme Court, SCFR 10-8 and 15-1 require that orders be in a specified form, found in Appendix A to the SCFR. SCFR 15-1(1) states that unless the SCFR otherwise provide, the order must be in the following form:

(a) if the order is a final order,

(i) in Form F33 if the order changes, suspends or terminates a final order and is made by consent;

(ii) in Form F51 if the order changes, suspends or terminates a final order and is not made by consent;

(iii) in Form F34 if the order is made under SCFR 10-8 without notice and without a hearing; or

(iv) in Form F52 in any other case [including final orders made following a hearing, trial or summary trial or in an undefended family law case];

(b) if the order is not a final order and is made without a hearing and by consent, in Form F33;

(c) if the order is not a final order and is made under SCFR 10-8 without notice and without a hearing, in Form F34;

(d.1) if the order is a protection order under s. 183 of the *Family Law Act*, in Form F54;

(d.2) if the order is a change of a protection order under s. 187 of the *Family Law Act*, in Form F54.1;

(d.3) if the order is a restraining order under s. 46 of the *Family Maintenance Enforcement Act*, in Form F54.2; and

(d.4) if the order is made under SCFR 7-1(15) at a judicial case conference, in Form F51.1; and

(e) for any order not referred to in paras. (a), (b), (c), (d.1), (d.2) or (d.3), in Form F51.

The forms in Appendix A must be used if applicable, with variations as the circumstances of the case require (SCFR 21-1).

The following is a description of the information that is included in family law orders when particular types of relief are ordered.

A support order will include the following:

- the names of the parties, identifying who will pay and who will receive support;
- the amount to be paid, whether it is to be paid periodically or in a lump sum, the commencement date or payment date(s) as applicable, and the date on which subsequent payments are to be made (for example, on the first day of every month);
- the legislation under which the order is made;
- each party's guideline income, including whether income is being imputed to the party;
- for child support orders, the names and birthdates of the children for whom support is paid; any extraordinary expenses (pursuant to s. 7 of the Child Support Guidelines) including the parties' proportionate share of the extraordinary expenses and how those expenses are to be paid; and if the amount of child support is based on a finding of undue hardship, then the reason for the hardship and the amount to be paid;
- whether the order is final or interim;
- whether the order is a variation of a previous order and what is being varied; and
- any terms providing for a review, adjustments based on changes in income, or termination after a specific period.

Note that support orders can be registered with the Family Maintenance Enforcement Program (the "FMEP"). Therefore, the order should include all information required by the FMEP to enforce it. (See §10.04(2) for more on this topic.)

An order for the care of and time with children will include the following:

- the name and birthdate of each child;
- the name of the party (or parties) who are guardians of the child(ren);
- the statute(s) under which the order is made;
- decision-making responsibility (under the *Divorce Act*) and/or guardianship terms (under the *FLA*);

[1] **Magal Huberman** revised this chapter in July 2023, July 2022, June 2021, March 2020, February 2019 and November 2016. It was previously revised by John-Paul Boyd (2013); Trudy Macdonald (2005, 2006, 2010–2012); Jeremy S. Sheppard (2002 and 2003); Cindy J. Lombard (1997 and 2001); Catherine M. Greenall (1996); and Frank Kraemer and Jodie Werier (1995).

- allocation of parenting responsibilities, if the order is made under the *FLA* and both parties are guardians;
- a schedule of parenting time (for guardians under the *FLA* and the divorcing spouses under the *Divorce Act*), or contact with children (for non-guardians under the *FLA*, and for people other than the divorcing spouses under the *Divorce Act*);
- any other terms of a parenting order or contact order under the *Divorce Act*.

An order for the care of and time with children may also include terms such as the following:

- supervision terms for access, parenting time, or contact;
- terms regarding travel with the children or prohibiting a person from removing a child from a specified geographical area;
- the means for resolving future disputes about an order made by the court (such as parenting coordination);
- terms regarding the children's school; and
- restrictions on consumption of alcohol or other substances, if there are concerns about substance abuse.

This list is by no means exhaustive, and orders respecting children should address the particular circumstances of each case.

An order for the division of family property and family debt will include the following:

- a description (in the order or in a schedule to the order) of each item of property and debt, such as its value or balance owing, its location (for real property), any particulars (for bank accounts), and how it is to be divided or allocated between the parties (some items can be described generally, such as, "each party will keep all personal and household items that are in that party's possession");
- a description as to the timing and any specifics regarding any sale, compensation payment, or transfer of property; and
- if applicable, a reference to the registrar for an accounting of family property and family debt.

For sample orders and provisions, see the *British Columbia Family Practice Manual*, *Family Law Agreements—Annotated Precedents*, and the Supreme Court "Family Order Pick List" (www.courts. gov.bc. ca/supreme_court/practice_and_procedure/sc_family_law_orders.aspx).

[§10.02] Effective Date of Orders

Unless the court orders otherwise, an order or judgment takes effect on the date it was pronounced, or, if made by a registrar, on the date it is signed by the registrar (SCFR 15-1(9)). This is true whether that order is entered or not. However, it is very difficult to enforce an order if it has not been entered. Furthermore, if a party does not obey an order of the court, the other party cannot proceed with a contempt application against the noncompliant party unless the party can show that the noncompliant party has had actual notice of the order.

Note that a divorce takes effect 31 days after the judgment granting the divorce is rendered, unless otherwise ordered by the court (*Divorce Act*, s. 12).

[§10.03] Enforcing Restraining Orders Regarding Property

When a party obtains an order to restrain the encumbering or disposal of property, the party should serve a copy of that order on all individuals who will be affected by the order, and on any institutions, such as banks, where restrained property is kept or managed. It is crucial that the orders be as clear and precise as possible.

If you indiscriminately serve restraining orders on third parties such as brokerages, banks, or lending institutions, you may prejudice the financial position of the opposing party. Not only may you cause embarrassment, you may place the other party in a position of being unable to raise funds to settle with your client because of the nervousness of bankers and lending institutions. As part of assessing the matter, consider whether you have sufficient knowledge of the other party's finances and whether there are sufficient assets to satisfy your client's claims that can be protected through other methods. It is important to advise the client of the risks associated with each course of action, and to obtain clear instructions from the client.

Counsel must be careful not to inadvertently participate in a breach of a restraining order, for instance, by accepting payment from a client from funds that may be subject to a restraining order.

[§10.04] Enforcing Support Orders

1. Extraprovincial Support Orders

The *Interjurisdictional Support Orders Act*, S.B.C. 2002, c. 29 ("*ISO*") provides a process for recognizing and enforcing support orders between BC and other provinces and some non-Canadian jurisdictions. It does not apply to orders made under the *Divorce Act*. Under *ISO*, support orders from other provinces have the same effect as orders from a BC court when they are registered in BC. Parties may also apply in a BC court to cancel or vary orders

that were made in another jurisdiction. The BC court will apply the law of the jurisdiction in which the children reside when determining the amount of support to be paid to children.

An order made under the *Divorce Act* has legal effect throughout Canada and may be registered in a court in any province and enforced as an order of that court (*Divorce Act*, s. 20).

2. *Family Maintenance Enforcement Act*

The *Family Maintenance Enforcement Act* (the "*FMEA*") establishes the Family Maintenance Enforcement Program (the "FMEP"), a publicly funded governmental organization that monitors and enforces child and spousal support orders and agreements in BC. The *FMEA* does not eliminate enforcement procedures already available to holders of support orders under the SCFR and the *Court Order Enforcement Act* (the "*COEA*"), although some *COEA* remedies were modified by the *FMEA*.

The goal of the FMEP is to collect support payments and replace the challenges and costs of enforcing support orders privately. Either party may enrol with FMEP, not only the recipient.

Enrolment with FMEP is done by submitting an application to the FMEP Enrolment Office, along with a copy of the support order. Enrolment can be completed online or by mail; see https://www. fmep. gov. bc. ca/enrol-and-get-started/. Once the FMEP has received all of the necessary information, the FMEP will calculate any arrears owing to the recipient and complete the enrolment process. The FMEP will then send a Notice of Filing to the payor and recipient, telling them that their order or agreement has been enrolled with the FMEP.

The Director of Maintenance Enforcement may enforce support orders filed with the Director (s. 4), and can take whatever steps the Director considers advisable, including commencing, conducting, continuing or discontinuing any proceeding that may be taken by a creditor under Part 3 of the *FMEA*. As long as the order is filed with the FMEP, only the Director, and the payee if authorized by the Director, may take steps to enforce the order (s. 5(1)).

Default hearings are authorized by s. 21 of the *FMEA*. A debtor is summoned to court to show cause before a judge why the support order should not be enforced.

The FMEP may use various measures to collect arrears of support, including attaching any income or benefits owed to the payor, such as wages, pension benefits, bank accounts (including 50% of joint bank accounts), income tax refunds, GST credits or rental income; registering a lien against land or personal property; reporting to the credit bureau; obtaining an order to seize and sell property of the payor; instructing ICBC to refuse to issue or renew the payor's driver's licence or vehicle registration; and requesting the federal government to suspend or refuse to issue or renew federal licences, including the payor's passport.

A payor may respond to enforcement proceedings by applying to the court for an order to change, suspend, or terminate the child support order under s. 152 of the *FLA*, or to vary, rescind or suspend the child support order under s. 17 of the *Divorce Act*. On hearing the application, the court may cancel arrears, suspend enforcement of the support orders, or make any order that the court considers appropriate. FMEP does not have the authority to change support orders.

As well, if the support order is in favour of a child or spouse who is not a status Indian, a payor who is a status Indian can rely on s. 89 of the *Indian Act* to resist enforcement proceedings for real property or personal property that is located on reserve. This section does not prevent enforcement when the spouse or child for whom the support is ordered is a status Indian.

See the *British Columbia Family Practice Manual* for more information.

3. *FLA*

Support orders may also be enforced under the general and extraordinary enforcement provisions of the *FLA*.

Under the general remedy at s. 230(2), on application by a party, the court may make an order to do one or more of the following:

(a) require a party to give security in any form the court directs;

(b) require a party to pay

  (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party's actions, including fees and expenses related to family dispute resolution,

  (ii) an amount not exceeding $5,000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the party's actions, or

  (iii) a fine not exceeding $5,000.

Where no other order will secure a party's compliance with an order, the court may take the extraordinary step of ordering that the party be imprisoned for up to 30 days under s. 231(2). Under s. 231(3), a person must first be given a reasonable opportunity to explain that person's non-compliance and show

why an order under this section should not be made. The section allows a court to issue a warrant for a person's arrest for the purpose of bringing that person before the court to show why an order for imprisonment should not be made. Imprisonment of a person under this section does not discharge any duties of the person owing under an order made under the *FLA*.

4. Other Enforcement Procedures

Enforcement procedures are also available under the SCFR, the PCFR, and the provincial *Court Order Enforcement Act*. For a discussion of these procedures, see the *British Columbia Family Practice Manual*, Chapter 17 (Enforcing Orders and Agreements).

A party may also apply for a finding of contempt where the opposing party has disobeyed an order of the court. This remedy is discussed in §6.04(12).

[§10.05] Enforcing Agreements

Written agreements that deal with the following matters may be filed at either the Supreme Court or the Provincial Court and then enforced as an order of that court:

- parenting arrangements (s. 44 of the *FLA*);
- contact with a child (s. 58 of the *FLA*);
- child support (s. 148 of the *FLA*); and
- spousal support (s. 163 of the *FLA*).

The definition of "written agreement" in s. 1 of the *FLA* does not require the agreement to be witnessed, but it must be signed by the parties. Further, s. 6 of the *FLA* provides that written agreements are enforceable without consideration.

Chapter 11

Child Welfare and Adoption[1]

[§11.01] *Child, Family and Community Service Act*

The *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, as amended (the "*CFCSA*") outlines the practice and procedures governing state intervention in the well-being and safety of children. The *CFCSA* applies to all children in British Columbia, except where Indigenous Nations have taken up their jurisdiction over child and family services and have their own laws regarding child and family services.

The Ministry of Children and Family Development (the "Ministry") is responsible for administering the *CFCSA*.

Recent provincial and federal legislative amendments affirm that Indigenous peoples have the inherent right to self-government, including over child and family services. The amendments also seek to address the disproportionate number of Indigenous children in the child welfare system in British Columbia. Some of the relevant amendments are as follows:

- The *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 ("*DRIPA*"), came into force in November 2019. It confirms that the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*") applies in British Columbia, and it requires the provincial government to review laws and policies to ensure they are consistent with *UNDRIP*.
- Federal legislation, *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, S.C. 2019, c. 24, came into force on January 1, 2020 (the "*Federal Act*"). The *Federal Act* affirms the rights of Indigenous peoples to exercise jurisdiction over child and family services and recognizes Indigenous rights of self-government that are reflected in s. 35 of the *Constitution Act* and in *UNDRIP*. In pursuing these purposes, the *Federal Act* sets out minimum standards that must be met by provincial child protection legislation, including the *CFCSA*. These standards include the factors for determining what is in the best interests of the Indigenous child as well as placement priorities for the placement of Indigenous children if removed due to child protection concerns. The *Federal Act* was upheld in its entirety by the Supreme Court of Canada on February 9, 2024 in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5.
- The *Indigenous Self-Government in Child and Family Services Amendment Act* ("*ISGCFSAA*") received Royal Assent on November 24, 2022. The legislation amends the *CFCSA* as well as the *Adoption Act* and is intended to align these Acts with the *Federal Act*, *DRIPA* and *UNDRIP*.

The *ISGCFSAA* amendments that are in force as of January 15, 2024 include:

- recognizing the inherent right of self-government, including jurisdiction in relation to child and family services, lawmaking authority and enforcement of laws in relation to those services, and giving Indigenous laws the force of law in British Columbia;
- providing that in the planning and delivery of services to Indigenous children and families there should be consultation and cooperation with Indigenous peoples and Indigenous governing bodies;
- aligning the *CFCSA* with the national standards in the *Federal Act*;
- providing for the referral of reports about the well-being of a child under s. 16 of the *CFCSA* to Indigenous authorities, meaning entities authorized by Indigenous governing bodies to provide Indigenous child and family services under Indigenous law (*CFCSA,* s. 1(1)), where such authorities have been established, an Indigenous law applies, and the Indigenous authority confirms that they will assess the report;
- providing for information sharing between the director and Indigenous authorities or an Indigenous governing entity;
- providing for agreements under *DRIPA* to be made between the director and Indigenous Nations, as well as other agreements relating to the Nisga'a Nation and Treaty First Nations; and
- providing for the withdrawal of the director due to an Indigenous law applying after a court proceeding has started, as well as after a continuing custody order has been granted.

[1] **Crystal Reeves** of Mandell Pinder LLP revised this chapter in March 2024 and February 2023. It was previously revised by Fiona M. Beveridge (2016, 2019, and §11.01 in 2020); Delia Jane Ramsbotham (§11.02 in 2020); PLTC (2018); John-Paul Boyd (2013); Trudy Macdonald (2005, 2006, 2010, 2011 and 2012); Kelly A. MacDonald (2001); Charles F. Rendina (1998); and Robin J. Stewart (1997).

The provisions not yet in force as of January 15, 2024 include:

- the creation of a new position of Indigenous Child Welfare Director within the Ministry; and
- amendments conferring jurisdiction on the Provincial Court if an Indigenous law provides for that jurisdiction.

One First Nation in British Columbia that has been exercising jurisdiction over child and family services since 1980, under an *Indian Act* Bylaw (Spallumcheen Bylaw #3-1980), is Splatsin. Under the Bylaw, Splatsin has exclusive jurisdiction over Splatsin children who need protection, regardless of where they reside.

The Provincial Court has jurisdiction over all proceedings under the *CFCSA* except appeals (s. 1, definition of "court"). Although not yet in force, under s. 55 of the *ISGCFSAA*, an Indigenous law can provide that the provincial court has jurisdiction in relation to a legal dispute arising under the Indigenous law.

Turning to the specific provisions of the *CFCSA*, s. 2 of the *CFCSA* details the guiding principles for interpreting the Act. Generally, the *CFCSA* must be interpreted and administered so that the paramount considerations are the safety and well-being of children. Section 2 enumerates seven specific principles, including the following:

- children are entitled to be protected from abuse, neglect, and harm or threat of harm;
- a family is the preferred environment for a child; and
- Indigenous children are entitled to learn about and practise their Indigenous traditions, customs and languages.

The service delivery principles are detailed in s. 3. The delivery principles support the guiding principles, and include the principles that families and children should be informed of the services available to them and encouraged to participate in decisions affecting them, and that services should be delivered in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services. Sections 3(b) and (b.1) in particular specify that in the planning and delivery of services to Indigenous children and families, there should be consultation and cooperation with Indigenous peoples and Indigenous governing bodies, and services should be planned and provided in ways that prevent discrimination contrary to the *Human Rights Code* and promote substantive equality, respect for rights and culture and, in the case of Indigenous children, cultural continuity.

Section 4 provides that, in determining the child's best interests, all relevant factors must be considered. Factors include the child's safety as well as the child's physical and emotional needs; the importance of continuity in the child's care; the quality of the relationship the child has with a parent or other person; the child's cultural, racial, linguistic and religious heritage; and the child's views.

Section 4(2) provides that if the child is Indigenous, "the importance of the child being able to learn about and practise the child's Indigenous traditions, customs and language" and of belonging to the child's Indigenous community must be considered in determining the child's best interests.

Part 1.1 (ss. 4.1–4.5) contains new introductory provisions relating to Indigenous laws and Indigenous children. These provisions include the requirement that the *CFCSA* be interpreted and administered in accordance with these principles (s. 4.1):

- Indigenous peoples have an inherent right of self-government, including self-determination, that is recognized and affirmed by s. 35 of the *Constitution Act, 1982* and by the *United Nations Declaration on the Rights of Indigenous Peoples*;
- the inherent right of self-government includes jurisdiction in relation to Indigenous child and family services, law-making authority in relation to those services, and authority to administer and enforce laws made under that law-making authority; and
- Indigenous laws have the force of law in British Columbia.

Section 4.2 sets out the relationship between the *CFCSA* and Indigenous laws in circumstances where an Indigenous authority intends to provide Indigenous child and family services under an Indigenous law.

Sections 4.3 and 4.4 set out the duties of directors under the *CFCSA* when they are exercising powers and performing duties in relation to Indigenous children and families.

Division 1 of Part 7 of the *CFCSA* deals with agreements under *DRIPA*. These new provisions permit the Lieutenant Governor in Council to authorize the Minister of Children and Family Development to enter into agreements with Indigenous governing bodies for the exercise of statutory powers under the *CFCSA*.

Under Division 2 of Part 7, the Minister may enter into agreements with a First Nation, Treaty First Nation, the Nisga'a Nation or a Nisga'a Village, a legal entity representing an Indigenous community, an Indigenous governing body, the federal government, the provincial governments, a foreign government, Community Living British Columbia, or "any person or group of persons" (s. 90).

Division 3 of Part 7 sets out processes to enable the Nisga'a Nation and Treaty First Nations to exercise law-making authority in British Columbia (in addition to the

authority in the Nisga'a Final Agreement or the final agreements of Treaty First Nations) as follows (s. 90.3):

- in the case of an Indigenous law of the Nisga'a Nation, in relation to Indigenous child and family services provided outside the Nisga'a Lands; and
- in the case of Indigenous laws of the Treaty First Nations, in relation to Indigenous child and family services provided outside the treaty lands of the Treaty First Nations.

1. Directors Under the *CFCSA*

The Minister may designate one or more persons as "directors" under the *CFCSA* for the purposes of any or all provisions of the Act (s. 91). Directors of Child, Family and Community Services are designated by the Minister under the *CFCSA* to administer the Act. Directors may do any of the following:

- make written agreements with a parent about care of a child, the provision of services to a family, taking a child into care temporarily (ss. 5 and 6) or payment of child maintenance (s. 97);
- establish support services for youth and make written agreements with young adults around support services (Part 2.1, ss. 12.1 and 12.2);
- investigate a child's need for protection (s. 16);
- take an unattended child, including a runaway, into care for up to 72 hours (ss. 25 and 26);
- remove a child if there are reasonable grounds to believe the child needs protection and either the child's health or safety is in immediate danger or there is no less disruptive way to adequately protect the child (s. 30);
- obtain information within the control of any public body except that protected by solicitor-client privilege (s. 96); and
- make agreements with a First Nation, a legal entity representing an Indigenous community, or the Nisga'a Nation or a Nisga'a Village (s. 90).

A director can delegate to any person, or class of persons, any or all of the director's powers, duties, or functions under the *CFCSA* (s. 92). Child protection social workers in British Columbia are delegates of the director.

The Minister has delegated child protection services to family service agencies, including those assisting Indigenous children and families. A list of these agencies can be found on the Government of British Columbia website.

The *CFCSA* prescribes the procedures that a director must follow when responding to a report about the well-being of a child. The responses may be classified within three broad categories:

- referral of the report to an Indigenous authority (if the Indigenous authority is providing child and family services under an Indigenous law),
- alternatives to removal by the director, and
- removal by the director.

The responses are described in the sections that follow.

2. Referral of Reports to an Indigenous Authority

Under s. 16, on receiving a report about a child under s. 14, 15 or 27, if an Indigenous authority confirms that an Indigenous law applies to the child and the Indigenous authority will assess the information in the report, the director may refer the report to the Indigenous authority and inform the person who made the report that it has been referred. The director and the Indigenous authority may have a specific process for the referral of reports through an agreement, such as a coordination agreement entered into under the *Federal Act*.

Once the report has been referred, the Indigenous authority will address the report according to the Indigenous law that applies. The director ceases to have any obligation with respect to the report. In these circumstances, the processes described below on alternatives to removal by the director and removal by the director would not apply because the Indigenous authority will address the report.

3. Alternatives to Removal by the Director

(a) Voluntary Agreements

The *CFCSA* gives a director several avenues to assist with a child without having to move the child into the director's care. These alternatives include support services and agreements, take-charge provisions, protective intervention orders, mediation, and family conferences.

In appropriate cases, a director and a parent may enter into a written agreement to provide—or to assist the parent to purchase—services to support and assist a family to care for a child (s. 5). The initial term must not exceed 6 months, but may be renewed for a further 6 months.

A voluntary care agreement can be made between a director and a parent if the parent is temporarily unable to look after the child in the home (s. 6). In this case the parent agrees to give care of the child to the director under a plan of care. The initial agreement term is up to 3 months for a child under 5, and up to 6 months for an older child. There are also maximum extensions for these agreements:

- 12 months, if the child is under age 5;
- 18 months, if the child is age 5 or older but under age 12; and
- 24 months, if the child is age 12 or older.

Agreements can be made with a child's family members or others. Section 8 of the *CFCSA* allows the director to make a written agreement with a person who has established a relationship with the child or who has a cultural or traditional responsibility toward a child. The director who has care of an Indigenous child may also make an agreement either before a presentation hearing (s. 33.01) or after (s. 48(1.1)) for care of the child by a parent or a person who has a relationship with the child or has a cultural or traditional responsibility toward a child (s. 8).

Part 2.1 gives the director authority to enter into voluntary agreements with young adults for residential, educational or other support services, or for financial assistance (ss. 12.2 and 12.3).

(b) Take-Charge Provisions

Section 25 provides that if a child is found unattended, a director may take the child to a safe place for up to 72 hours. Section 26 also permits a director to take charge of a child for up to 72 hours if it appears that the child is lost or has run away. These provisions permit a director to intervene temporarily without removing the child.

(c) Protective Intervention Orders

If a director has reasonable grounds to believe that contact between a child and another person would cause the child to need protection under s. 13(1)(a) to (e) or (i), that director can apply to either the Provincial or the Supreme Court for a protective intervention order (s. 28).

(d) Non-Removal Supervision Orders

A director may apply for a supervision order without first removing the child where there are reasonable grounds to believe that the child needs protection and a supervision order would be adequate protection (s. 29.1). A director must attend a presentation hearing no later than 10 days after applying for a supervision order (s. 33.1(1)).

If the court finds reasonable grounds to support the director's concerns, then the court must make an interim supervision order and set a date for a protection hearing. If at that protection hearing, the court finds that the child needs protection, then the court must order a supervision order under s. 41.

Notice of the date, time and place of the presentation hearing, in the form of a written report described in s. 33.2(1), must be served on the following:

- the child, if 12 years of age or older; and
- the person with care of the child.

In addition, the director must, if practicable, inform applicable people and entities outlined in s. 33.1(4); they may include the parents, the Public Guardian and Trustee, an applicable Indigenous organization, a Treaty First Nation, or the Nisga'a Lisims Government.

At the presentation hearing for a supervision order, the director must present to the court a written report that includes the following (s. 33.2):

- the grounds for making the application; and
- an interim plan of care for the child, including the director's recommendations about the terms and conditions to be included in the supervision order.

(e) Mediation

Section 22(1) provides a mediation mechanism by which a director and any person may resolve an issue about the child or a plan of care. Section 22(2) provides for mediation and alternative dispute resolution mechanisms if there is a dispute about whether an Indigenous law applies to a matter under the *CFCSA*.

Section 24 confirms the confidentiality of the mediation process and that information obtained in a mediation (or family conference or other alternative dispute resolution mechanism) must not be disclosed unless by consent, or to be reflected in an agreement, or the disclosure is necessary for a child's safety or the safety of a person other than a child.

4. Removal by the Director

A director may, without a court order, remove a child if that director has reasonable grounds to believe that the child needs protection; the director must also believe that either the child's health or safety is in immediate danger, or no less disruptive measure is available to adequately protect the child (s. 30). Section 13 contains a broad definition of circumstances where a child needs protection. The circumstances include where there has been or is likely to be physical harm, sexual abuse or exploitation, neglect, emotional harm, deprivation of necessary health care, deprivation of treatment for treatable conditions, or inadequate care. Section 13(3) clarifies that a child does not need protection in the circumstances described in s. 13(d) (neglect) or (h) (inadequate care) solely on the basis of socio-economic conditions like poverty, inadequate housing, or the parent or child's health.

The duties and powers of a director following a removal are set out in those sections following s. 30.

If the director does not withdraw or return the child, the director must, within seven days of removing the child under s. 30, attend a presentation hearing (s. 34(1)). The director must, if practicable, inform the people and entities listed in s. 34(3) of the hearing; they may include the child (if 12 years of age or older), the parents, the Public Guardian and Trustee, an applicable Indigenous organization, a Treaty First Nation, or the Nisga'a Lisims Government.

If a director removes an Indigenous child, and where an Indigenous law applies, there is now a process by which an Indigenous authority can exercise its jurisdiction to provide child and family services under its Indigenous law and for the director to withdraw before the end of the presentation hearing, after the end of a protection hearing, or after a continuing custody order is made. There also are new Provincial Court *(CFCSA)* Rules and forms that facilitate the process of an Indigenous law applying to the child and the director withdrawing on that basis.

Before the end of a presentation hearing, if the child is Indigenous and if the director receives (under s. 33.02(b)) a written confirmation from an Indigenous authority that the Indigenous authority will provide child and family services in accordance with an Indigenous law, as well as a written request that the director withdraw, then the director must promptly notify each person who is entitled to be informed of the presentation hearing under ss. 34(3), 36(2.1) or 42.1(3), as well as any other relevant Indigenous authority other than the Indigenous authority that requested the withdrawal.

Once notification is provided, under s. 33.04(2), any of the following may file an application for an order that the Indigenous law referred to in the notification does *not* apply to the child:

- a director;
- each parent;
- the following designated representative, as applicable:
    - if the child is a First Nation child, a designated representative of the First Nation;
    - if the child is a Nisga'a child, a designated representative of the Nisga'a Lisims Government;
    - if the child is a Treaty First Nation child, a designated representative of the Treaty First Nation; or
    - a representative of another Indigenous community (identified by the child, if age 12 or over, or by a parent, if the child is under 12); and
- any relevant Indigenous authority other than the Indigenous authority that requested the withdrawal.

The application must be made within seven days of the date of notification, unless the time limit is extended by the court.

Where such an application is made, the court must, after considering the application of the Indigenous law to the child, order that (s. 33.04(8)):

- the proceedings continue (and make various orders such as a temporary custody order or a supervision order); or
- the Indigenous law applies and the director is to withdraw in accordance with s. 33.05(2).

Where no application is made under s. 33.04(2), or the applicant does not intend to pursue the application, the director must notify the Indigenous authority with that information (s. 33.05(1)). After the court orders under s. 33.04(8) that the Indigenous law applies and the director is to withdraw, or the director provides notification that no application under s. 33.04(2) has been made or is proceeding, the director is to withdraw on the date and time the Indigenous authority has confirmed that they will provide child and family services in relation to the child (s. 33.05(2)).

Where the director withdraws, any interim, supervision or temporary custody order made under s. 97(5) that is in effect is cancelled (s. 33.06(1)).

Section 35 governs the material required at a presentation hearing related to the removal of a child, including the reason for the removal and the interim plan of care for the child. In the case of an Indigenous child, the director must present the steps to be taken to support the child to learn about and practise the child's Indigenous traditions, customs and language and to belong to the child's Indigenous community.

At the conclusion of the presentation hearing, where an Indigenous law does not apply and therefore the director has not withdrawn, the court must make one of the following:

- an interim order for custody to the director;
- an interim order for return of the child to the parent under the supervision of the director;
- an order that the child be returned to or remain with the parent; or
- an interim order that the child be placed in the custody of a person other than a parent with the consent of the other person and under the director's supervision.

Except where the judge orders return to the parent without supervision or an Indigenous law applies and the director withdraws, the court must set a protection hearing within 45 days of the conclusion of the presentation hearing. Section 38 requires at least 10 days' notice of the protection hearing. For who must be served, see ss. 38(1) and 39.

A similar process applies to withdrawal of the director due to Indigenous law *after* a presentation hearing, under Division 4, part 3 (ss. 48.1–48.5)

Under s. 48.1, at any time after a presentation hearing, the director must withdraw from a proceeding in accordance with ss. 48.2 to 48.5 if the child is Indigenous, an Indigenous authority provides written confirmation that it will be providing child and family services under an Indigenous law and requests that the director withdraw, and the court orders the Indigenous law applies, after an application is made under s. 48.3.

Again, if the director receives a confirmation and request from an Indigenous authority under s. 48.1(b), the director must promptly notify each person who is entitled to be informed under s. 48.2, including the child (if 12 years of age or older), each parent, the applicable designated representative (i.e. the designated representative of a First Nation, the Nisga'a Lisims Government, a Treaty First Nation, or a representative of another Indigenous community identified by the child if the child is 12 or over or a parent if the child is under 12), any relevant Indigenous authority other than the Indigenous authority that requested the withdrawal, the Public Guardian and Trustee if the Public Guardian and Trustee is the child's property guardian under *CFCSA*, s. 58), and a person other than a director who has custody of a child under an interim order or temporary custody order.

Once notification is provided under s. 48.2, a director, each parent, the applicable designated representative, or a relevant Indigenous authority other than the Indigenous authority that requested the withdrawal, may file an application for an order that the Indigenous law referred to in the notification does not apply to the child. The application must be made within seven days of the date of notification, unless the time limit is extended by the court. The application must be served on the director at least 12 days before the date of the hearing of the application, and the director must provide notice to other parties, including the Indigenous authority, of the application.

Under s. 48.2(8), where such an application is made, the court must, after considering the application of the Indigenous law to the child, order that:

- the proceeding continue (and make various orders such as a temporary custody order or a supervision order); or
- the Indigenous law applies and the director is to withdraw in accordance with s. 48.4(2)

Where no application is made or the applicant does not intend to pursue the application, the director must notify the Indigenous authority with that information.

After the court orders that the Indigenous law applies and the director is to withdraw, or the director provides notification that no application has been made or is proceeding, the director is to withdraw on the date and time the Indigenous authority has confirmed that they will provide child and family services in relation to the child.

Where the director withdraws, any interim, supervision or temporary custody order made under s. 97(5) that is in effect is cancelled (s. 48.6).

In addition, s. 48.5 provides that an Indigenous authority may apply to a court for an order that an Indigenous law applies to an Indigenous child where circumstances have changed significantly since a previous order from the court that an Indigenous law does not apply.

At the protection hearing, if an Indigenous law does not apply and the director does not withdraw, the court must determine whether the child needs protection (s. 40). If the court finds the child does need protection, the court must make one of the following orders under s. 41:

- that the child be returned to or remain in the custody of the parent and be under the director's supervision for up to 6 months;
- that the child be placed in the custody of a person other than the parent with the consent of the other person and under the director's supervision, for a specified period in accordance with s. 43;
- that the child remain or be placed in the custody of the director for the specified period in accordance with s. 43; or
- that the child be placed in the continuing custody of the director, if the requirements of s. 41(2) are met.

Temporary orders under s. 41 are time-restricted (s. 43), unless extensions are sought under s. 44. The time restrictions on the duration of orders under the Act apply to every child in a group of children at that time before the court (such as a sibling group from one family) and are determined by the age of the youngest child in the group. For example, if three brothers are removed, ages 4, 9, and 13 years old, then the order for custody of all three is limited to the restriction affecting the 4-year-old.

The time restrictions under s. 43 are as follows:

- 3 months if any child in a group is under 5 years of age;
- 6 months if any child in a group is 5 to 11 years old; and
- 12 months if any child in a group is 12 years of age or older.

Sections 41 and 49 outline the procedures and time considerations for the director to apply for a continuing custody order. Section 50.02 and following set out a process where an Indigenous authority intends to have custody under an Indigenous law for a child who is in the continuing custody of the director.

A continuing custody order places the child in the permanent care of the director. It is granted where the identity or location of a parent has not been found, or where a parent is unable or unwilling to resume custody of the child. Section 49 sets out the following criteria for the order: there is no significant likelihood that the circumstances that led to the child's removal will improve within a reasonable period of time or that the parent will be able to meet the child's needs. Section 41(2) sets out slightly different criteria: the nature and extent of the harm the child has suffered or the likelihood that the child will suffer harm is such that there is little prospect it would be in the child's best interests to be returned.

Once a continuing custody order is made, the director becomes the sole personal guardian of the child and the Public Guardian and Trustee becomes the sole property guardian of the child (s. 50), until one of the following events occurs (s. 53):

- the child reaches the age of 19;
- the child is adopted;
- the child marries;
- the court cancels the continuing custody order; or
- the custody of the child is transferred under s. 54.1.

Section 50.02 sets out that if an Indigenous authority intends to have custody of an Indigenous child under an Indigenous law, where that child is in the continuing custody of the director, the Indigenous authority must provide written confirmation to the director and the Public Guardian and Trustee of their intention.

After receiving that confirmation, the director must promptly notify each person who is entitled to be informed under s. 48.2, including a director, each parent, the child if 12 or older, the applicable designated representative, and any relevant Indigenous authority.

Once notification is provided under s. 50.02(2), a director, each parent, parties to the proceeding where the continuing custody order was made, the applicable designated representative, or a relevant Indigenous authority may file an application for an order that the Indigenous law does not apply to the child (s. 50.03). The application must be made within ten days unless the time limit is extended by the court, and must be served on the director at least 12 days before the date of the hearing of the application. The director must serve notice of the hearing on the other parties who receive notice under s. 50.02(2) at least ten days before the hearing of the application.

Under s. 50.03(8), where such an application is made, the court must, after considering the application of the Indigenous law to the child, order that:

- the child remain in the custody of the director under a continuing custody order and that the continuing custody order be maintained; or
- the Indigenous law applies and the continuing custody order is to be cancelled in accordance with s. 50.04(2).

Where no application is made or the applicant does not intend to pursue the application, the director must notify the Indigenous authority with that information.

After the court orders that the Indigenous law applies and the continuing custody order is cancelled,

the continuing custody order ends on the date and time the Indigenous authority has confirmed they will take custody of the child.

In addition, s. 50.05 provides that an Indigenous authority may apply to a court for an order that an Indigenous law applies to an Indigenous child where circumstances have changed significantly since a previous order from the court that an Indigenous law does not apply.

Where an Indigenous law does not apply and the director does not withdraw, s. 54 allows a party to a proceeding in which a continuing custody order was made to apply, with permission of the court, to cancel the continuing custody order. Under s. 54.1, the director may apply to the court to permanently transfer the custody of a child who is in the custody of the director under a continuing custody order to a person other than the child's parent. For example, this may allow the child to be transferred into the permanent custody of an individual within an Indigenous community who is not a parent or a family member. Once this transfer is ordered, the individual to whom custody is transferred becomes the guardian of the person and estate of the child (s. 54.2).

Section 54.01 allows the director to apply to permanently transfer custody of a child to a person who had care of a child pursuant to an agreement made under s. 8 or a temporary custody order.

Section 57(3) also allows the court to cancel or change certain orders where there has been a change in circumstances and it is in the best interests of a child.

Section 70 of the *CFCSA* outlines the rights of a child who is in care. Indigenous children specifically have the right to receive guidance, encouragement and support to learn about and practise their Indigenous traditions, and to belong to their Indigenous communities.

Section 71 governs placement decisions about children after removal. Section 71(1) directs that the director must consider the best interests of the child when deciding where to place a child, and s. 71(2) provides:

> The director must give priority to placing the child with a relative or, if that is not consistent with the child's best interests, placing the child as follows:
>
> (a) in a location where the child can maintain contact with relatives and friends;
>
> (b) in the same family unit as the child's brothers and sisters;
>
> (c) in a location that will allow the child to continue in the same school.

Section 71(3) provides:

> If the child is an Indigenous child, the director must give priority to placing the child as follows:
>
> (a) with the child's extended family or within the child's Indigenous community; or
>
> (b) with another Indigenous family, if the child cannot be safely placed under para. (a); or
>
> (c) with a relative, or where the child can maintain contact with family and friends, if the child cannot be safely placed under paras. (a) or (b) of this subsection.

Part 5 governs confidentiality and disclosure of information under the *CFCSA*, and expressly exempts the information collected and kept under this Act from the operation of the *Freedom of Information and Protection of Privacy Act*. The procedures for accessing file information are complex and unique to this Act.

It is appropriate to hear protection proceedings together with custody applications under the *FLA* and, upon application, the court will determine whether the *FLA* application and the *CFCSA* proceedings ought to be joined and heard together. Often, grandparents, aunts and other relations apply for custody of a child who has been removed from a parent's care. However, the court may refuse to hear a contested custody application at the presentation stage of the protection proceedings.

A party may appeal to the Supreme Court as of right (s. 81) and from the Supreme Court to the Court of Appeal with leave on a question of law (s. 82). The Supreme Court Civil Rules govern the procedure on the appeal.

Rule 2 of the Provincial Court (*CFCSA*) Rules directs that if at the commencement of a contested protection hearing a consent order is not made and the judge determines the matter cannot be heard that day, the judge must direct the parties and lawyers to attend a case conference. At any other time, a judge can direct that a case conference be held either at the request of a party or if the judge thinks it will help (Rule 2(2)). In practice, all protection hearings must be referred to a Rule 2 case conference before a hearing date will be set.

Mediation is also encouraged under the *CFCSA* and mediations are conducted regularly under s. 22.

For more information about proceedings under the *CFCSA*, see the *British Columbia Family Practice Manual*, the *Family Law Sourcebook for British Columbia*, and the *Annotated Family Practice*.

[§11.02] *Adoption Act*

There are five types of adoption:

(1) placement by the Ministry: children in the continuing custody of the Director of Child, Family and Community Services are placed with and adopted by families approved to adopt by the Ministry;

(2) placement by an adoption agency: birth parents work with an agency to create an adoption plan, and the child is transferred to the adoption agency, which in turn place the child with adoptive parent(s) who have been approved to adopt through the homestudy process;

(3) direct placement: a parent or other guardian places a child for adoption with one or two adults, neither of whom is a relative of the child, with the assistance of an adoption agency;

(4) relative or stepparent adoptions; and

(5) custom adoptions of Indigenous children.

The *Indigenous Self-Government in Child and Family Services Amendment Act* amends the *Adoption Act*, R.S.B.C. 1996, c. 5. Some amendments came into force on November 25, 2022, including the following:

- additional considerations around the best interests of Indigenous children (s. 3.1);
- a requirement that the Act be interpreted and administered according to the principle of the inherent right of self-government, where the provisions of the Act relate to the adoption of Indigenous children who are in the continuing custody of the Director (s. 3.2); and
- requirements for the disclosure of Indigenous community information in relation to adoptions of Indigenous children.

The new provisions require consultation and cooperation with designated representatives of Indigenous communities before the Indigenous child is placed for adoption (s. 7), and allow agreements to be made under *DRIPA* with Indigenous governing bodies for the exercise of statutory powers under the *Adoption Act* (Part 6, Division 1).

Adoption proceedings are commenced in the Supreme Court by petition (SCFR 3-1(2.2) and (3), and 17-1(24)). See also Family Practice Direction—*Adoption Applications* (FPD-14) for further directions.

One adult or two adults jointly may adopt a child, regardless of their marital status, sexual orientation, or gender identity (*Adoption Act*, s. 5).

If the prospective adoptive parents reside in British Columbia, the director or adoption agency can place a child with them only after they are approved on the basis of a homestudy completed in accordance with the *Adoption Regulation* (*Adoption Act*, s. 6(2)). If the parents reside outside British Columbia, they must be approved to adopt according to the laws of the jurisdiction in which they reside.

Under s. 13(1), consents are required from the birth mother, the father (see the expanded definition in s. 13(2)), any person appointed as the child's guardian, and from the child if 12 years of age or older. The birth mother and father's consents are not required if the child is in the continuing custody of the director under the *CFCSA*, or if the director is the child's guardian under the *Infants Act*. In certain circumstances, a person's consent may be dispensed with, including where the person cannot be located or where the person is not capable of giving an informed consent (s. 17). Consent can also be dispensed with where a person has abandoned the child, not made reasonable efforts to meet their parental obligations, or is not capable of caring for the child.

When an adoption order is made the child becomes the child of the adopting parent(s) alone (s. 37(1)). Financial obligations of the birth parents to pay maintenance are terminated, although payments in arrears are still due. Right to contact with a child also ends unless expressly preserved in the adoption order (s. 38(1)). In the case of Indigenous children, rights of the child as an Indigenous child are not lost upon adoption (s. 37(7)).

Section 46(1) recognizes custom adoptions:

> On application, the court may recognize that an adoption of a person effected by the custom of a First Nation or Indigenous community has the effect of an adoption under this Act.

An adoption under s. 46(1) of an Indigenous person does not affect any rights of the person as an Indigenous person (s. 46(2)).

Canada is a signatory to the *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (the "*Hague Adoption Convention*"). British Columbia residents who wish to adopt a child residing in another country that is also a signatory to the *Hague Adoption Convention* must comply with the *Hague Adoption Convention*, the laws of the child's jurisdiction, and Canadian immigration laws, prior to bringing the child to Canada. If a British Columbia resident wishes to adopt a child from a country that is not a signatory to the *Hague Adoption Convention*, the family must comply with the laws of British Columbia, the child's jurisdiction, and Canadian immigration laws, prior to bringing the child to Canada.

For more information on adoptions, see the *British Columbia Family Practice Manual* and the *Family Law Sourcebook for British Columbia.*