# FAMILY LAW Part 1

## September 10, 2020

*PART I: INTRODUCTION – THE FAMILY AND FAMILY LAW*

Open remarks

- Most well-known and pervasive law
- Family law is in high demand (recession proof)
- On the ground law

Family justice system as a whole: What does the Canadian family and family justice system look like today?

- Family justice system is in severe crisis
    - In some jurisdiction 80% of people are entering family court system being self-represented (entering with no counsel) → result of high fees (lawyer & court fees)
    - In some jurisdictions there are not enough lawyers to meet needs of those able to afford legal service
- *Cromwell Report* – without adequate access to justice than the substantive laws are not of use/have limited value
    - Barriers:
        - 1. Limited resources available for family justice system – more engaged with criminal justice – more resources directed to criminal justice
            - Delayed justice – extreme time delays
                - i.e waiting 3-5 years to go to court re: parenting application
            - Resources allocated to criminal law over family law
                - I.e. AB and family lawyers lobbied for a unified family court and they thought the funding was there but then it was announced it was suspended
        - 2. Culture of justice system
            - foundation of justice system is adversarial (confrontational) BUT adversarial system is toxic for family law;
            - neither the bench nor bar has adequate training to handle/address the sensitive emotion and psychological issues associated with family law – ill-equip to deal with the issues associated with family law
                - i.e child acting out what do I do; because my husband moved out, I cannot afford my bills; I am not sleeping, and it is affecting my parenting – what do I do? Lawyers are not trained to help their clients with these issues…
    - Recommendations: 22 recommendations made in the report
        - First 3 recommendations relate to legal education and law schools; include specific recommendations to law schools to make changes to the curriculum (better training), emphasize conflict resolution, hire professors who are well versed/interested in family law
- What does it mean for family law?
    - Need to be training more individuals in family law;
    - Huge rise in number of self-represented litigants in family law – what does this mean for future area of practice? Will it lead to unbundling family services? Will it lead to family lawyers doing certain tasks and the rest being done by self-represented; paralegals doing more work and drafting documents
    - Lack of family law academics – evidenced in the law faculty (no staffed family practitioners) – what does that mean for the area of family law? Will family law become merely a skills course?

What is family law about?

- How is family defined? By its form? Or by its function?
    - Traditionally it was defined by form – you were a family if you were a heterosexual couple with biological kids out of your union
        - Marriage was most privileged, essential and most respected; Importance of religion; man and women; kids only in marriage; husband was provider and protector; women sustained marriage (primary responsibility of failed marriage on women); penalties for offending rules of marriage; family as social cement
    - Now it is defined by function – heterosexual union is no longer the norm; family take diverse and unconventional shapes (blended, gay, couples without children, common law, etc.) – increasingly recognized by statute and common law
        - Recognized by function; recognized as family because of the function it serves

- *Defined family as any combination of two or more persons who are bound together over time by mutual consent, birth or adoption or placement, and together can assume responsibility of some of the following: physical maintenance and care of members, addition of new members via procreation/adoption, socialization, social control of members, production and consumption, nurturance and love*

- What challenged these factors?
  - Rise of cohabitation instead of marriage (2016 census 1/5 (21.3%)of Canadian couples living in common law; in Alberta specifically 17% in common law); between 2006-2011 common law increased at a faster rate than married couples
  - Improvement of charter equality – section 15 used to recognize rights (ex. Same sex couples – used for adoption rights)
  - Increase of same sex couples – Between 2006 to 2016 opposite sex couples rose 10% to 60% - a greater rate than opposite sex couples (9.6% opposite versus 60% same sex)
  - Reproductive technology – sperm/egg donors – changed our conception of what a family looks like
  - Children's rights & focus on children's interest – shift from children as possession to focusing on the best interest of child
  - Later age of marriage – Married later age meaning later child rearing or no child rearing; From 2011 to 2016 # of couples living without children rose quicker (7%) than couples living with children (2%)
  - Choice not to have children – increase in rate of couples not having children
  - Two income families – shift away from man as provider and women at home

What is family law?

- Per Pain: "Federal, provincial and territorial legislation regulated family law has been piecemeal in its evolution – there has been no broad overarching rules regulating family law"
- Two main periods of family law: *Pre 1968 and Post 1968 area*
  - *Pre 1968* – no divorce statue (apply divorce at common law – had to petition to privy council and only grounds was adultery and in Nova Scotia spousal cruelty)
  - *Post 1968* – had passage of *Divorce Act* (first time for no fault grounds for divorce was introduced; included separation of 1 year – no fault assigned but couple lived apart for 1 year) and the *Right to Spousal Support* was codified in legislation (Before 1968 spousal support was regulated by provincial statutes and those statutes imposed a unilateral obligation on a guilty husband to maintain an innocent wife BUT post 1968 spousal support became financial based not sex based )
- Post 1968 continued
  - Late 70s & 80s – introduction of provincial matrimonial property Act (family property)
    - *Murdoch v Murdoch (1973)* – married couple on ranch – wife assisted both in home and on the ranch – then when divorced all the property in husband name and she felt this was not fair for him to take everything so she challenged in court and it went to the SCC where it was decided she did not financially contribute
      - This led to change allowing 50/50 ownership despite financial contribution – Statutory reform by provinces for Matrimonial property act
  - Growth of equitable remedies for cohabitant couples
    - Common law couples – unjust enrichment and constructive trusts – could pursue for property division; now extends family property rights to common law couples – equal entitlement
  - New procedures for family disputes – mediation, collaborative family law, mandatory parenting education, changes to rule of court
  - 2019 amendments to *Divorce Act*
    - New Amendments - Bill C-78 - *Divorce Act* was supposed to change but due to covid-19 it was postponed

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RECCOMMEND READING: THE TRADITTIONAL MARRIAGE

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*Hyde v Hyde*

*Facts:* Polygamist marriage: man entered into marriage in US, and then married another woman in UK

*Issue*: Whether Hyde's marriage was recognized in the UK

*Ratio:* The case established the common law definition of marriage: voluntary union of one man & one woman for life to the exclusion of all others.

-Lord Penzance found that institutions in foreign countries (including marriage) cannot be considered as valid under English law, unless they resemble the equivalent English institution

## September 15, 2020

*PART II: STATE RECOGNITION OF THE FAMILY UNIT*

### The Traditional Marriage: Jurisdiction

- JURISDICTION – which level of government has responsibility for legislating marriage and divorce, which statutes matter, what level of court do you need to go to
    - Fragment jurisdiction in terms of what level gov has authority to govern the family and which court have control of family disputes
- Legislative Jurisdiction: *Section 91 and 92 of the Constitution Act*
    - Both levels have some jurisdiction and authority over some aspect of marriage, divorce and the family
        - It might be a federal or provincial statute; dictates how you handle the dispute
    - 91(26) federal gov have legislative authority over marriage and divorce
    - 92(12) provincial gov have legislative authority over the solimization of marriage in the province
    - 92(3) Provincial gov have legislative authority over the property and civil rights in the province
        - means provinces have the authority to legislate in the area of division of matrimonial property – every province has its own matrimonial/family property act
        - Pursuant to the adoption reference (1938) adoption, guardianship, welfare and custody fall within provincial jurisdiction under 92(13). However, custody, child support and spousal support are within federal jurisdiction 91(26) – these collar support provisions have a rational and functional connection to divorce therefore federal gov have authority to legislate. Concurrent jurisdiction between federal and provincial in terms of custody, child/spousal support; important to remember because depending on the act you proceed under (Divorce or provincial act) there may be different rules
    - Federal legislation
        - *Divorce Act* (divorce and corollary relief (custody and access, child support, spousal support))
        - *Civil Marriage Act* (capacity to marry)
        - *Marriage Prohibited Degrees Act* (prohibited degrees of consanguinity and affinity)
    - Provincial legislation
        - *Marriage Act* – made pursuant to provincial jurisdiction 92(12) – deals with solmization of marriage
        - *Family Property Act* – deals with division of property - made pursuant to provincial jurisdiction 92(13)
        - *Family Law Act* – deals with child support and spousal support, parenting – made pursuant to provincial jurisdiction 92(13)
- Court jurisdiction
    - The applicant filing the application can choose which level of court to go to with a few exceptions
        - Divorce and Property are exception –must be court of Queen's bench as only superior courts in province have power to grant divorce or divide matrimonial property
    - Court of Queen bench section 96 court – judges appointed federally and deal with family law, divorce and property; provincial judges are appointed provincially by provincial court nominating committee
    - Generally, the applicant can choose which level of court you want to make your application; BUT sometimes statute specifically states – ALWAYS LOOK TO RELEVANT ACT TO DETERMINE WHICH COURT CAN DEAL WITH YOUR FAMILY LAW ISSUE AS SOME PROVISIONS SPECIFY A CERTAIN COURT
- SEE JURISDICTION OVER FAMILY LAW MATTERS CHART below

## JURISDICTION OVER FAMILY LAW MATTERS

| FEDERAL | PROVINCIAL |
|---|---|
| MARRIAGE<br>• The essential capacity to marry [*Constitution Act, 1867,* s. 91(26); *Civil Marriage Act*]<br>• Degrees of consanguinity [*Constitution Act, 1867,* s. 91(26)); *Marriage (Prohibited Degrees) Act*] | MARRIAGE<br>• Solemnization of marriage in the province [*Constitution Act, 1867*, s. 92(12); *Marriage Act*] – what do you need to do to get a marriage; what are the required formalities of a ceramony |
| DIVORCE<br>• Exclusive jurisdiction to the federal government [*Constitution Act, 1867,* s 91(26); *Divorce Act]*<br>• Custody of children, child support and spousal support as "necessarily ancillary" to Parliament's divorce jurisdiction [*Adoption Reference 1938*] | PROPERTY AND CIVIL RIGHTS<br>• Division of family property [*Constitution Act, 1867*, s 92(13); *Family Property Act*]<br>• Adoption, guardianship, child welfare, custody, child support and spousal support are fall within provincial jurisdiction under s. 92(13) [*Adoption Reference 1938*] |
| APPOINTMENT OF FEDERAL JUSTICES<br>• *Constitution Act, 1867*, s. 96<br>• Jurisdiction over divorce, property division and other matters within the jurisdiction of the superior court** | APPOINTMENT OF PROVINCIAL JUDGES<br>• Jurisdiction over matters within the jurisdiction of the provincial court** |
| **Look to the relevant Act to clarify which level of court can deal with your issue** | |

### Federal Legislation

- *Civil Marriage Act*
- *Marriage (Prohibited Degrees) Act*
- *Divorce Act*
    - Divorce, custody and access, child support, spousal support

### Provincial Legislation

- *Marriage Act*
- *Adult Interdependent Relationships Act*
- *Family Law Act*
    - Remedies for both married and unmarried partners – guardianship, child support, spousal/partner support
- *Family Property Act*
- *Child, Youth and Family Enhancement Act*
    - Child welfare, adoptions
- *Protection Against Family Violence Act*
- *Maintenance Enforcement Act*

### The Traditional Marriage: The Essential Validity of Marriage

- Until 2005 no statutory definition of marriage in Canada and one had to look to common law for definition, specifically from the case Hyde v Hyde (1866)

- **Common law definition marriage:** defined marriage as the "voluntary union of life for one man and one woman to the exclusion of all others"
    - Voluntary union – free and informed consent to have a valid marriage
    - Exclusion of all others – speaks to degree of exclusivity and monogamy that you can only have 1 legal spouse at the time
    - One man and one woman – defined marriage based on gender lines; heterosexual
- Between 2003 and 2005 there was a wave of cases challenging the Hyde definition of marriage as discriminatory under section 15 of the charter
    - *Halprin v Toronto* – Ontario court of appeal
        - Case in which 7 gay/lesbian couples applied for a marriage license and they were refused issuance or registration of marriage as they did not conform to common law definition of marriage. These couple applied to appeal the definition arguing that it offended equality rights
        - Court held the common law definition violated the equality right of same sex couples stating they were prevented from accessing the benefits of marriage because of their sexuality, which in turn amounted to a denial of equal benefit of the law on the basis of an annumerated ground which cannot be saved under section 1.
            - The effect was discriminatory, as it violated the dignity of same-sex couples. The violation could not be saved under s. 1 of the Charter, as there was no pressing and substantial objective for excluding same-sex couples from the institution of marriage.
        - Struck down and replaced with **new definition of marriage** that was: "the voluntary union of two persons to the exclusion of all others."
- In 2005 parliament enacted the *Civil Marriage Act*

**The Traditional Marriage: Formal Validity of Marriage by Statute**

- Capacity is married dealt with under *Civil Marriage Act* and *Marriage Prohibited Degrees Act*
- *Civil Marriage Act* → (page 184 of Statutory Materials)
    - ⇒ Section 2: **definition of marriage** states marriage as the lawful union of two persons to the exclusion of two persons as well as the **essential capacity to marriage**
        - Section 2.1 Consent required
        - Section 2.2 Minimum age of 16
        - Section 2.3 Previous marriage dissolved by death, divorce or court order
        - Must meet the definition as well as the capacity requirements
    - ⇒ Section 3: Religious officials – free to refuse to perform marriages that are not aligned with their religion – a means to balance equality rights with religious freedoms
    - ⇒ Section 4: Legislative confirmation that same sex marriage cannot be attacked (marriage validity cannot be voided) based on same sex marriage
    - ⇒ Section 5: Marriage of non-resident persons – addresses same sex couples who come to Canada to marry because same sex marriage was not legal in-home country. HOWEVER, the marriage would be valid in Canada but not valid in-home country.
    - ⇒ Section 7: Divorce of non-resident persons – can return to obtain Canadian divorce provided that spouses had 1) breakdown of marriage, living separate and apart 1 year prior to application; 2) neither could reside in Canada at the time the application was made (different provision under Divorce Act would apply if one spouse resides in Canada); 3) if in state/country that recognizes (may not have at the time of marriage) the same sex marriage then must seek divorce in that jurisdiction
    - ⇒ Section 8: Corollary relief – parenting support, child support, spousal support – does not apply to non-resident persons

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- *Marriage Prohibited Degrees Act* → (page 122 statutory material)
    - ⇒ Section 2: Consanguinity (blood relations); Affinity (marriage); Adoption
        - Prohibition: no person shall marry another person if they are related LINEALLY (consanguinity), or brother or sister or half-brother or half-sister, including ADOPTION → NO LINEAL BLOOD RELATION OR ADOPTION
    - ⇒ Section 3(2): Marriage is void if you try to marry someone related lineally by blood or adoption it is VOID AMBITIO (never comes into being; never recognized as a marriage
    - ⇒

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- Out of country non valid marriages: Marriage recognized abroad and was valid abroad but now they are in Canada and want to divorce and access the corollary relief in Canada but Canada doesn't recognize there union… i.e issue for polygamous couples. what happens?
    - Polygamous relationships are not recognized and are prohibited in Canada; denied access to Canadian courts for purpose of obtaining a divorce however they MAY be able to pursue spousal and child claims for support under provincial legislation

- Case Law also deals with mental capacity of marriage
    - Discuss mental capacity to marry – what circumstance are people deemed so mentally incapable they cannot enter a marriage
    - Mental capacity is the standard for all unions/contracts – must be capable to enter into a marriage
        - Both parties must be able to understand the nature of the marriage contract and all that it entails – low threshold
    - Test set out *Ross Scott and Potspin 2014 BCSC 435*
        - A person is capable to entering into a marriage only if she or he has the capacity (is able to) to understand the nature of marriage commitment and duties/responsibilities it creates; the assessment of the persons capacity to understand is informed in part by ability to manage themselves and their affairs; delusional thinking or diminished cognitive thinking's may not destroy an individual's capacity to inform the intention to marriage, so long as the person is capable of managing their own affairs
        - Adults are presumed capable to marry and onus of proving lack of capacity is on party asserting lack of capacity; relevant time to look at capacity is the time the decision to marry is made; if lack of capacity is proved the marriage is VOID ABITIO (never recognized as valid under law, void from outset, never came into being)
    - Example: *Hunt v Warred 2017 ONSC 7397* - man injured ATV accident and married in secrete at a hotel → declared the man was incapable to contract for marriage and the marriage was deemed void abitio
    - Example: *Debor Thompson v Emma Hulane 2017 BCSC 1289* - Women had alkimers (advanced stage) who niece was appointed as power of attorney and she ultimately entered into a marriage with a man who was trying to get her to write cheques to her in the amount of $40,000. Deemed marriage as void abitio

- Provincial Jurisdiction over marriage
    - Legislates over the solmization of marriage and formalities of a marriage ceremony
    - Formalities of marriage governed by *Marriage Act* (p.92 of statutory materials)
        - Key parts: 1) stipulation of formalities of marriage ceremony (obtain marriage license, qualification of marriage officiant) and 2) matters that hinge on the validity of the marriage (age of people, parental consent of underage

- *Marriage Act* → (page 92 statutory materials)
    - ⇒ Section 3: Authorized to perform a marriage – must be clergy or registered commissioner
    - ⇒ Section 4: registration for clergy or members
    - ⇒ Section 8: Required recited phrase that a commissioner must make the parties state
    - ⇒ Section 9: Marriage license issued within 3 months of marriage date
    - ⇒ Section 10: witness requirements – 2 adult witness; parties must understand the language
    - ⇒ Section 17: Marriage of persons under 16 – no allowed to marry prior to age of 16
    - ⇒ Section 18-19: Marriage age of 16 to 18 requirements/ parental consent
    - ⇒ Section 20: Application for order dispensing parental consent;
        - exception if you are prego or mother of living child under 16 can apply for marriage;
        - voidable marriage if between age of 16 and 18 with no order dispensing parental consent (not voidable if had sex or lived together as husband and wife)
    - ⇒ Section 21: Petition for presumption of death of spouse
    - ⇒ Section 22: Voiding marriage of minors
    - ⇒ Section 27: Mental Capacity and capacity issues – not able to issue person if there is knowledge or reason to believe that there is a diminished capacity
        - Subsection 3: alcohol – if impaired by drug and alcohol cannot issue marriage

- CONSENT
    - Consent is required – if no consent the marriage is void
        - Consent can be vitiated by duress - Duress can void a marriage
        - Fraud or mistake can vitiate the marriage because no consent
        - AGE, NAME, WEALTH do not service to vitiate consent

- CONSUMATION (SEX, THE DIRTY, THE NASTY)
    - Consummation – both parties must have the capacity to perform the consummating
    - Non-consummation is not a ground for annulment
        - In order to use as a ground you must be incapable to consummate -impotence to some level, in ability to do it – VERY RARE AND HARD TO PROVE
    - Marriage of convince – "green card marriage"
        - Can you attack based on the motivation nature of marriage knowing consummation was never going to occur anyway? Motive for marriage is irrelevant, where both parties voluntarily enter into a immigration marriage of convivence it is valid and cannot be annulled for reason of non-consummation

- VALID, VOID vs VOIDABLE MARRIAGE
    - Valid marriage is one that satisfy the requirements set out in legislation
    - Void marriage is one that is void abitio – never comes into being and regarded as never having taken place
        - Ex: marriage blood related relative … daughter tries to marry her father
    - Voidable marriage
        - Marriages that can be created but posses some flaw; treated as a valid and subsisting marriage unless and until challenged in court
        - A voidable marriage can be treated as valid
    - Child support is still valid for void and voidable marriages and the courts have jurisdiction to legislate and enforce

- Legal requirements to marriage:
    1. Must have capacity to marry
        i. Age – under 16 years in age is not capable; one exception under AB marriage act
        ii. Must be single to validly contract marriage
        iii. Consanguinity and adoption
        iv. Mental capacity/capability
        v. Heterosexual (no longer the case due to *Civil Marriage Act* but used to be required)
    2. Consent
        i. Vitiated due to duress, fraud/mistake, intoxication
    3. Compliance with formalities
        i. Alberta Marriage Act (valid registration, valid marriage license, mandated phrase for commissioner recited)
    4. Capacity to carry out sexual aspects of marriage

The Traditional Marriage: Marriage Valid at Common Law

- Different from cohabiting couples – there is an actual definition of common law marriage: a marriage that meets the definition of a common law marriage is a valid marriage and it is subject to legal entitlements and requirements enjoyed by and imposed on married persons by law
- *Keddie v Currie 1991 BCCA* – Man and women living in a cohabitational relationship and she transferred interest in her property to him and when she passed away he attempted to claim an interest in her remaining property as her common law spouse.
    - At the time the Act required a valid marriage at common law rather than a common law relationship. Therefore, the court found that although they were in a cohabitational relationship it <u>was not a common law marriage or a marriage valid at common law</u>
    - Court held a marriage valid at common law is "a legal relationship distinct from a common law relationship where parties were unable to comply with the statutory requirements of marriage or where the parties have not submitted to the local laws"
        - Ex: war time occupation situation; jewish form of marriage despite not complying to the laws of the time due to inability to comply

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RECOMENDED READING: MARRIAGE VALID AT COMMON LAW

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*Keddie v Currie*

<u>Facts</u>: This case discusses the statutory requirements for a common law marriage. Section 85 of the Estate Administration Act defines a common law spouse as: 1) a person who is united to another person by a marriage that although not a legal marriage, is valid by Common Law or 2) a person who has lived and cohabitated with another person as a spouse and have been maintained by that person for a period of not less than 2 years immed.preceding death.

-C and K lived in house for 6 years together (both were previously married)

-K helped bring C out of debt, and provided money for mortgage payments

-C transferred half interest in house to K as a tenant in common

Issue: Is K a CL spouse? What are the required elements of a CL spouse?

Analysis: **Marriage valid at common law (or common law marriage) is different than a common law union or relationship.** Dependency is an essential ingredient…

**What are the circumstances where the courts would recognize marriage valid at common law:**

1) unable to comply with formal requirements of marriage
2) parties have not submitted to the local law (military occupation)

## September 17, 2020

**Same-sex couples case history:**

- *M. v H.* – court says same sex cohabitational couples should be treated the same as opposite sex cohabitational couples
- *Halprin v Toronto* – struck down common law definition of marriage as discriminatory which opened the door for legalization of same sex marriage across the country

**Opposite sex cohabitational couples**

- *Miron v Trudel* – established marital status is an analogous status under section 15 and recognized cohabiting couples served the same function as married couples
- *Walsh v Bona*
    - Matrimonial property rules at the time: in NS which stipulated that there was presumptive division of assets between married couples when the relationship broke down; no matter who was legal owner on title if you were legally married and seeking a divorce the presumption was each spouse owned 50%. Common law couples were not included – spouse not on title had no presumptive legal rights to that property, would have to make the claim of unjust enrichment and a constructive trust as part of a property.
- How did the court try to distinguish between miron and walsh so that they could come to a different conclusion in walsh v bona?
    - 1. In Miron the couple could only access the benefit by getting married – denied unless married; whereas with common law couples there was a way to divide property it is just not the same way as married couples; married couples have matrimonial act and common law couples have the law of unjust enrichment and constructive trusts – saying sure we treat different but they still have mechanisms.
        - In walsh there is a mechanism to remedy the problems that common law couples were having in the situation by just getting married whereas in Miron v Trudel the same kind of solution was not there unless they go married
        - Justice L'Heureux-Dubé stated unjust enrichment and constructive trusts is not the same – your not starting from a presumption of equality as with marriage couples are, it is fact specific, likely litigation – it is not the same
    - 2. Stated in miron v trudel had a situation where you had a couple as a unit against a third party but in walsh it was discussing the couple as against each other – discussion of rights as between the couple as opposed to between the couple and third party
- *Quebec v A (Eric v Lola)*Marks the end of the push on family issues signalling that before any changes it would have to be the legislature for common law couples

### RECOMENDED READING: SAME-SEX UNIONS

***M. v. H. (1999)*** → Pre-halpern: interspousal benefits are conferred on same-sex couples

*Facts:* SCC case - Two women that lived together for almost 10 years. At time of separation, they agreed on division of family property. M changed her application to include a claim for spousal support in accordance with provisions of the Family Law Act of Ontario. She was denied b/c she did not meet the definition of spouse under the Ontario family law act, despite satisfying every single requirement of a spouse except for a man and women. Argued the definition of "spouse" was invalid because it only applied to opposite-sex spouses and thus deprived her right to receive support from H.

- Challenged definition of "spouse" so that she can seek the equivalent of spousal support – violation of her equality charter rights
- the definition of spouse included cohabiting couples but it related to heterosexual relations (a man and a woman)

*Issue:* Whether same sex couples have a right to seek spousal support?

*Decision:* Court held that the exclusion of same-sex couples from the definition of spouse under section 29 of the Ontario Family Law

Act was in violation of equality rights under section 15(1) and not saved (sexual orientation and status). As a remedy, the court struck down section 29 altogether rather than read in any necessary changes.

## RECOMENDED READING: COMMON LAW OR COHABITATIONAL RELATIONSHIPS

*Miron v Trudel,* [1995] 2 SCR 418 → Marital Status is an Analogous Ground for Discrimination

*Facts*: Man and woman lived together with their children in a common law relationship. Man injured in car accident and attempted to claim the injuries under his partner's insurance policy. Ontario Insurance Act provided that benefits were only available to spouses who were legally married and denied the claim. He was not legally married so did not meet the definition of spouse.
*Issue:* Does the definition of spouse in the legislation violate s. 15 of the Charter?
*Decision:* Court held that an insurance benefit provided only to married couples discriminated against common-law couples. Denial of equal benefit on the basis of marital status was established. (one considering factor – unmarried persons are a historically disadvantaged group).
*Ratio:* Marital status was an analogous ground of discrimination for purposes of s.15 and cannot be saved under s.1. Should be "read in" to the legislation.

## REQUIRED READINGS: COMMON LAW OR COHABITATIONAL RELATIONSHIPS

*Walsh v Bona, 2002 SCC 83*
*Facts:* Susan Walsh and Wayne Bona lived together in a common-law relationship for approximately 10 years. Because not married they did not meet the definition of spouse

- The couple had two sons together who continued to reside with their mother when the parties separated in 1995
- After the relationship ended, Walsh sought child and spousal support
- She also was not entitled to the presumptive 50% of property/asset division a spouse would get if married because did not classify as a wife
- Walsh also brought a s 15 Charter challenge to the definition of "spouse" in the MPA (*Matrimonial Property Act)*, which is limited to married couples
- Walsh claimed that the similarities between common law couples and married couples are such that the exclusion of common law couples from the definition of spouse violates her human dignity

*Issues:* Is exclusion from the MPA of unmarried cohabiting persons of the opposite sex, discriminatory?
*Held:* No.
*Ratio*: Issue of choice emphasized by majority of SCC: you choose to get married or you choose not to and couples who choose not to should not have legalities of formal marriage imposed upon them; couples could make the choice to marry or not
*Reasons:*

- Bastarche focused on choice and dignity
- Bastarache, writing for the majority, held
    - the distinction between unmarried and married couples in the Act does not affect the dignity of these persons and does not deny them access to a benefit or advantage available to married persons; difference emerges from choice – co-habiting couples choose to not to marry
    - marriage is a contract and couples who enter into a marriage choose to be governed by the matrimonial property act regime, while cohabiting couples, by not marrying, expressly or impliedly reject said regime
    - Not respecting Mrs. Walsh's choice to not marry would be an affront to her dignity. It would also be an afront to the dignity of married couples as it would downplay there decision to marry
- Bastarache applied the test set out in *Law v Canada* to test whether a statute violates s 15(1):
    - Does the law impose differential treatment between the claimant and others, in purpose or effect;
    - Are one or more enumerated or analogous grounds of discrimination the basis for the differential treatment; and
    - Does the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee?
- S 2(g) passed the first two questions of the test, but not the third

- Many opposite sex individuals in conjugal relationships choose to avoid marriage to avoid the legal consequences that flow from it
- To ignore the differences among cohabiting couples presumes a commonality of intention that simply does not exist
- Finding this was not the case effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected by the state
- Unmarried cohabitants maintain their respective proprietary rights and interests throughout the duration of their relationship and at its end
- If they so choose, they are free to marry, enter into domestic contracts, own property jointly or register as domestic partners
- As a result, the application of the Act to married persons only is not discriminatory in this case as the distinction reflects and corresponds to the differences between those relationships.

*Dissent*: L'Heureux-Dubé held that the Act was discriminatory and could not be saved under section 1 as unmarried heterosexual couples were deserving of the same protections that the Act was passed to provide

- Heterosexual unmarried cohabitants have historically faced disadvantages through a legal system that fails to acknowledge them as legitimate family forms
- Many heterosexual unmarried cohabitants cohabit not out of choice but out of necessity
- Rejected that the law enhanced autonomy by respecting choice – stated couples rarely decided to get married based on the legal consequences; said many are unaware of the consequences or have misconceptions
- For many, choice has denied them by virtue of the wishes of the other partner – that is, not all couples have choice; the partner who wants to cannot exercise there choice to get married → "one partners choice is respected at the expense of the other"
    - To deny them a remedy because the other partner chose to avoid certain consequences creates a situation of exploitation.
- Preferred to recognize the functional similarity between married and unmarried cohabitational couples; contributions and needs of individuals does not depend on their status of relationship – NS act failed to recognize the need of unmarried cohabitational couples and thus discriminated against them – the realities of the relationship at its termination are what the act addresses not the intention of the parties at the outset
- Held: both married and cohabiting couples are at the same stage upon termination of the relationship and this functional similarity justified access to the same procedures for the orderly and equitable redistribution of economic resources

*Quebec v A (Eric v Lola), 2013 SCC 5*

*Facts:* A and B met in A's home country. Eric is a rich cirque performer, Lola is from Brazil (17 yrs old). She came to Canada. They broke up soon after. Then they saw each other sporadically, where A became pregnant with their first child. Together for 12 years.

- 3 types of relationship in Quebec: married; civil partnership; defacto spouses (don't qualify for rights)
- She had 2 other children with B. No property in her name. They spoke about marriage on at least 2 occasions.
- By the time they had stopped living under the same roof, the couple had lived together for seven years.
- A began proceedings seeking custody of the children, spousal support, a lump sum support payment, and use of the family home
- She challenged constitutionality of the Quebec Civil Code, claiming access to the same protections as married spouses

*Issues:* Whether provisions in Quebec's Civil Code that exclude common law couples from the property and support rights granted to married spouses violated the right to equality under s 15, and if so whether the provisions could be upheld under s 1 of the Charter

*Held:* No violation of s 15 – the exclusion of defacto spouses did not violate the charter

*Reasons:* Justice Abella's, while dissenting in the result, expressed the view of the majority on s 15(1) analysis

- The most notable aspect of her opinion is that she dropped the requirement that the claimant demonstrate that the challenged law operate through the perpetuation of prejudice or stereotyping
    - Large shift from the *Kapp* test
- But the court on a different majority decided that her s 15 rights had not been violated, and if they were, they were saved under s 1
- Whether the focus on discrimination should focus on the purpose behind the legislation (behind excluding common law couples) or if it should focus on the effect (disadvantage suffered)
- Abella J:
    - Used functional approach – if it walks, talks and looks like a family it should be treated like one – what matters is not the form or consent or choice but what the relationship actually does and where the parents and children end up after separation
    - When you look at this in a contextual way, given the story of this claim, recognize that one party to this relationship is clearly vulnerable, the economic interdependencies that arise of a co-habitant relationship are not necessarily a choice, but they arise. And excluding common law couples from these statutory schemes, you are disadvantaging those

- Primary reason for the exclusion is autonomy for people. **People should be able to choose whether they want to have their relationship recognized by the law.** This is not discriminatory
- Abella: look at the effect, not the purpose. What is the effect? It is likely to make a class of individuals that are already vulnerable, who are in an unequal power relationship, who lack the ability to protect their own interests in these types of relationships. Effect is to impose a serious disadvantage on persons like A, that we have relieved for people in marital relationships
- Any exploration for the purpose of the legislation should happen under s 1, not under s 15
- **Where court really struggles is that they can understand why people in common law relationships are vulnerable to the same type of economic dependency as those who had been formerly married, but they also want to respect people's choice not to become married**
    - Is s 15 flexible enough to allow the national assembly to exclude common law relationships from the provisions of spousal support, or whether that offends s 15
- **In Quebec, you have to be married or have registered your relationship in order to gain the rights under the legislation. The two hadn't gotten married or registered their relationship**

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Adult Interdependent relationship Act

- Common law couples can now access property division in AB if you qualify as an adult interdependent relationship under the Act
- The Act was passed in 2002 – applies to all couples who are not legally married AS WELL AS NON-CONGIGAL OR PLATONIC COUPLES OR BLOOD/ADOPTIVE RELATIVES
- Main thrust of the act was to establish the types of arrangements that qualify as an adult interdependent relationship
    - Requirements for eligibility: if meet criteria you get certain rights and entitlements (spousal report, succession right, etc.)
- 3 steps:
    - 1. Meet definition of adult interdependent partner – defined under section 1.1.a: "in this act, adult interdependent partner means an adult interdependent partner within the meaning of section 3… section 3 defines an adult interdependent partner as someone who lived in relation to interdependence for 3 years or someone who has lived in a relationship of interdependence of some permeance and there is a child of the relationship by birth/adoption or entered into an adult interdependent agreement (don't have to prove) under section 7
        - For option 1 & 2 you can't qualify till you satisfy the requirements of 3 years or permeance with a child
        - For option 3 you automatically qualify
    - 2. Next look at the definition relationship of interdependence which is defined in section 1.1.f. States relationship of interdependence means a relationship outside marriage in which any two persons share any one another lives and our emotionally committed to one another and function as an economic and domestic unit
    - 3. Next look to definition of economic and domestic unit
        - Economic and domestic unit is defined in section 1.2 which states that in determining whether two persons function as an economic and domestic unit for the purposes of subsection 1.1.f, all the circumstances have to be taken into account including such of the following matters that must be relevant:
            - Whether the people have engaged in a conjugal relationship
            - Degree of exclusivity
            - How they conduct household activities/living arrangements
            - How they present themselves to the community – are they telling them that they are together as a partnership
            - Have they taken steps to formalize the relationship (i.e. named beneficiary)?
            - Financial support
            - Direct/indirect contributions
            - Care and support of children
            - Ownership, use and acquisition of property
        - Factors case from case law and it is the indica of spouse like relationship and important to note NO ONE FACTOR IS DETERMANTIVE; ALL factors will be evidence your functioning as an economic and domestic unit
        - Section 11: states onus on party alleging the existence – claimant is responsible for proving the relationship
- Restrictions:
    - No AIR with minors related by blood or adoption (**s 4(1)**)
    - No AIR if one person provides domestic or personal care for fee or other consideration (**s 4(2)**)
    - Cannot, at one time, have more than one adult interdependent partner (**5(1)**)
    - Cannot become an adult interdependent partner while living with his or her spouse (**5(2)**)

- Rules around Adult interdependent partner agreements roughly map on to rules about validity of marriage.

Adult interdependent partner agreements

- You can become adult interdependent partners by executing an adult interdependent agreement under section 7 of adult interdependent act
- This is the only way persons related to each other by blood/adoption can become adult interdependent partner
  - i.e. mother and daughter living together and want to access benefits available to adult interdependent partners they can execute an agreement
- Section 4.2 states that it does not exist in care giving situations – if one person is being paid to assist that does not make one eligible for adult interdependence
- Section 5.1 states a person cannot have more than one adult interdependent partner at one time
- Section 5.2 states a married person can have an adult interdependent partner but not when still living with husband and wife
  - i.e if married but living apart and you start living with an adult interdependent partner can qualify for adult interdependent partnership, notwithstanding the marriage – KEY IS THAT YOU ARE SEPERATED AND LIVING SEPARATE AND APART
    - Need to be separate and apart; cannot have adult interdependent if living with husband/wife (SPOUSE)
  - Also cannot enter into an adult interdependent partner agreement if still living with spouse
- Criticism:
  - if you can have simultaneous spouse and adult interdependent partner there is the possibility of overlapping claims
    - i.e Have spouse and adult interdependent partner. You own house and under property act spouse have 50% entitlement then the adult interdependent has a presumptive 50% because qualify as adult interdependent partner; Does that mean you get zero? How does that work?
  - Requirement to consider conjugality –say conjugality has nothing to do with property or spousal entitlement; nothing in legislation/case law states you're not eligible if you don't have sex…so why is it a requirement for something to consider in qualifying for an adult interdependent status
  - Requirement to consider the degree of exclusivity – can one spouse by infidelity disentitle their partner to support or property claims because they are no longer exclusive or can't qualify for adult interdependent under the act
- Note: Cohabitational agreements can include aspects that essentially act like prenup

*PART III: THE BREAKDOWN OF FAMILY UNIONS*

Resolution of Family Dispute Resolution

- Family breakdown often involved both an emotional divorce and legal divorce
- Julian Pain indicated that a marriage breakdown invokes three crisis:
  - Emotion crisis
  - Economici crisis
  - Parenting crisis
- Per pain divorce is a loss, whether devastating or not, it is a loss and results in sort of emotional reaction as a death
- There is an emotional overlay that lawyers deal with and typically the law is the easy part – the hard part is determining what the driving for causing the conflict and to assist in a compassionate and effective way to resolve the conflict
- Determined the longer marriage lasted the longer the recovery will be for spouses – not uncommon for family law litigants to be dealing with this for two years;
- Not uncommon for negotiations for a binding legal settlement when one or both are still experiencing trauma
- 3-4% of divorces go to trial in all of Canada; families and couples settle in other ways

Resolution of Family Dispute Resolution – Process Options: Exploring Alternatives for Dispute Resolution:

***see albertacourts.ca for more information –click court of queens bench, area of law, family*

*COOPERATION* *ADVERSARIAL*

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*Kitchen table Mediation Collaborative Law Mediation/Arb Arbitration Limited scope retainer Litigation*

I. Mediation – engages a third-party facilitator but is party driven
   - Involves a neutral facilitator that identifies issues/interests and explores background of dispute; not adjudicative; mediator is not pronouncing a solution on the parties; simply helps with the process
   - Utilizes interest-based negotiations to identify common interest and identify acceptable solutions

- Clients typically only involved – sometimes lawyers; closed and private process intended to make a binding written agreement
- Mediated agreements are not final unless both parties obtain independent legal advice on the legal agreement, but goal is to reach a binding legal agreement
- *Stewart v Stewart, 2008 ABQB 348*
- Pros:
    - Not adversarial – encourages working together which preserves the relationship
    - Control own process and outcome; more ownership as they had a hand in creating it
    - Quicker – earlier resolution
    - Confidential
    - Cost less – available mediation services through government
- Cons:
    - Harder to do when complex issues (especially with property division)
    - Power imbalance issues are difficult situation – mediator may not be able to remain neutral
    - Confusion over lawyers role

II. Collaborative law – out of court process
- Allows couples to create their own settlement with the support of collaborative professionals
- involves lawyers but is settlement orientated process; does not typically end in court
- Involves two clients and two lawyers but each lawyer must be a registered collaborative lawyer, meaning they are a lawyer, trained mediator and at least 40 hours of interest based negotiation training
- Each client and lawyer will sit together to discuss and resolve their issues; they must sign a participation agreement at the beginning which is a binding obligation to deal in good faith and abide by the rules and disclose all information; cannot seek external legal advice outside the meeting (cannot have meetings with own lawyer to strategize nor communication between lawyers outside meeting) – everything discussed together with all 4; if process moves beyond then both lawyers are disqualified and each client needs to retain new lawyer to represent outside collaborative process
- Confidential and without prejudice
- Experts are mutually and jointly retained
- Collaborative Family Practice
    - Collaborative divorce Alberta association – collaberativepractice.ca

III. Mediation/arbitration – fixed time for mediation with understanding if no consensus reached the mediator will act as an arbitrator and will give a final and binding decision

IV. Arbitration – adjudicative process in which parties agree to be bound by decision of 3rd party; can select own arbitrators and the role of the arbitrater can be specifically defined by the parties;
- how formal or informal the process is can be defined
- Quicker and flexible process

V. Limited scope retainers /unbundling – when partiers use a lawyer for a discrete part of litigation; often includes fix fees and might hire lawyer for legal advice and research/ preparation of pleadings or doc review

VI. Litigation
- Consultation and discuss process options

Resolution of Family Dispute Resolution – Process Options: Entering Litigation
- If litigation process begins with pleadings - File statement of claim for divorce which includes claim for collar support as well often filed jointly with statement for division of property
    - Under divorce act file statement of claim for divorce and division of property
    - Under family law act you file a claim under that act
    - Statement of defence, maybe potential counter claim
    - If parenting or child issues are at play – the litigant must take the parenting after separation course within 3 months of filing the pleadings (course offered by AB gov that helps parents navigate through divorced)
    - Next file a notice to disclose (can be done same time as pleadings) – it mandates financial disclosure from both sides so both sides no assets and liabilities at play
    - If going to court – you first go to family docket court (must go before proceeding with scheduling of any formal proceedings of a family matter – place where court considers matter, directs to a process that will be satisfy needs; outcomes include consent order, referral to ADR, directed to file desk application(decided on basis of affidavit alone), if none work might direct to schedule formal interim application (morning order chambers application (shorter, less complex issue, decide on basis of application and supporting affidavit, judge doesn't read material, 10 min each side to state case) or specials family law afternoon application

(complex, 1hr, advance scheduling, file application supporting affidavit and a confirming letter (4 page written argument), judge does read material and longer to present case → both rely on affidavit evidence
- Case conferencing involves meeting with judge in court room to try and resolve issues and reach settlement before going to court and can give advice to next steps
- Possible JDR – judge picked by lawyers can run half or full day mini trial and clients speak (not under oath) judge give opinion but not binding; cane be made binding
- If none work move to trial for questioning (examination for discovery) question other side under oath before trial. Court reporter takes transcripts; before court; test your own case and obtain more disclosure; once done move to trial
- Trial results in final order than can only be changed by appeal or after the fact circumstances change materially and you are authorized to apply for a variation

## REQUIRED READINGS: MEDIATION, ARBITRATION & MED/ARB

*Stewart v Stewart, 2008 ABQB 348*

*Facts:* H and W separate and go to mediation, no agreement is signed. The W then files for summary judgment using emails as evidence. The H contests her ability to do so?

*Issue:* Can documents or discussions from mediation be used in court

*Decision:* No – upholds confidentiality

- Policy reasons for justification for encouraging parties to settle matters by not going to court– court has interest, from policy, in encouraging other ADR mechanisms:
  - 1. Parties are usually more satisfied when they can achieve settlement rather than have a 3rd party tell them what to do
  - 2. Party driven settlements are more creative and designed to satisfy both sides
  - 3. Cost less in terms of financial and emotional
- Given this we need to preserve the confidentiality of the process

*Analysis*: It is clear from both the agreement to mediate and the mediation information document that all of the discussions both between parties and with a third-party mediator are confidential (without prejudice) and can thus not be used in court proceedings → mediation agreement stated: spouses agree all communications between spouses are made without prejudice and are privileged; any information arising out of mediation is to be treated by all parties as confidential; anything obtained cannot be used in further court proceedings [see page 43]

→ can produce documents that would be produced in normal course of litigation, notwithstanding they might be used in mediation (financial statements, rsp statement = acceptable to be introduced in subsequent litigation but draft agreement, affidavits, emails, etc. = unacceptable to be introduced in subsequent litigation)

*Ratio:* Courts will uphold creation of privilege within the mediation agreement

# September 22, 2020

## Violence in Relationships

- VIOLENCE in relationships and what constitutes spousal abuse – includes violence, physical abuse (application force – way to enforce), mental abuse (threats of isolation), sexual abuse (use of guilt or humiliation to force certain types of sexual acts), emotional and psychological abuse (threats, disparaging comments, mind games, extreme jealousy, accusations of adultery), economic abuse (abuser exercise improper financial control over the victim – removing victims access to cash, limiting amount of gas in tank, not allowing one to work)
- Spousal homicide counts for 15% all deaths in Canada; 4x as many women are victims
- Why don't they seek legal remedy?
  - Fear of retaliation and revenge
  - Desire to keep the family as one unit
  - Fear of living on social assistance after divorce (don't have own money … what happens when they leave? How do they support themselves?)
  - Lack of information (where to go to get help) or support
  - Fear that police and courts won't believe them that abuse occurred; fear of victim building or lack of action to protect them following court
- *Edmonton community legal center (ECLC)*
  - Family law clinic – volunteer lawyers that take on family law files for low income individuals

- Have a screening tool
  - Lawyer to go through with client to determine if domestic/family violence is occurring and to the degree as well look at risk level for spousal homicide
  - Ask client each question
  - see TWEN for the sheet
- Have/create safety/escape plans for victim if risk is extremely high – what to bring when leaving, how to change bank info, how to screen calls, etc.

## Remedies to violence in relationship

I. **Protection Against family Violence act** (p.112 of statutory materials)
- Section 1(1)(d) defines a family member:
  i. persons who are or have been married to one another, who are or have been adult interdependent partners of one another or who are residing or have resided together in an intimate relationship
  ii. persons who are the parents of one or more children, regardless of their marital status or whether they have lived together at any time,
  iii. persons who are related to each other by blood, marriage or adoption or by virtue of any adult interdependent relationship
  iv. any children in the care or custody of person referred to in subclauses (i) or iii)
  v. persons who reside together where one of the persons has care and custody over the other pursuant to an order of the court

  ***Note: only those classified as family members can access the act for remedy
- Section 1(1)(e) defines family violence:

  ***Note: it states "includes" meaning there may be more deemed as family violence that isn't listed
  i. Any intentional or reckless act or omission that causes injury or property damage and that intimidates or harms family member
  ii. Any act or threatened act that intimidates a family member by creating a reasonable fear of property damage or injury to a family member
  iii. Forced confinement
  iv. Sexual abuse
  v. stalking

  *** BUT it states: "but is not to be construed so as to limit a parent or a person standing in the place of a parent from using force by way of correction toward a child who is under care of the parent or person if the force does not exceed what is reasonable in the circumstances
- Section 1(1)(K) defines sexual abuse
- Section 1(1)(K.1) defines stalking
- Section 2 defines conduct
- **Emergency Protection Order (EOP)**
  i. Section 2(1) If able to qualify under these conditions (you meet the definition of family member and your experiencing any type of defined family violence one remedy you can access under the Act is an *Emergency Protection Order (EOP)*
     - Made without notice to the other side or ex parte
  ii. Requires section 2(1)(a) that a family violence has occurred as defined section 1(1)€; that the claimant has reason to believe the respondent will continue or resume family violence; that it is a serious or urgent situation requiring immediate protection
  iii. Section 2(2) sets out factors that the court should consider when granting an EPO:
     - History of family violence
     - Whether it is repetitive or escalating
     - Existence of immediate danger
     - Vulnerability of elderly claimants
     - Need for safe environment
     - Etc..
  iv. Section 2(2.1) sets out grounds on which an EPO should not be denied:
     - (e) that criminal charges has been or may be laid against the respondent
  v. Section 2(3) sets out the terms of an EPO
  vi. Section 2(5) Takes effect immediately
  vii. Section 2(6) has to be reviewed by court within 9 working days

        - Its made without notice, meaning the respondent does not have the ability to refute the alleged claims and this review provides the respondent with time to speak but also respects the safety and protection of the claimant
    - Section 3: Confirmation of Emergency Protection Order
        i. Section 3(3) – confirmation hearing with justice of court of QB
        ii. Section 3(4) lays out the option of the hearing:
            - (a) revoke the order
            - (b) direct that an oral hearing be held
            - (c) confirm the order
            - (d) revoke the order and grant a new order
    - Section 4: Queen's bench protection order
        i. Made on notice to the respondent
        ii. Section 4(2) sets out the terms that may be included in the protection order
    - Section 13.1: Offences and penalties
        i. Offence to disobey a protection order if one knows a protection order is in existence
        ii. Fines or potential imprisonment – the teeth of the order; more than just a piece of paper

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## REQUIRED READINGS: VIOLENCE IN RELATIONSHIPS – PROTECTION AGAINST FAMILY VIOLENCE: EOP

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*Lenz v Sculptorneau,* 2016 ABCA 111

*Facts:* Began dating in 2012 but lived in separate residences during the relationship, though they would spend some nights together at one of the residences

- They did not share expenses, no children
- At the time of application, the respondent was married to someone other than the appellant and had not commenced divorce or separation proceedings
- RCMP were later contacted about threats of violence and property damage
- An EPO was then granted

*Issues:* Whether the definition of "family members" under the *Protection Against Family Violence Act* encompasses person who have been involved in an intimate relationship, who have not resided together and do not reside together, and who do not fit within the definition of "adult interdependent relationship" under the provisions of the ***Adult Interdependent Relationships Act***

- Specifically, whether a Justice of the Peace was correct to issue and *ex parte* EPO under s 2(1) of the *PAFVA* and whether the Court of QB was correct to confirm it

*Held:* **The appellant and respondent do not fit within any of the legislated definitions of "family members."** – people who do not meet the definition of family member are not entitled or qualify to seek EPO

*Reasons:* The plain and ordinary reading of this definition makes clear that the *Act* does not provide protection to all people in intimate relationships; rather, this particular form of protection applies only to those who are residing or have resided together in an intimate relationship, or who qualify as adult interdependent partners

- A comprehensive consideration of the legislation supports the conclusion that persons in intimate relationships who have not, or do not now reside together, and who are not adult interdependent partners, are neither captured under the definition of "family members", nor are they entitled to seek EPOs against one another
    - A contrary interpretation would give this text an implausible meaning
- "Protection orders were designed to protect family members from family violence. They were never intended as a backdoor, ex parte, way of obtain children or exclusive possession of matrimonial property…." (Page 50) - EPO must be used with extreme care – cautioning that the court needs to be cautious when granting EPO's because they do shift the balance of power in a family law file
- No threshold amount of time the couple needs to be living together to be classified as family member under the *Family Violence Protection Act* – this differs from *Adult Independent Partners Act*

*Statutory Interpretation*

- Words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of [the Legislature]"
- The evidence does not demonstrate that the appellant and the respondent functioned as an economic and domestic unit for a continuous period of not less than 3 years
    - They are not AIP under the *PAFVA*
- Under s 5(2) of the *AIRA*, a married person living with his/her spouse cannot simultaneously be an adult interdependent partner of another person

- S 7(1)(2) expressly excludes married persons from entering in an adult interdependent agreement
- S 1(1)(d)(i) also defines "family members" as persons who are residing or have resided together in an intimate relationship
    - A plain reading of this part of the definition suggests that being in an intimate relationship with someone without also "residing" together during that relationship is insufficient for qualifications as family members
- Applying the ordinary meaning to "reside", two people are family members eligible to seek EPOs against one another if they satisfy two requirements:
    - (1) They are or have engaged in an intimate relationship with another and
    - (2)rDuring that sexual relationship, they lived together in the same home that was their common, jointly intended place of cohabitation
- The Legislature intended EPOs to be an extraordinary remedy reserved for situations of imminent familial domestic violence
- The PAFVA's extraordinary procedure was designed and intended to address one subset of abusive relationships – violence among prescribed family members – whereas common law restraining orders are available for broader forms of abusive relationships
- The *PAFVA* has the specific purpose of targeting violence amongst persons with familial relations, as defined under the statute
    - The EPO scheme is reserved for those that fall within the strict definition of "family members"

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II. Criminal charges
- Could be a condition on release for bail not to contact victim

III. Peace bonds
- Available under section 8(10) of the Criminal code; can obtain if you are fearing for your safety; used for non-urgent circumstances and requires an individual to have no contact with those named in the peace bond
- *How to get peace bond*: two situations 1) the complainant has chosen the peace bond as remedy (complaint to police) or 2) the abuser has been charged with assault against victim and crown prosecutor uses bond as a means to resolve the matter
- *Process*:
    i. Complaint is made to police; accused is arrested and given notice to appear to court; at court the accused is asked if they will comply to a peace bond and if yes peace bond is prepared for them to sign and the matter is ended (if no agreeance then sent to trial)
    ii. Be as a way to resolve criminal charges – requiring no contact with victim for period time
- Peace bond does not create a criminal record but violating the bond does constitute as offence and violator could be charged

IV. Restraining orders
- Issued pursuant by the inherent jurisdiction to provide protection to its litigants
- Apply for one against any persons who by there actions/words made you afraid for your safety
- Made to queens bench, with or without notice
    i. If application made with no notice – a review date will be set and respondent will be given a chance to respond
- Under section 127 – it is a criminal offence to breach court order and thus if restraining order violated can be punished not exceeding two years

**Note:** The inclusion of discussions and defined terms surrounding family violence in the new amendments to the divorce act. **Bill C-78** (p.43 of statutory info)

- Resources for comparing old divorce act to new amendments:
    - John Paul Boyd – unofficial consolidation of divorce act https://static1.squarespace.com/static/5b6db734b1059890c89e8172/t/5e4ad0aafd3ee771bdafa177/1581961387966/The+New+Divorce+Act.pdf
    - DOJ changes explained https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/index.html
- Preamble: to assist courts to address family violence
- Section 2(1) definition of family violence
- Section 7.8(2) new duties of the court
- Section 16: consideration of family violence – presence and absence when considering best interest of child

## The Breakdown of the Formal Marriage: Divorce

I. History of the divorce act

- Federal legislation

II. Jurisdiction: Constitutional and Ordinary residence
- In AB all applications under divorce act must be brought under court of QB (confirmed in divorce act)
- Ordinary residence
    - Section 3(1): jurisdiction in divorce proceedings
        - One spouse must have lived in province for at least one year immediately preceding the commencement of the proceeding; that one year has to expire before commencing divorce – it grounds the jurisdiction (hard and fast rule – no exception to rule except in civil marriage act, where non-resident seek divorce )

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REQUIRED READINGS: THE BREAKDOWN OF THE FORMAL MARRIAGE: DIVORCE - JURISDICTION

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*Quigley v Willmore*, 2008 NSCA 33

*Facts:* Willmore filed a petition for divorce in Texas (TX)
- Pursuant to *Civ Pro Rule* 11.05, Willmore applied to have Quigley's petition struck out on jurisdictional grounds
- Wilson found that Quigley had not been ordinarily resident in NS for at least 1 year proceeding her filing
- All orders were set aside, including the custody order giving Quigly custody of their 8 year old child
- During the couple's marriage, they lived in NS for some periods and TX for others, but always maintained a home in NS
- They spent long times apart, largely due to the fact that Willmore worked overseas in the oil industry and Quigley was a lawyer in NS

*Issues:* Whether Quigley satisfied the residence requirements of the *Divorce Act* prior to filing her petition for divorce in NS

*Held:* Quigley was ordinarily resident in TX

*Reasons:* Ordinarily resident refers to a person's residence in the course of a customary mode of life during the relevant time; is a question of time, object , intention and continuity; based on fact, matters of degree and must be contrasted with casual intermittent, special, temporary or exceptional residence; not the length or visit/stay but the nature of the time spent
- A person arriving in a new location with intent of making that location a home for an indefinite period means the person is ordinarily resident in that community
- *Thomson v Canada (Minister of National Revenue*) → "one is ordinarily resident in the place where in the settled routine of his life he regularly, normally or customarily lives. Once sojourns at a place where he usually, casually, or intermittently visits or stays. In the former, the element of permanence, in the latter the temporary predominates. The difference cannot be stated in precise and definite terms"
- *Macrae v Macrae* → "Ordinary residence is a thing which can be changed in a day. A man is ordinarily resident in one place up till a particular day. He then cuts the connection he has with that place ... and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place."
- The court then identifies several main themes from this (and other) caselaw:
    - The determination of ordinary residence is highly fact specific and a matter of degree
    - Ordinary residence is in contrast to and distinguished from casual, intermittent, special, temporary, occasional or exceptional residence (such as a stay or visit)
    - A person's ordinary residence is where they are settled and maintains their ordinary mode of living, or where they live as one of the inhabitants as opposed to a visitor
    - There is no temporal requirement; residence may be limited from the outset or it may be indefinite or unlimited, and is established when a person goes to a new locality with the intention of making a home there
    - The person's state of mind may properly be taken into consideration for a limited purpose as to whether they were within the jurisdiction as a visitor, etc., but a mere intention to return to the initial location is not sufficient to overcome the residency
- Note:
    - Court can take into account premarital residence in the province – how long province in total not just when married
    - Situations where neither spouse are ordinary resident for year so neither spouse can commence an action in jurisdiction until requirement satisfied – must satisfy 1-year ordinary resident
    - What if you don't live anywhere for a year – could look to mortgage (owning) vs rent, job, health care card, driver's license, kids school enrollment, employment, etc. to prove ordinary residence
        - Also can look to intention or communication of express intention
- Bill C-78 is changing ordinary resident:
    - Section 35 states the concept of ordinary residence is going to be changed to habitual habitants
        - "habitually resident" rather than "ordinary resident" for one year prior commencement

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## September 24, 2020

- We ended last day talking about an aspect of jurisdiction under the divorce act, which was Section 3(1) stating that a party needs to be ordinary resident in the province where they are filing your divorce action for at least one year immediately preceding the commencement of the divorce proceeding;
- Determining when a court has jurisdiction and which court has jurisdiction:
    - Sections three through five of the divorce act also address and a few other aspects of jurisdiction:
        - Section 3(2) it discusses what happens in in circumstances of competing jurisdictions - So what happens if each spouse is ordinarily resident in a different provinces, let's say once in Alberta ones in BC, and they both commenced divorce proceedings
            - Statute S. 3(2) states the one that was commenced first is the one that takes precedence - so if the person who lived in BC filed first then the proceedings are going to happen in BC;
        - Statute s. 3(3) states that if the proceedings were commenced on the same day then the federal court takes jurisdiction over the matter
        - Section 4(1) talks about jurisdiction to hear corollary relief proceeding
            - NOTE: there's essentially two separate types of proceedings under the divorce act - there is a proceeding strictly for the divorce the dissolution of the marriage and then there's proceedings to do with corollary relief in conjunction with the divorce (those are things like child support, parenting applications etc)
                - Practically these are heard together we don't ever see a divorce application scheduled separately from a corollary relief application
                - The jurisdiction for the courts to hear both of those applications is addressed different in different sections of the divorce act
            - A court and a province has jurisdiction to hear and determine a corollary proceedings if one spouse is ordinarily resident in the province after commencement of the proceedings (so this is different from the ordinarily resident requirement for divorce; there had to be ordinarily resident for an entire year immediately preceding the commencement whereas here you only have to be ordinarily resident in the comments at the date you commenced the proceeding)
                - And the reason for that is if a person needs interim relief if we you know a mother desperately needs child support or something like that they don't want to have to make her wait a year before she's able to apply for that corollary relief under the divorce
            - In sum: either the spouses ordinarily resident in the province corollary release proceeding is commenced or both spouses accepted jurisdiction backport
        - Section 4(2) and 4(3) - Essentially say the same thing as Section 3 is that if applications are commenced in different provinces the first one to file takes precedence and if they are filed on the same day the federal court takes jurisdiction;
        - Section 5 addresses variation preceding - so this is what happens if there has already been a final order determining probably child support, spousal support, parenting …if they've gone to trial or if they have terms of corollary relief incorporated into a divorce judgment and 1 or the other parent or spouse is trying to vary the terms of the order, the court has jurisdiction to hear and determine that variation application if one spouse is ordinarily resident in the province again at the commencement of the proceeding or both spouses accepted court's jurisdiction
            - This applies even if the court did not grant the original order → so if you have the original order as an order of the court of Queen's bench of Alberta and you're commencing variation proceedings in British Columbia, that's allowed as long as you meet the jurisdiction requirements: so a either the person who's commencing the proceedings is an ordinariy resident in British Columbia or both spouses agree to accept the jurisdiction of the British Columbia court; Then again sections 2 and 3 are the same as above: the first to file takes precedence if they both file on the same day federal court takes jurisdiction
            - CHANGE WITH BILL C-78 - THE procedure under bill C -78 is going to change so when you have competing applications either for divorce OR corollary relief or a variation application, the procedure over what happens when they are commenced on the same day is going to change:
                - For example: an application for divorce is commenced by the spouses in two different provinces on the same day… under the new provisions jurisdiction is determined on application to the federal court (recall under the current provisions the federal court takes

jurisdiction) - the federal court is just going to determine which one of the provincial courts should take jurisdiction

- The exception #1: when it includes a parenting application - so if the corollary relief application includes any aspect of parenting, then the court with jurisdiction is the court in which the child is habitually resident
  - For example: if we're taking the Alberta BC example, an mom lives in Alberta and Dad lives in BC and they both commence applications on the same day but the child lives with mom and Alberta, then the court that decides the application is going to be the court in Alberta because that's where the child is habitually a resident
    - So that's The first criteria that the federal court can use to decide which court has jurisdiction
- The exception #1: The second criteria that the federal court can use to decide which court registration is it will be in the court of the province where the spouse has had their last common habitual resident, provided that one of the spouses is still habitually resident in that province
  - For example back to Alberta and BC example… wife lives in Alberta husband lives in BC (no children) and when they lived together as husband and wife they lived in Alberta, so in that case the federal court would determine that the court with jurisdiction is the court of Alberta

- If neither exceptions applies, then the federal court determines which jurisdiction is most appropriate → they just use their discretion, they accept submissions from council and they determine which jurisdiction is most appropriate
- So again those exceptions emerge with bill C 78 - they're going to come into force next year so be aware that how you're going to determine which court has jurisdiction is changing but only in the context of applications that are commenced in different provinces on the commencing and if you're looking in for those provisions their sections 2 to 4 of each bill C 78

- Section 6 - talking about divorce proceedings, corollary relief proceedings or variation proceedings, it is possible to transfer them to another jurisdiction but the transfer will depend on which province that children are most substantially connected to
  - this may be done on application or on the court's own motion
  - for example, if we're using our Alberta and BC example – mom lives in Alberta with the kids, dad lives in BC and dad commences his application in BC (we don't have any issues about jurisdiction, he's been ordinarily resident there so he's able to file, we don't have any issues about competing applications because mom has not filed her application yet). Mom can either make an application to the court in BC to say listen its not the appropriate forum because the kids are most substantially connected to Alberta or the judge in BC can say that on his or her own and say listen this is not the appropriate place to hear this application because again the children are most substantially connected to Alberta → so if that ends up being the case those proceedings that were started in BC would then be transferred to Alberta and heard an Alberta court
  - The reason for this is that the court needs access to things like the children's teachers, for pediatricians, if there seeing counselors, their counselors, there friend group …they need sort of the whole context of the children's life and if that's entered in a province other than the province where the application has been filed then it may be best for those proceedings to be transferred
  - CHANGE WITH BILL C-78
    - There's going to be a slight change when bill c-78 comes into force… so instead of transferring the proceedings to the province where the children are most *substantially connected* (which is what the act currently reads) <u>there changing that</u> to *habitually resident*
      - You can transfer the proceedings if the court or a person making the application is arguing that it would be appropriate to transfer because the children are habitually resident in a different jurisdiction

- New jurisdiction provisions that are going to be coming in under bill C-78
  - Provisions are going to be brand new dealing with jurisdiction about applications for contact orders and applications where the child maybe doesn't even reside in Canada so the new divorce
    - section 6.1 is going to deal with when the court has jurisdiction if there is an application for a contact order …
    - section 6.2 Deals with the court jurisdiction if the child is wrongfully removed from or retained in a province

        - this situation unfortunately happens sometimes where you know maybe mom and dad are in a high conflict situation and dad decides that he wants to live in BC with the child and mom won't agree so dad just up and takes the child to be seen and then what do we do how do we get an Alberta court order enforced in BC or how do we get the BC court orders for return of the child …that type of thing so again if you're looking for jurisdiction and those types of matters where the child has been wrongfully removed from his prominence his or her jurisdiction or wrong simply retained into jurisdiction look to section 6.2
    - section 6.3 deals with applications where the child is habitually resident outside of Canada
        - So this is going to be a situation where maybe the child habitually lives in the United States with his mother or his father and his other parent lives up here in Canada he comes for a visit and then the parent that lives in Canada is refusing to return him to his own country

## III. Duties under divorce act

- **Lawyer**: As a legal advisor lawyer, I would have statutory duties that I must discharge under the divorce act
    - Section 9(1) of the divorce act stipulates that a legal advisor must inform the parties of their duties under this act and must discuss reconciliation and advise of marriage counseling
        - duty of every family law practitioner, every legal advisor to discuss with their client whether reconciliation and marriage counselling is possible
        - Exception to this is if the circumstances make it inappropriate to do so so
            - A big example of where it might be inappropriate to discuss reconciliation and marriage counseling is when it's been a very very abusive relationship and perhaps the abusers in jail because here, she's been convicted assault
                - in that situation it is probably inappropriate to discuss reconciliation and marriage counseling
    - Section 9(2) a legal advisor must discuss the possibility of negotiation with their client
        - in other words they need to discuss not litigating the file, negotiating or attending mediation or one of those alternate dispute resolution processes
        - it's important here that the lawyer is stressing the importance of settlement and is able to discuss mediation facilities with the client
        - it's our statutory duty to inform them that they have these opportunities to resolve their dispute outside of court by some other means
    - Section 9(3) States that a legal advisor must sign a certificate stating that they have complied with these operations and then it accompanies the commencement documents
        - so if I'm filing a statement of claim for divorce on behalf of my client I must also include a certificate of legal advisor certifying that I have discharged my duty under the divorce act, I've discussed reconciliation, ii have discussed negotiation, I recommended marriage counseling or mediation
        - need to take this duty very seriously because it's your word going through the court
        - you cannot sign on behalf of another lawyer without speaking to the client first
            - if there's another lawyer in your office that says listen I had a consultation with this client and I need you to file a statement claim for divorce and can you just sign for me… you can say sure but I need to talk to the lawyer client first even if it's just a phone call to satisfy myself that they have been discussing with the client possibility of reconciliation marriage counseling all of those things
    - CHANGE WITH BILL C-78
        - **Amendments:** Section 9 is being repealed but its content is being preserved it simply being moved to a different part of the act – will be the new section 7.7 once the bill comes into force
        - **Additions:** Also must encourage client to attempt to resolve the dispute through a family dispute resolution process and you must inform your client of any family justice services that may help them resolve their dispute
            - For example, early case conference interventions that the court often offers at the family justice dispute resolution process, family justice services process, that under the new provisions of bill C-78 lawyer must inform their client so that are aware of them if they want to take advantage
- **Court**: the court has statutory duties that it must discharge under the divorce act
    - Section 10(1) of one of the current divorce act it says that the court might satisfy itself that there is no possibility of reconciliation, unless the circumstances make it inappropriate to do so
    - Section 10(2) state that if the court is not satisfied that there is no possibility of reconciliation, court can order the parties to counseling
    - section 10(3) says 14 days after this adjournment either or both parties can apply to resume the divorce proceeding

- CHANGE WITH BILL C-78:
  - Section 10 duties are preserved - so the court still has the ability or still has the duty to satisfy itself there is no possibility of reconciliation and it still has the ability to order the parties to counselinig
  - there's a new duty under section 7.8 – states that in a corollary relief proceeding the court must consider it there is a civil protection order or existing child protection order etc (it's dealing with those family violence orders, child welfare orders or those types of things under the amendments from bill C-78) – COURT HAS TO to consider those types of orders or proceedings
- Parties: When bill C 78 comes into force the parties are actually going to have statutory duties that they must discharge (those are brand new)
  - Constitute Sections 7.1 to 7.6 under the new divorce act
  - They have 5 duties are duties:
    - the parties, so of the spouses - the husband and the wife- any person with parenting time, decision-making responsibility or contact must exercise that right in a manner consistent with the best interest of the child
      - Becoming a statutory duty under the divorce act at if there are children involved you must act only in their best interests when proceeding through the divorce action
    - a party to a divorce action must protect child from conflict arising from the preceding
    - they must attempt to resolve the dispute through family dispute resolution
    - They must provide complete accurate and up-to-date information
    - they must certify awareness of these duties in the commencement document
      - just as the lawyer needs to include with the statement of claim the certificate, the parties also need to include a certificate with their statement of claim certifying that they have been informed of these duties and that they are aware of them

## IV. Admission made to marriage counsellors/mediators

- Section 10(4) - Court ordered marriage counselling
  - The question becomes is that counselor now an officer of the court and compellable in the proceedings because they've been nominated or appointed by a judge?
  - Section 10(4) states No counselor or mediator that the parties are ordered to by the court is compellable as a witness in the divorce proceedings
  - Section 10(5) says actually in fact no marriage counselor or mediator can disclose any admission or communication made to them whether or not they were appointed by the client

## V. Barriers to religious remarriage

- An example of a barrier to religious remarriage is something called “aget” in the Jewish faith – aget Essentially a Jewish bill of divorce and without this aget on the spouses can't remarry within the Jewish faith. So, they can have a civil marriage but it wouldn't be considered a Jewish marriage within the Jewish faith
  - Under Jewish law a wfiie cannot obtain aget unless her husband agrees to give it …so this can sometimes turn into an exploitive situation where the husband is withholding the issuance of the get for the extraction of better terms on parenting property or support…
  - So what recourse is there?
    - Under section 21.1(2) of divorce act iit imposes legal sanctions on a spouse who unjustifiably refuses to remove a barrier to the religious remarriage of the other spouse
      - so the spouse who was unable to obtain the religious remarriage or obtain the religious divorce, may file an affidavit and the court may then use this powers to deny the spouse denying the divorce the benefits of the act (it can deny any applications for child support, etc)
      - it can dismiss the pleading that any denying spouse have filed and the denying spouse has 15 days to remove the barriers before the court will begin to exercise in power
        - essentially the person who is unable to get the religious divorce, filed an affidavit, there's a 15 day window where the person who had been denying have an opportunity to then provide the religious divorce, if they refuse to do so then at this point at the end of the 15 days the court can start exercising its powers to essentially punish them for their withholdings so again just missed their pleadings denied or corollary relief application with that type of thing
      - Note: it must be the other spouse denying not a religious body or official

## VI. Conflict of laws and recognition of foreign decree

- What happens if you obtained a divorce in a different country? is it going to be recognized here in Canada?

- Section 22(1) a foreign divorce will be recognized if either spouse have been ordinarily resident in the foreign jurisdiction for at least one year preceding the commencement of the divorce proceedings
    - if the spouse would have qualified under the divorce act jurisdiction provision – an ordinary resident in the other country for the specified amount of time - that they would meet the ordinary resident requirement under the divorce act, then the Canadian courts are going to recognize that form divorce because they're going to recognize the fact that court had appropriate jurisdiction according to Canadian law
- Foreign grounds of divorce are irrelevant - Doesn't matter if they got divorced because of adultery or cruelty or you know anything, the ground doesn't matter, we're looking at whether or not under Canadian standards the court had jurisdiction

## VII. The divorce judgement

- It used to be called decree nisi and then three months after that I decree absolute issued - so there was essentially a three month waiting period before the divorce became final
- Under section 12(1) it now says that divorce judgement does not take effect until 31 days after the judgment is rendered or until all appeal rights have been exhausted, then a certificate of divorce is granted and the divorce is considered final
- Sections 13 and 14 specify that once the certificate of divorce is issued and is final, the divorce has legal affect throughout Canada
    - You cannot appeal a certificate of divorce – no appeal rights (must appeal before 31 days allapsed)

## VIII. Abridging the time

- Circumstances where you cannot wait the 31 days
    - Well then you look at 12(2)(a) -and this is called abridging the time abridging the time for the divorce judgment
        - the court has the discretion to shorten the waiting period if it feels that there are special circumstances and both spouses agree not to appeal the judgment
        - two conditions:
            - a court must agree that there are special circumstances
            - Spouses both agree not to appeal
        - Examples:
            - impending birth of a child - a desire to be born within marriage;
            - desire to remarry before a family member dies
        - it's going to be very specific obviously and generally it's going to be very severe or serious situation; Would cause a great deal of inconvenience heartache and possibly expense

## IX. Appeals

- Section 21(1) specifies that all final and interim orders can be appealed
- Section 21(2) states that the divorce judgment itself cannot be a period appealed once a waiting period has expired
    - so you could appeal your child support, support parenting , etc. – it doesn't matter whether it's a final order or intern order – BUT the only thing that cannot be appealed is the divorce judgment once the 31 days has expired
- Section 21(3) specifies that if you are appealing you must do so within 30 days from the date on which the order was made
- Section 21(4) give the appellate the ability to extend the time period for an appeal if necessary but the tests for extension are very stringent
    - practically if you are in doubt about whether or not your client is going to appeal you might want to consider and discuss with them whether it's a good idea to file anyways… pay the $600 appeal filing fee and then at least you're right to appeal has been preserved because if you miss the deadline to file your appeal it's going to be extremely difficult to get an extension

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## REQUIRED READINGS: THE BREAKDOWN OF THE FORMAL MARRIAGE: DIVORCE - APPEALS

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*Hickey v Hickey,* 1999, 2 SCR 518

*Facts:* Married in 1971 with two kids; separated in 1986 and entered into a separation agreement

- The appellant (mother) gained sole custody under the agreement as well as spousal support, child support and divided assets
- A divorce was later granted with terms of the agreement incorporated into the terms of corollary relief
- The parties could bring action for change in circumstances
- Susan, one of the children, ceased living with the mother and was removed from the support order. Child support remained the same but only for Walter (the other child), while spousal support also increased

- The responded contests this increase
- TJ held that while there was an equal division of assets at the time of separation, we must take into account post-marriage financial successes of the parties
    - He found a change in circumstances such that the respondent was making a lot more money now, so an increase was appropriate
- CA disagrees and reduced child support and spousal support. The appellant was at an age in which she was capable of earning and income and was equipped with training to do so

*Issues:* Did the CA err in reducing the amount of child and spousal support?
*Held:* Restored the trial judge order; The reasons of the TJ properly reflected the objectives set out in s 17(7) of the *Divorce Act* and that he took account of the material changes in circumstances while also considering the existence of the separation agreement and its terms as a relevant factor
*Reasons:* Because of its fact-based and discretionary nature, the TJ must be given considerable deference by the appellate courts when such decisions are reviewed

- The TJ heard the parties directly and deference to this promotes finality in family law litigation
- There must be a serious, material error or misapprehension of the evidence, or an error of law, to overturn the TJ's decision. There is a high standard of review here. SCC talks about what an appropriate standard is for family law cases.
    - those are the circumstances under which an appellate court can interfere with a final or interim order made under the divorce act
    - Reasons for high bar for standard of review
        - We need to have a high standard of review in family law cases is because most family law awards are discretionary and the presiding trial judge has heard all of the facts and is in the best decision position to decide → so in these circumstances the trial judge should be given deference by appellate court because it's a discretionary award and may as the person who has heard all of the facts and evidence are in the best position to decide
        - Second reason for having high genitive review is because it discourages appeals and promotes finality in family law mediation
        - Third reason they give is that Appellate courts are not entitled to intervene simply because they would have made a different decision or balance the factors differently that is the role of the trial judge and we cannot substitute an appellate courts judgment for the judgment of the trial judge unless there was an error in principle ,a significant miss apprehension of the evidence, or the award was clearly wrong
- *Willick* → s 17(4) of the *Divorce Act* says that a court must satisfy itself that there has been a change in condition, means, needs or other circumstances
    - If the threshold is met, the court must then consider the factors reflected in s 17(8) in determining what will be contained in the variation order
- In this case, the means of the respondent increased significantly in the time between the original order and the application for variation
- It was also appropriate for the judge to take into account the child's increased needs caused by inflation and the fact that he was 10 years older
- There was no error of law and the CA should not have intervened
    - "Our court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong"
- S 17(7)(a) requires the court to taking into account economic advantages and disadvantages arising from the marriage or its breakdown
- S 17(7)(c) outlines the equally important objective of relieving economic hardship arising from the breakdown of the marriage
- S 17(7)(d) which is the self-sufficiency factors is only one of four objects to be taken into account

***Notes:*** Clients may be very unhappy about the decision of a trial judge in chambers or at trial and in fact I would say most of them are unhappy because it's rare that the judge makes a decision that any side is completely OK with. However it is a lawyers job to explain this high standard overview and discuss with the client whether or not the judge has actually made a legal error.

- Especially on an interim order, it is usually better to spend the time and money on speeding the matter through trial where we can try and get that interim order varied for the purposes of the final order rather than waste a lot of money appealing that interim order and it still having to come back down get a final order at trial
- there's a huge number of cases confirming that Alberta Court of Appeals disinclination to allow appeals even on interim orders; only about 12% likelihood of success on family law matters

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## X. Grounds for divorce: indica of marriage breakdown – (I) Living separate & apart (II) Adultery (III) cruelty

- Section 8(1) states that the only ground Divorce in Canada is marriage breakdown
  - Section 2 states marriage breakdown means
    - we can be living separate and apart for one year; adultery or mental or physical cruelty;
      - those are the three ways you could prove marriage breakdown and marriage breakdown in the only ground for divorce in Canada
- No fault grounds: **living separate & apart**
  - Section 8(3)(a) specifies that To qualify as living separate and apart at least one spouse must have the intention to be doing so;
  - Section 8(3)(b) states further the period of living separate and apart will not be considered terminated if either spouse is no longer capable of forming the intention to live separate and apart or it discusses reconcile for less than 90 days
  - What does it mean to be living separate and apart
    - Section 8 were saying you must be living separate and apart for at least one year, at least once both must have you tension to be living separate and apart, and if you reconcile for less than 90 days that does not affect the one year.
    - living separate and apart is defined in the case law –
      - Can mean living in different residences but could include under same roof
        - the husband went down to the basement he lived in the basement & I lived on the main floor we're still living together technically in the sense that we're living under the same roof but we've been separated for a year so
      - ***Enman v McCafferty, 2010 NBQB 118 –*** evidence of living separate and apart
        - The spouses occupy separate bedrooms
        - Absence of sexual relations
        - Little if any communication between spouses
        - The spouses cease performing domestic services for each other
        - No longer eat meals together
        - No social activities together
  - NOTE: **distinction between the one-year separation that you need to prove the grounds for marriage breakdown and the one year that you need to prove ordinary residents to ground the jurisdiction of the court**
    - so you must meet the ordinary residence requirement <u>before</u> you filed (it is one year ordinary residents then you can file your divorce proceedings) but you can actually start your divorce proceedings on the very day you start living separate and apart from the other person (don't have to meet living separate and apart requirement before you file)
      - so, you must be living apart at the commencement of the proceedings but they can be on the exact same day → you can move out and on the very day without you can file your proceedings for divorce that one year.
    - We're talking about living separate and apart applies to the amount of time that must elapse before you can get your divorce judgment granted paint
    - You can start your proceedings living separate and apart butt wont get judgment till one year requirement is met
    - Why the difference? May need interim relief; don't want to make parent wait a year before applying for corollary orders; need ability to make applications for interim relief
- Fault grounds: **adultery and cruelty**
  - So somebody actually did something wrong and now we're going to give them a divorce because of it; someone committed adultery or someone was cruel
  - Fault based divorces can be granted immediately → if you're proceeding under the grounds of separation you have to wait for one year of being separated before the divorce can be granted BUT if you're proceeding based on adultery or cruelty that divorce can be granted immediately
    - Must proceed with caution when you are to proceed on fault based grounds because contested fault based divorces usually take up to one year to process anyways, at which point you will have met the threshold for living separate and apart and you could have just proceeded on those grounds, instead of fighting about who was at fault
  - In addition even if the fault based grounds are not contested so even if the husband or the wife is saying yeah I committed adultery let's get a divorce based on adultery so we can be divorced now, even if they're saying that it requires the guilty spouse to swear an affidavit admitting the marital event, thus becoming public knowledge on public record

        - If don't want to sign affidavit, then you need to proceed on no fault ground
    - Adultery
        - In the traditional definition of adultery when the voluntary sexual intercourse I am married person with a person of the opposite sex, generally it required penetrative sex (it didn't catch oral sex things like bestiality, same sex activities)
        - Post wave of charter equality cases – expanded definition to include same sex Activity of an intimate and exclusive nature between a spouse and another individual outside of marriage
        - Almost impossible to prove unless other spouse admits it
        - Cannot use your own adultery as a ground for divorce
            - Section 7 of AB evidence act – you Do not ask questions about adultery or compel a witness to speak to adultery
            - To prove adultery it must be the other person's adultery and must prove on your own
        - *Burbage v Burbage (1985), 46 RFL (2d) 33 (Ont SC)*
            - The onus is on the person trying to prove adultery to establish on a balance of probabilities that there was opportunity for adultery and there was intimacy between the parties and then it is up to the alleged adulterers to call evidence in rebuttal
                - opportunity and intimacy must be proven
        - What the most important thing you guys need to remember about adultery is is that the person who is alleging adultery needs to be able to prove it and that you cannot use your own adultery as grounds for divorce
    - Cruelty (mental or physical)
        - Needs to be to such a level as to make continued cohabitation intolerable
            - the definition of intolerable is also subjective so it must go beyond unhappiness; just because your unhappy it does not rise to a level of intolerability nor does it rise to a level of cruelty
        - *Burbage v Burbage (1985), 46 RFL (2d) 33 (Ont SC)*
            - Cruelty alleged must be of such a nature and kind as to render such conduct intolerable to a reasonable person and involve serious and weighty matters
                - In order to prove cruelty you need cruelty (objective determination by the court) and intolerability (objectively – such a kind a reasonable person would find it intolerable and subjectively – feelings of the claimant)
        - *A(I) V D(S), 2009 ABQB 513*
            - Goes through the difference between incompatibility and cruelty
                - quote on page 72: *"Cruelty is a question of fact and the plaintiff bears the onus of proof on a balance of probabilities whether or not the claimants contested. The divorce act requires that cruelty must be of such a kind as to render intolerable continued cohabitation. A finding of cruelty bears a stigma and that should not be a shortcut to a divorce that should be based on separation. a distinction drawn between incompatibility and cruelty as marital disputes an unpleasant usually precede a separation the court should not granted decree of divorce on evidence of conduct on the part of the spending spouse that is merely distasteful or irritating the test is both objective and subjective before the effect of defendants conduct on the plaintiff is considered the court must first be satisfied that such conduct in itself is capable of causing physical or mental hurt. This has been described as grave and weighty conduct. Ultimately whether the cruelty is established depends upon the parties and the history of the marriage accordingly irrelevant an important question for consideration is the subjective effect of the conduct complained of upon the affected spouse"*
            - Incompatibility is we're looking at things like marital disputes, unpleasantness, distasteful or irritating conduct, insensitivity, all of that might exist in the marriage but it doesn't amount to cruelty
            - Cruelty is the affliction of suffering; Delighting in or exhibiting indifference to the misery of others; hard heartedness; malicious or unnecessary infliction of pain or suffering; and it must be of a grave and weighty nature
        - Hard to prove cruelty – clear trend towards focusing on separation rule rather than fault ground divorce
- We have to have these conversations with our clients about adultery and cruelty because a lot of them are focused a lot on fault and blame but we also need to be able to explain to them why it's probably not a good idea to plea default based ground because you have to prove it and it's going to take a lot more time a lot more expensive that a

fault based ground is contested and by that time you've been separated for a year so it's usually just easier to proceed separation

## REQUIRED READINGS: THE BREAKDOWN OF THE FORMAL MARRIAGE: GROUNDS FOR DIVORCE – LIVING SEPARATE AND APARTT

***Enman v McCafferty, 2010 NBQB 118***

*Facts:* Enman (husband) wsa unaware that McCafferty obtained legal counsel and was surprised when she initiated divorce proceedings

- They continued to be intimate and as far as he was concerned, the continued to live as a married couple
- They took trips together and supported each other

*Issues:* Did the couple live "separately and apart for a period of one year prior to the commencement of proceedings"?

*Held:* At the time of commencement, there had not been a permanent and irretrievable breakdown of the marriage.

*Reasons:* S 8(1) of the *Divorce Act* says that a court of competent jurisdiction can grant a divorce on the breakdown of a marriage

- S 8(2) defines a breakdown of a marriage as the spouses living separate and apart for a period of one year at the commencement of proceedings
- There is no need for mutual intention to separate
- One or both of the parties must communicate an intention to separate
- While it is possible to live separately and apart under the same roof, there must be a finding based on clear, irrefutable evidence and the circumstances exist to support their contention that they were in fact separate
    - A complete withdrawal of the performance of matrimonial duties and obligations with the intent of terminating the matrimonial relationship
- *Dupere* → circumstances that indicate separation are provided:
    - The spouses occupy separate bedrooms
    - Absence of sexual relations
    - Little if any communication between spouses
    - The spouses cease performing domestic services for each other
    - No longer eat meals together
    - No social activities together
- Enamn may have formed the intent to live separately and apart at the time of her Petition for Divorce, however, subsequent to that she continued to cohabit with her husband in a matrimonial relationship
- When trial was filed, there had not been a permanent and irretrievable breakdown of this marriage for a period of one year

## REQUIRED READINGS: THE BREAKDOWN OF THE FORMAL MARRIAGE: GROUNDS FOR DIVORCE – ADULTRY

***Burbage v Burbage (1985), 46 RFL (2d) 33 (Ont SC)***

*Facts:* The wife claims cruelty for a petition of divorce

- She claims he slapped her once a long time ago and was cruel to her son and dog (this is contested)
- The husband complained of her love of reading and claimed adultery
- There was evidence of opportunity and evidence of inclination towards adultery though the wife claimed her lover was impotent

*Issues:* Was there cruelty or adultery? How is property and support to be divided?

*Held:* The wife committed adultery. In order to provide an equitable result, the husband shall pay the wife $8k. While adultery was found, this does not disentitle the wife to spousal support in the amount of $500.

*Reasons:* s 3(d) of the *Divorce Act* refers to physical or mental cruelty of such a kind as to render intolerable the cohabitation of the spouses.

- *Austin v Austin* → the test is subjective, but the cruelty alleged must be of such a nature and kind as to render such conduct intolerable to a reasonable person
- The Husband's state of mind is irrelevant, so it doesn't matter if cruelty was intended or not
    - No evidence of cruelty
- In terms of adultery, once opportunity and intimacy are established on a BOP, there is a burden on the alleged adulterers to call evidence in rebuttal sufficient to dislodge the preponderant evidence
    - The wife should have called an expert witness to testify about her lover's impotence
    - And so the court here said that in terms of being able to prove adultery once opportunity and intimacy are established on a balance of probabilities by the party trying to prove adultery it is up to the alleged adulterers to call evidence in rebuttal

- The husband will leave the marriage worth $17k more than the wife as well as a secure job with a pension
- The wife has neither of these
- Therefore, an equal division of family assets requires a redressing to avoid inequity
- If a *prima facie* equal division of family assets does not produce an equitable result, and no division of nonfamily assets is justified, then the court examines the possibility of awarding the deserving spouse a larger portion of the family assets
- Although adultery was found, the court is not satisfied that this is a sufficient basis to disentitle her from support
- While she is working on being self-sufficient, the will not be able to enter the full employment field until after a certain date in the future

Note: The client should be aware that despite adultery being committed, they are not going to get any special remedy because of that ground. As Divorce lawyers, we cannot ignore that our clients are feeling bad, but we are gatekeepers to the judicial system. You should not facilitate a spouse shaming the other spouse by proceeding on a fault-based ground. Usually the most important thing to the hurt spouse is the children, so you should facilitate that purpose and not the shame. The only good thing about adultery is that you can do away with the 1 year waiting period.

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## REQUIRED READINGS: THE BREAKDOWN OF THE FORMAL MARRIAGE: GROUNDS FOR DIVORCE – CRUELTY

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### *A(I) V D(S), 2009 ABQB 513*

*Facts:* The Wife (I.A.) seeks a divorce on the grounds of mental and physical cruelty

- She claims her husband called her names, got angry often, complained when she didn't do housework well, was controlling, and discouraged her from visiting friends
- He also pushed her, restrained her, slapped her, hit her, and grabbed her in public
- The husband denies all of this
- She admits she fought back on occasion and raised her voice

*Issues:* Has cruelty been made out on the facts?

*Held:* The Court is satisfied that the physical and emotional abuse as claimed by the wife did not occur as described and whatever did occur was not cruel. The evidence simply indicates incompatibility.

*Reasons:* The husband gave his evidence calmly while the wife was very angry and agitated during her testimony

- Cruelty signifies a disposition to inflict suffering; to delight in or exhibit indifferences in the pain or misery of others. It is a question of fact, and the burden is on the plaintiff to prove on a BOP. It is a modified objective test.
- The cruelty, as defined in the *Divorce Act* must be intolerable to sustained continued cohabitation
- The conduct must be "grave and weighty" and must be considered cruel towards the reasonable person before you turn to the subjective test
- The couple should be divorced, but no grounds currently exist to facilitate that
- The action is not dismissed, but the husband can proceed on the counterclaim for separation after a year when that year has elapsed.
- The cousin testified in the case as an eye witness and the court said her testimony was too similar to that of IA, which is shocking to Friedland
    - Just doesn't make sense

Impact on AI: she is stuck in this abusive relationship despite standing up for herself and bringing this case to court

- Her words were reduced to immaturity and incompatibility
- Better method would have been for AI to just wait out the year and avoid this pain

Impact on DS: no stigma and no divorce

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I. Bars to relief: (I) Collusion (II) Connivance (III) Condonation

- Section 11 of divorce act
    - it actually constitutes another duty of the court so section 11 is often described as the three C'S and reasonable arrangement
    - Collusion - Section 11(1)(a) it says that if the court is of the opinion that the spouses have participated in collusion then this is an absolute bar to divorce;
        - in a divorce proceeding it is the duty of the court to satisfy itself that there has been no collusion in relation to the application for a divorce and it is the duty of the court to dismiss the application if it finds that there was collusion in presenting it
    - Section 11(4) it gives the definition of collusion so it says in this section collusion means an agreement or conspiracy to which an applicant for divorces 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 or to decieve the court not include an agreement to the extent that it provides for the separation between the parties financial support division of property or the custody of children
    - essentially what this means is that the parties get together and make an agreement to say OK listen i know we haven't been separated from your let's just lie and say that we have so we can get after it works that's collusion and then if the court determines it is collusion (suppressed evidence) then they are required to deny the application for divorce
- Connivance - Section 11(1)(c) is a situation where the applicant has actively promoted or encouraged the Commission of the marital offence complained of and yet wants to use it as grounds for divorce; it only relates to the grounds for divorce down inspection 8 sub two sub be so it only relates to the fault based grounds
    - So as an example if you have encouraged your spouse to go out and have an extramarital affair to go out to commit adultery and then you try and use that adultery as grounds for divorce that would constitute connivance
    - this is a discretionary bar to divorce so the court still is able to grant a divorce in situations of conniving, but it is another hurdle that the couple has over come
- Condonation –
    - Section 11(1)(c) Spouse forgives the adultery or cruelty and continues or resumes cohabitation and then tries to use the previous offence as grounds for divorce
        - it only relates to the grounds for divorce down inspection 8 sub two sub be so it only relates to the fault based grounds
    - Discretionary bar and recent years it is not used as a ground for divorce
        - Seen as against the public interest and it actually is seen as a way of discouraging attempts at reconciliation

II. Duty of the Court to protect children
- Section 11(1)(b) - So this is the 4th way that a court may deny the granting of the divorce and it's when the court is not satisfied that reasonable arrangements have been made for the children of the marriage
    - so there's a large onus on the plaintiff here to satisfy the court that reasonable arrangements have been made and it's a statutory duty of the court that's taken very seriously
- ***Orellana V Merino (1998), 40 RFL (4th) 129 (Ont Ct. J).***

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REQUIRED READINGS: THE BREAKDOWN OF THE FORMAL MARRIAGE: DUTY OF THE COURT TO PROTECT CHILDREN

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***Orellana V Merino (1998), 40 RFL (4th) 129 (Ont Ct. J).***

*Facts:* The parties have separated, and they have two children
- So both spouses in this case were anxious to get divorced and the new was willing to pick up the financial slack for the care of the kids the habit however would not disclose his finances and was already in arrears for child support he had very little access to the children and so the parties entered a consent support order and set support at $50 a month
    - Custody and support were previously awarded to the mother
- The husband appears to be gainfully employed, but there is no current information as to his present ability to pay support
- Wife applied for divorce but was denied on the basis that reasonable arrangements had not been for the children had been determined
    - Court stated Not for either the applicant or the respondent to choose to not bother to arrange reasonable support for the children; support is a right of the child and it is not for the parent to contract out of

*Issues:* Can the husband escape support payments where the wife does not contest such an escape? Is this contrary to section 11(1)(b) regarding reasonable arrangements for the children?

*Held:* The Court is not persuaded to act on a letter from counsel to exercise its discretion to allow the husband to avoid his obligation to his children due to some reluctance by the wife. As per section 11(1)(b) there must be reasonable arrangements for the children else the divorce must be stayed.

*Reasons:* Counsel seeks to have the Court exercise its discretion and grant the divorce, despite the principles of the new Child Support Guidelines
- What the applicants seek is a complete abrogation of the court's obligation and a direct contravention of the intent and principles of the Guidelines
- A support order of $100 a month would require any non-custodial parent earning only $9,000 per year
- There is no evidence to indicate that is the only earnings for the Husband
    - Even minimum wage would result in higher pay

- It is not for the wife to choose not to bother to try and obtain reasonable support
- finances of the new partner had no bearing unless he or she was intending to adopt the child so we can't let the biological off the hook just because we wanted to force the primary considerations first and foremost is that reasonable arrangements have been made for the child here they were not
    - The primary financial obligation remains with the natural parent of these children

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I. Annulment

- Declaration by the court that the marriage never took place
    - It's different than divorce because divorce presupposes a valid marriage
    - where is it annulment creates a situation where the marriage never existed
- An application for annulment is unsuccessful when is not trapped in the marriage they can still seek a divorce but in that situation is going to be the marriage existed and now it's no longer, as opposed to the marriage had never existed, which is what the annulment
- Even if you get an annulment there are still protections under both the family law act and the family property act that preserve the rights of a party to be declared, a Guardian of a child, to apply for support order, or to apply for division of property, not withstand the marriage was annulled - you can still access from corollary relief under these provincial statutes notwithstanding that your marriage is annulled

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REQUIRED READINGS: THE BREAKDOWN OF THE FORMAL MARRIAGE: ANNULMENT

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*Jomha v Jomha, 2010 ABQB 135*

*Facts:* The wife is seeking an annulment on grounds of no consummation

- The couple met on Facebook and had a traditional Muslim wedding
- The wife said she never felt accepted by the husband's family
- Traditionally, to support an annulment, the law requires proof that the marriage is unable to be consummated, which is also referred to as proof of impotence

*Issues:* Can the marriage be annulled? That is, is there proof of impotence?

*Held:* The marriage was never consummated, and the court accepts the fact that, in her mind, it was impossible for the marriage to be consummated before the wedding banquet and that the marriage can now never be consummated as the religious bond between them has been severed.

- Not to consummate is grounds for annulment but being unable to engage in a sexual relationship is different than a mere absence of sex; It can be either physical or psychological and they describe a psychological inability to engage in sex at an invincible repugnance or psychological abhorrence to the sex act
- so in this situation the way that it was completely unfathomable in her mind that she would ever engage in sex with her husband before the wedding was the banquet never took place and in her mind it was absolutely impossible to complete the sex
- So since the court found that it actually was repugnant for the white to even consider sex before the wedding banquet she was considered psychologically impotent and the annulment was granted

*Ratio*: An annulment is a declaration of invalidity of marriage. However, if there is an annulment, the spouse may still be entitled to relief, property and support.

*Reasons:* In law, impotence can arise from physical inability or a psychological incapacity

- The mere refusal of marital intercourse due to caprice is not a sufficient ground to warrant a decree of nullity
- Consummation is intimately tied to the tradition of marriage through the religious obligation to procreate. This is why an annulment may be granted if there is impotence
- Note, however, that this is a legal annulment and not a religious annulment
- From a procedural point of view, there is no real difference between an annulment and a divorce except the waiting period.

Grounds for annulement: AND/OR *Jomha*

1. The marriage was never consummated, AND
2. The marriage was UNABLE to be consummated (proof of impotence)

- Physical impotence OR
- "an invincible repugnance toward the act of consummation"
    - "Impossibility in the mind of at least one of the parties" conscience (e.g. based on beliefs and understandings of marriage ceremony) can be akin to a "invincible repugnance" or psychological abhorrence"

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*PART IV: Support*

Provincial / Federal Jurisdiction Issues Related to support

- Support - we need to remember when we're talking about support that there is concurrent jurisdiction between the federal government and provincial governments over support
  - so if your married and you're proceeding under the divorce act and she seeking child support As for spousal support as part of your corollary relief under the divorce act you're going to be under federal jurisdiction
  - and you must go to the court of queens bench because it actually defined In the divorce act that any application made under the divorce act any reference to court under the divorce act mean Alberta court of queens bench
  - also provincial jurisdiction for child and spousal support under the family law act
    - so this would be for unmarried people so people who are you know living in a common law relationship that have never been married but need to address child support or spousal support they would proceed under the family law act as well as married people who are maybe separating but not thinking of formal divorce
    - Section 3 of family law act
      - Choose to either go to the court of QB or the provincial court except in the list of circumstances
  - there's also provincial jurisdiction for child welfare under the child youth and family enhancement act

*Family Law Act*

- The first questions we need to ask and before we even get into a quantification of child support is: who is the parent and who is a child?
  - We need to make sure that these parties are in the appropriate legal relationship that qualifies them for child support
  - Section 1(j) it says a parent means a person determined under part one to be a parent of a child
    - So then you have to look at the provisions of part one of the *family law act* which are dealing with how to establish parentage of a child
      - so this is only going to be an issue in cases where parentage is disputed
        - i.e. so you know you might have a father that saying oh I'm not the father of that child
        - there are certain presumptions under the family law act where he may be declared the father of the child even though he's disagrees
      - Section 7(2)(a) it says that the parents of a child are its birth mother and its biological father unless clause (b) or (c) applies
        - (b) the has to do with assisted reproduction
        - (c) has to do with adoptive parents
      - so unless you're in a situation of assisted reproduction or adoption family law act presumes that the parents of the child are its birth mother and its biological father
        - Determining biological father - Section 8
          - person is presumed to be the biological father of the child in the following circumstances:
            - married to the mother at the birth mother at the time of childbirth
            - if he became the mothers spouse after the birth and acknowledges he is the father
            - see for complete list
          - Section 8(3)
            - says none of these presumptions exist if assisted reproduction is used
          - Section 8(2)
            - if you look at subsection two it says the if the operation of them would give rise to the presumption that more than one male person could be the biological father
      - Determining parentage under section 1 - 3 ways:
        - 1) biologically - Birth mother and biological father are presumed to be the parents – Section 8 sets out provisions for determining biological father
        - 2) adoptive parents
        - 3) Assisted reproductions
- Declarations of parentage provisions
  - Section 9 - if you need a declaration of parentage ,so if there's some sort of dispute about who is the parent of a child and you're needing to apply to court to have someone declared the parent of a child, either under the

biological presumption or under the assisted reproduction presumption, you use the process in section 9 to get to declaration of parentage

Section 15 of the family law act - deals with DNA testing in cases of parentage

Section 15 talks about tissue testing in DNA testing … so if there is a dispute about parentage the court does have the ability to order DNA testing.

- The person who the sample is being taken from has to consent to that testing
- if the person refuses to consent to testing, the court is allowed to draw an adverse inference against them

- The presumptions regarding parentage in situations of assisted reproduction
  - Situations where you might have a sperm donor, an egg donor, an embryo donor, a surrogate
  - Dealing with surrogates:
    - Section 8.2(6) - Rules with parentage regarding surrogacy sometimes work to declare the surrogate a parent
      - This is true even if the surrogate has no biological connection to the child
      - The rule in Alberta is that if you are using a surrogate she must consent after the birth of the child to give up the child to its intended parents and this under section 8.2(6)
        - How she consents: it is done by application, an application is made to the court to declare who is the parent of the child and generally the application is being made by the biological parents
          - they are saying we would like a declaration stating the surrogate is not a parent of this child and that we as husband and wife or as the same sex couple are the parents of this child
        - And if the surrogate consents to that application - she saying yeah I was just the surrogate I am not claiming parentage to this child whatsoever - all she has to do is give her consent in the prescribed form BUT IF she DOES NOT consent and the child that has been born belongs to the surrogate, notwithstanding none of her genetic material has been used in order to create the child
      - Under section 8.2(8) any agreement which a surrogate agrees before the child is born to give up the child is unenforceable and may not be used as evidence of consent in any application to declare parentage after the baby is born
      - Under section 8.2(9) the court may waiver consent but only in traditions where she is deceased or cannot be located after the birth
  - How do you deal with determining who are parents under assisted reproduction?
    - NOTE: not being tested on but we should be aware
    - section 8.1(2) – States if only the male person provides the reproductive material then the parents are presumed to be the birth mother and the male person, UNLESS the birth mother is a surrogate and she consents after the birth to give up the child, then the parents are presumed to be the male person who provided the reproductive material and the person he was married to or in an adult interdependent relationship with at the time of the child's conception, provided that that person consented to be the child parent and did not withdraw consent before the birth; If the birth mother is a surrogate and she does not consent then she is the only parent to the child
    - Example:
      - A&B are married. B donates sperm that is used in assisted reproduction with A and A give birth to the child. Under the rule both A & B are considered to be parents of the child.
      - A&B are married. B donates sperm that is used in assisted reproduction to impregnate C, a surrogate. A agreed to be the parent of the resulting child and she did not withdraw her consent before the child's birth. If the surrogate agrees after the birth of the child to give the child up then A&B are the parents but if C does not agree to give up the child after birth than C is the only parent.
- Take away: Family law act has provisions and presumptions under which parentage can be determined. Parentage can be determined by blood which are those biological productions; it can be determined by adoption; it can be determined by assisted reproduction presumption; or it could be determined by local parentis (standing in the place of a parent)
-
- Exam NOTE:
  - You should be able to identify parentage situations not involving assisted reproduction …so if I asked you a question on the exam to determine who qualifies as the biological father of a certain child using the biological presumptions in the family law act you should be able to do that

- With respect to assisted reproduction want is for you to be aware that these presumptions exists and to be aware of the big policy decision regarding surrogates (that unless she consents after birth the child is hers)

In Loco Parentis Relationship

- In some places cases it's clear who is apparent obviously biological parents and adoptive parents. In most of those situations it's clear who the parent is but what about stepparents or what are sometimes called psychological parents?
- If we're talking about married parents , so for example a wife who has a child from a previous relationship and is married to a new partner, what is the relationship of that step parent to the child from the wife's first relationship?
  - The first thing you do is go look at the definition of child of the marriage found in the *divorce act*
    - it says child of the marriage means a child or two spouses or former spouses who at the material time and then it sets out (a) and (b)
    - Section 2(2) it says for the purposes of the definition child of the marriage in subsection one, a child of two spouses or former spouses include any child for whom they both stand in the place of parents and any child for whom one is the parent and one stands in the place of the parent
  - Standing in the place of a parent under the divorce act
    - Well we have to go look to case law to determine what that phrase mean and leading case for such is *Chartier v Chartier, [1999] 1 SCR 242*
      - Case represented an important shift from the subjective intent of the stepparent to an objective indicia of the type of relationship. These provisions are intending to capture that it's really an exercise of equality theory - the court is saying children are equal regardless of whether or not they are the actual biological offspring of their relationship or if they are only treated as the psychological child of the adult
        - so they're not making distinctions anymore between biological children and stepchildren if they are treated the same within the family unit then they should be treated the same upon breakdown
      - What did the court say about the material time? At what time are we assessing the relationship to determine whether or not this standing in place of a parent existed?
        - You cannot qualify by time whether or not you are standing in the place of a parent.
        - Court said that the material time for determining whether someone was standing in place them a parent is during the relationship not at the time of the application
          - this is important because you're not judging the relationship between the stepparent and child at the end when things are messy and kind of falling apart, but you want to judge it at the time that the family was together/whole and functioning as a family unit and if at that material time the relationship meets those objectives criteria then the stepparent is declared a parent for all intents and purposes and cannot unilaterally withdraw from that status
        - Once that determination is made - once a person is found to be standing in the place of a parent - they receive all the benefits and incur all of the obligations of Parenthood towards a child …so it is a permanent finding but it's not just for support purposes they are found to be apparent for all purposes under the law
      - The case was seen as fostering and encouraging kindness and generosity towards children; it offers a modern child focused approach towards supporting the needs of children
        - Basically saying the law should not offer a financial incentive to terminate the parent child relationship so once you're committed to that parent child relationship it should not benefit you financially to say I'm out
      - Criticism: RG has been how this decision accords with people's ideas and expectations regarding support obligation. The big controversy has been whether or not it's appropriate to impose indefinite child support obligations on someone when they've had a shorter term relationship with the adult parent of that child s
        - Whether this appropriate to impose the indefinite obligation?
          - For those people who say that it's inappropriate to impose that kind of obligation they suggest that maybe there should be a connection between the time that the family lived in that type of relationship and the duration of the support obligation for step parents (i.e. 3 years relationship = 3 years support)
            - How would we reconcile that when there are lifelong obligations for parents who have children out of a one-night stand?
      - Response to criticism: Some AB Courts address the issues by saying that someone standing in the place of a parent is a high threshold.

- The courts aren't just going to find that someone standing in the place of a parent left right and centre but it's a high threshold and the reason that it's a high threshold is because it is a permanent finding, incurring all rights and responsibilities of parenthood to the child

## REQUIRED READINGS: CHILD SUPPORT – CHILDREN OF MARRIED PARTENTS: IN LOCO PARENTIS RELATIONSHIP

*Chartier v Chartier, [1999] 1 SCR 242*

*Facts:* The spouses have one child together and the father took an active role in caring for another step-child; the spouses had another child together

- No formal adoption occurred for the step-child
- On application for divorce, the wife claimed support for her child and the husband's step-child
    - The husband contests this
- As per the *Carignan* case, the TJ held that a spouse voluntarily standing in the place of a parent can unilaterally withdraw from that role
    - The CA recognized that *Carignan* has not been applied across all jurisdictions, but there is no clear alternative, and at least it provides consistency
- As per the *Farryo* case, the judge held A person cannot unilaterally withdraw from a relationship in which he or she stands in the face of apparent on the court must look to the nature of their relationship to determine if a person does in fact stand in the place of apparent

*Issues:* Under what circumstances can an adult who is or has been in place of a parent pursuant to s 2 of the *DA* unilaterally withdraw from that position?

- What is the proper time period for determining whether a person stands in the place of a parent?

*Held:*

- SCC determined that once a person is found to stand in the place of a parent, that relationship cannot be unilaterally withdrawn by the adult. You cannot qualify by time whether or not you are standing in the place of a parent. There are many factors that must be considered.

*Reasons:* The case of *Carignan* states that a person who voluntarily stands in place of a parent (the doctrine of in *loco parentis*) can unilaterally withdraw while the case of *Theriault v Theriault* says that unilateral withdrawal is not possible, and the court must determine whether the person in fact does stand in the place of a parent to a child

- The Modern Approach to Statutory Interpretation suggests that despite similarities between the doctrine of in *loco parentis* and the *Divorce Act*, the doctrine is not helpful
    - The case of *Theriault* is the proper course to take
- The interpretation of the provisions of the *Divorce Act* relating to "children of the marriage" should be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects
- *Carignan* ignores the objective of the *Divorce Act* to include the child as little as possible
    - Couples can divorce each other, but not the children
- Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively
- A step parent does not just acquire obligations, they also acquire rights
- The court must determine the nature of the relationship by looking at a number of factors, among which is intention (both formally and inferentially) and the child's perspective of the spouse
    - There needs to be actual fact of forming a new family. This includes a *manifestation* of intent
- The relevant factors to determine whether one is a parent include:
    - Whether there was intention to be a parent;
    - Whether the child participates in the extended family in the same way as would a biological child (equality);
    - Whether the person provides financially for the child;
    - Whether the person disciplines the child as a parent;
    - Whether the person represents to the child, the family, and the world that he or she is responsible as a parent;
    - The nature or existence of the child's relationship with the absent biological parent
- The Court of Appeal expressed concerns that people will be hesitant to provide support to children if such support would give rise to a parental relationship
    - However, people do not enter into parental relationship with the view that they will be terminated

Note: There is a way to contract out of *in loco parentis*. There is a difference between an agreement that contemplates younger children and older children. However, it is important to realize that when a contract contemplates the rights of children, it will not be the be all and end all in court. It might merely be a matter of attributable weight

Note: Court said it doesn't matter if they are already getting support from their biological parents, they may still also be entitled to support from their stepparent parent and it does not offend the divorce act to have you3 separate people being parents of this child and paying support

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- Standing in the place of a parent under the family law act
  - Actually in the statute - section 48(1) - as a person is standing in the place of a parent is person a is the spouse of a parent of the child or is or was in a relationship with interdependence of some permeance with the parent of the child and has demonstrated a settled intention to treat the child as the person's own
  - Example: let's say man and woman are in an adult interdependent relationship with each other .The woman has a child from a previous relationship.
    - So in that situation a the first criteria is satisfied because this person is in an adult interdependent relationship with the parent of the child.
    - Then the question becomes whether or not that man has demonstrated a settled intention to treat the child as his own? The family law act has set out some criteria to determine whether or not that settled intention has been demonstrated
  - Family law factors for determine whether or not intention to stand in place of parent has been demonstrated
    - Section 48(2): it said in determining whether a person has demonstrated a settled intention to treat the child as the persons own the court may consider any of the following and it goes through a list of factors:
      - The child's age
      - the duration of the child's relationship with the person
      - the nature of the child's relationship with the person, including
        - the child's perception of the person as the parental figure
        - the extent to which the person is involved in the child's care, discipline, education and recreational activities , and
        - any continuing contact or attempts at contact between the person and the child if the person is living separate and apart from the child's other parent
      - whether the person has considered
        - applying for guardianship of the child
        - adopting the child
        - changing the child surname to that person surname
      - whether the person has provided direct or indirect financial support for the child
      - the nature of the child's relationship with any other parent of the child
      - any other factor that the court considers relevant
    - NOTE: this is only for support purposes under the family law act - Under the family law act if you are standing in the place of apparent you're only doing so for support under this section
  - Section 51(5): Notwithstanding subsection 1, the obligation of a parent to provide child support outweighs the obligation of a person standing in the place of apparent to provide child support and in determining the amount in the duration of child support a person standing in the place of a parent must pay, the court will consider the following:
    - the amount determined in accordance with the prescribed guidelines
    - the amount of child support that is being paid or should be paid by either or both parents of the child
    - the duration of the relationship between the person standing in the place of a parent and the child of for whose benefit the order is sought
    - any other factor the court considers relevant

    NOTE: THIS IS DIFFERENT FROM DIVORCE ACT – see note in *Chartier v Chartier, [1999] 1 SCR 242*

How do we determine who is a child?

- Start with statutory definitions
  - *family law act* - you would look to section 46(d)
    - Child: a child means a person who is under the age of 18 years or a person who is 18 years older and is unable under his or her parents charge and unable by reason of illness disability being a full time student and or other cause to withdraw from their parents charge or obtain the necessaries of life
      - two categories there either (1) you're under the provincial agent majority or (2) you're over the provincial age of majority but because of one of those listed reasons through unable to become self sufficient and you're still financially dependent on your parents
  - *divorce act* – you would look at Section 2(1)

        - Child of the marriage: child of the marriage mean the child of two spouses or former spouses who at the material time is under the age of majority and has not withdrawn from their charge or is the age of majority or over and under their parents charge but unable by reason of illness disability or other cause to withdraw from their charge and obtain the necessaries of life
- Who is not a child?
    - Under *family law act* – section 49: (1) Every parent has an obligation to provide support to his or her child, (2) that support obligation does not extend to a child who is a spouse or adult interdependent partner or is under the age of 18 years old and has with voluntarily withdrawn from his or her parents charge and is living an independent lifestyle → they may still fit the definition of child under 46 but if either one of those situations in section 49(2) apply then they are not entitled to support
    - Section 49(3) - Re: second situation – where under the age of 18 years but not living with their parents and they have an independent lifestyle – they may not be entitled to support at that time but if they move back in with their parents and they abandoned their independent lifestyle then that support obligation revived as long as they're still under the age of 18 years and otherwise qualify under the definition in section 46.

Support for children who were over the age of majority

- Both the *Divorce Act* and the *Family Law Act* made provision for continued support for children who were over the age of majority - the main point here is that they are unable for whatever reason to withdraw from their parent's charge
- So we need to be able to prove that they are unable to withdraw from their parents charge - how do we do that?
    - We look to case law – *KMH v JPB, 2019 ABQB 10*
    - Actually well settled law in Canada under the divorce Act that what constitutes another cause (definition of child of the marriage said there over the age of 18 but unable to withdraw from the parents charged by reason of illness disability or other cause) is well accepted in Canada to include pursuit of postsecondary education
        - Court in *KMH v JPB, 2019 ABQB 10* says whether or not attendance in a postsecondary institution will be sufficient cause for finding that the child is still a child of the marriage requires an examination of all of the circumstances so it is not a conclusion which follows automatically from proof of attendance at an institution -cannot say I'm enrolled in the university therefore I'm still a child of the marriage but need to look to broader circumstances - the Farden factors (p.86 of CB)
            - Farden factors – not an exhaustive list and that not all factors must be present before a chambers judge can conclude that the child remains a child for the purposes of the *Act*.

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REQUIRED READINGS: CHILD SUPPORT – CHILDREN OF MARRIED PARTENTS: ADULT CHILDREN

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*KNH v JPB, 2019 ABQB 10*

*Facts:*

- The mother applies for retroactive and ongoing child support for two adult children pursuing postsecondary education period the father opposes on the basis that one child has no need of support and that the other is pursuing training unlikely to lead to a career and is astranged from the father without justification. the father crossed supplies for retroactive child support when the father cared for the children for approximately a year on his own. The father seeks further disclosures an orders against the mother.

*Issue:* Whether each of the children noted is a child of the marriage under s. 2(1)(b) of the *Divorce Act*? Notwithstanding being over the age oof majority

*Held:*

- Son - he had the ability to get part time employment; looked like he was going to succeed in his program; he had the option to get student loans and have access to the RESP because he was in a qualified program as well as scholarship; they said he could attend essentially be independent from his parents and pursuing; a second degree may be a consideration (was supported for first one)
- Daughter - so she was still considered a child of the marriage because she was pursuing a reasonable course of studies, and the rigors of the program were so intense that she was unable to provide for herself and the programs were not eligible for other types of education funds that her parents had set aside her
    - Due to of those factors she was unable to withdraw from her parents charge and she was still considered a child of the marriage
    - Note the father was trying to argue ballet as not a reasonable course of study because making it as a professional was a far-fetched dream – court said there Was it clear link between the daughters attendance at the ballet studio and he planned career as a ballet dancer; she has shown an aptitude for ballet, was an activity that the family

encouraged while they were together and she is doing very well at school, so it's possible that she will make a career as a dancer.

- Court said for this child with this type of skill it is reasonable for her to assume that she would get a career as a ballet dancer and in order to get there this program is a reasonable way to pursue it; said it didn't matter that it was not accredited the point is whether the program will enhance a child ability to gain employment in a chosen field

*Analysis:*

- A child of the marriage can include an adult child who is pursuing studies. The case recognizes that postsecondary education can be beneficial to children and that children of separated families should continue to receive financial support in this regard. The person seeking support bares the onus. The onus falls on the applicant to proved an adult child is entitled to support as a child of the marriage within the meaning of the *Act*. In this case the onus lies with the mother.
- Factors to be taken into account are (***Farden Factors***) :
    - whether the child is in fact enrolled in a course of studies,
    - whether it is full or part time studies,
    - whether the child has applied for or is eligible for student loans or other financial assistance,
    - The career plans of the child, and whether the child is simply going to college because there is nothing better to do,
    - the ability of the child to contribute to their own support through part time employment, the age of the child,
    - the child's past academic performance and whether the child is demonstrating success in the chosen course of study,
    - what plans the parents made for the education of their children,
    - In the case of an adult child, whether or not the child has unilaterally terminated the relationship from the parent from whom support is sought.

    Note: that not all factors must be present before a chambers judge can conclude that the child remains a child for the purposes of the *Act*.

    Note: Onus of proof is on the side seeking support
- The *Farden* factors are analyzed for the case at issue but left out of this case brief
    - Issues for each child:
        - G: whether he has access to the RESP, government loans, or employment funds and if this precludes his 'child of the marriage' status
            - The court found that G will be amply supported for the balance of his degree through a combination of future scholarships, summer earnings, and RESP funds. As for retroactive support, the same applies.
        - C: whether she created the estrangement and if so, without justification if WSB is a reasonable and appropriate career training.
            - *Lawlor v Lawlor* – the father did not establish that the children have refused to have a relationship with him or that their current attitude toward him is not directly and reasonably attributable to his own actions.
        - C: weather ballet school is a reasonable course of studies
            - the court found the determining whether the pursuit of a sports career falls within the ambit of other cause in the definition of child of the marriage, when dealing with children engaged in sporting or cultural activities in the hope of making it a career, court should have regard to the aptitude move the child and the probability of the child attaining that goal. If the child's goal is realistic there is no reason why the court should not distinguish Between career choices.
            - Not determinative because the school isn't accredited, court found it will enhance daughter's prospects of a ballet career
            - Cases cited by the father included career paths with absolutely no reasonable attainment of meaningful employment (distinguishable here)
            - Determined the daughter was pursuing a reasonable course of studies with determination and comment and found that she is a child of the marriage for support purposes
    - *Wahl* Factors for Determining Reasonably Necessary Post-Secondary Education
        - The adult child must have an aptitude that is reasonably likely to lead to academic success
        - He or she must be pursuing the course of studies with diligence
        - There should be a reasonable likelihood that successful completion of the course of studies will lead to gainful and self-supporting employment

*Decision*: even if termination of the relationship is unilateral this shouldn't be grounds for denying support as a child of the marriage.

- Determination of Separation Date:
    - Must consider *Divorce Act* s. 8(3)(a): spouses deemed to live separate and apart when they lived separate and either had the intention to live separate and apart from the other
    - Intention is the key analysis, it Need not be a mutually shared intention , a unilateral abandonment of the matrimonial relationship sufficient. The spouse who wishes to separate must take action consistent with that intention. This may be evidenced through communication to the other party and acted upon.
    - Analysis of what might be found to be an event of separation, combined with how the parties subsequently lived their lives.
    - Court found date of separation was August 2016 but that financial separation was June 2018.
- Retroactive Child Support
    - Retroactive child support typically cannot be attained for children that have reached the age of majority. An exception applies where adult children continue to be children of the marriage or regain that status. The mother is entitled to retroactive child support for the daughter after the end of June 2018 to present.

Note: Review comment on unilateral termination and whether it is appropriate as a reason to deny support (p. 92 of CB)

- create a disincentive to the parent to rebuild the relationship because if they rebuild the relationship then that might be a reason that they have to pay child support
- Also for children under the age of majority, so a child was ten years old the strength of that child relationship with their parents who pay support has absolutely no bearing on whether or not that parent has to pay support - they're paying support regardless of the relationship, so why is it different for a child with otherwise qualify as a child of the marriage simply because they are over the age of majority
- It doesn't always makes sense to argue estrangement in support issues

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## REQUIRED READINGS: CHILD SUPPORT – CHILDREN OF MARRIED PARTENTS: ADULT CHILDREN

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### *KMR v IWR, 2020 ABQB 77*

*Facts*: The Minutes of Settlement set out a child support amount. Change in circumstances warranted a review of the support amounts.

- At the time of separation the child was underage of majority but when coming back to review the father's support obligation he is over the age majority.
    - He had attended 1 years of uni but did not return; at time of review he was unemployed and living with mother.
- Mother claimed he was a child of marriage and should receive support because he could not work and he was entirely dependent on her because of depression, anxiety and PTSD – he was a recluse and completely dependent for financial and emotional support
    - No medical documents provided

*Issue:* Are the children "children of the marriage" for the purposes of divorce?

*Analysis:*

- G: is not a child of the marriage because he is over the age of majority, did not attend post secondary education or participate in the workforce. The mother claims the son is unable to work because mental health issues, evidence is required and is not provided to support this finding.
    - Court said Illness or disability must be significant and of such a nature that the child is either unable to withdraw from the care of his parents or unable to support himself
    - the point here is that you must have medical evidence - a bald assertion by one parent that the child is ill or disabled is not going to cut it you need to have a formal diagnosis for medical evidence
    - Son did not qualify under illness – but did he qualify under other cause?
        - Discussion about courts recognizing broader social reality as concerns the concept of child of the marriage
            - page 104 of your casebook - here's a quote from justice Pentlinchuk in part of decision called Greer: States: there are few children whether or not from separated or divorced families were economically self-sufficient on their 18th or 19th birthday for in the month they

complete high school, but unless the child is entering post-secondary studies the common reality is child support obligations of the payor parents often cease on or close to these dates
    - Rose Branton argues the marriage has been interpreted far too restrictively, is counter to principles of statutory interpretation and does not reflect the current economic conditions for young adults
    - the court used that quote to say that other cause under the *divorce act* should be interpreted broadly that in my opinion Section 2(1)(b) the divorce act should be construed broadly not restrictively.
    - justice Pentlinchuk comments from Greer may support a conclusion that social realities and economic conditions could amount to other causes within the meaning of the divorce act
        - So what this means is that you know if we're in a complete recession and there's no jobs out there an 18, 19, 20 year-old is trying and trying but can't get a job that could potentially qualify as another cause justifying their continued entitlement to support
    - Court is saying we need to look at social and economic conditions the child is existing in to determine whether or not they are able to withdraw from care
    - The court cautions that this should not be seen as an indefinite entitlement to support rather what it may justify is a transition period where the child is getting support for a limited amount of time while they are able to sort of get on their feet

*Decision*: The court finds that the *Divorce Act* should be construed broadly. The courts recognize that a parent may have an obligation to continue to support an adult child during a reasonable transition period following education (on average 3 months). Here it doesn't state that G couldn't have obtain full time employment. He had no economic or social contexts hindering him. Thus he no longer qualified for child support

- Just because an adult child is in full-time undergraduate university doesn't automatically entitle them to support, but they typically qualify. An adult child can re-qualify if they return to school full time.

Note: I wanted to read this case because of this discussion of other cause being interpreted more broadly and potentially encompassing social realities and economic conditions. and the reason that I wanted to read it is because of the worldwide pandemic we now find ourselves in this is now a case that potentially a practitioner can draw on to say do not because of cold but my 20 year old can't find a job so he should be or she should be entitled to child support because the economic realities and the social conditions make it impossible for them to withdraw from my care.

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Summary – see twen handout

### Children over the age of 18

- Under the *family law act* there is a statutory condition that children over the age of 18 must contribute to their own support. This differs from under the divorce act where, as seen in above case, employment was one of the relevant considerations - one of the farden factors was the ability of the child to contribute to their own support , whether or not they quit – where a the family law act they are saying it is an obligation.

### Federal support guidelines

- These are regulations under the divorce act - which means the divorce act is the grounding legislation therefore, we need to look at the divorce act first before we can get into the regulation
    - Federal Support Guidelines are regulations under the divorce act so they are going to be used for divorcing parents
    - Note: The Alberta child support guidelines or regulations under the family law act they are going to be used for determining child support in situation where the parents are either unmarried or they're not pursuing in divorce
        - the approach is essentially the same – but for class I'm only going to talk about the federal child support guidelines but know that it applies equally under the Alberta child program guidelines
- Section 15.1 of the Divorce act specifies that the court It has jurisdiction to order child support and to order in term child support
- Section 15.1(3) States the court must use the guidelines - this is a presumptive rule that they have to determine child support in accordance with federal child support guidelines
    - May only deviate in certain circumstances from the guidelines and those certain circumstances are set out in section 15.1 of the divorce act

- Under section 15.1(5) - if the parties have made special financial arrangements between themselves and the application of the guidelines would now be inequitable given those arrangements
    - so this may involve for example a substantial lump sum of child support - the payor is very very wealthy and gives a giant chunk of change right up at the front to be used for child support - that is potentially a reason the courts may be able to deviate from the guidelines under subsection 5
        - it's very rare that this would happen but it's technically possible
- if the courts do decide to deviate from guidelines then they must report their reasons for doing so specified in 15.1(6)
- Under section 15.1(7) – If the parties have consented to deviate from the guidelines and the court is satisfied that reasonable arrangements have been made for the children (remember that the duty of the court – have to be satisfied);
    - court should not consider the arrangements unreasonable soley because they deviate but they must take Guidelines into account when determining if the deviation is reasonable
        - Example: An example of where the courts have deviated from the guidelines that came up often in practice is where there are situations where the payor parent had to pay a lot in order to exercise their parenting time with the child… so dad lived in BC and the kids lived in Newfoundland and it cost the dad thousands of dollars to fly to Newfoundland every single time he wanted to visit the child …that may be a reason to reduce the amount of support under the guidelines
- The primary policy agenda objective is to limit deviations except where reasonable arrangements have been made
    - what we want to make sure is that child support is not being waived or reduced by parents
- The child support guidelines came into effect in 1997, prior to that child support was hugely problematic (It was taxable meaning the recipient parent had to pay tax on that support, where and the pay your parents got to write it off as deduction), it was usually way too low, it was inconsistent and unpredictable which discouraged a lot of court applications because parties never knew what they were going to have to pay, And there was an excessive use of highly complicated budgets of the recipients trying to show why they needed a certain amounts (providing 50 page budget showing all of the expenses that the child incurs)
- After May 1st 1997, when the child support guidelines came into force the situation vastly improved
    - the norm now is periodic payments so generally every month you're paying child support and lump sum monies are rare
        - this is because the needs and the circumstances of the child might change and the danger is usually to the person paying child support of not being able to rely on the agreement to do away with future periodic support
    - now child support is tax neutral - so the payor doesn't get a deduction and the recipient does not have to include it as income
- Section 1 of the guidelines (p.170 of SM)
    - Set out to the objectives of the Child Support guidelines
        - establish a fair standard of support for children that ensures they continue to benefit from the financial means of both spouses after separation
        - To reduce conflict and tension between in our sense by making the calculation of child support orders more objective
        - to improve the efficiency of the legal process by giving courts and spouses guidance and setting the levels of child support orders an encouraging settlement
        - To ensure consistent treatment of spouses and children who are in similar circumstances
    - The objectives of the guideline really frame everything that comes next → if you're ever having to make a child support argument either for or against use of the guidelines, the objectives are really good place to base your argument on

How do we actually determine child support? The Components

- 1. Well if you look at Section 3 of the Child Support guidelines it says that: there is a presumptive rule
    - so unless otherwise provided under these guidelines, the amount of child support for children under the age of majority is the amount set out in the applicable table according to the number of children and the income of the spouse and the amount if any determined under section
        - presumption is in favour of the table amount for children under the age of 18 – it is the **base amount**, a section 3 amount of support
        - Paid by the non-custodial parent to the parent who has child living with them
    - Section 3 amount is determined by the gross annual income amount of the person paying child support
        - the variables are the province in which they were live, and the number of children that he or she needs to support

- it does not matter the recipient parent earns the only thing that matters is what the person who paying support earns

- 2. Section 7 expenses is the second component of child support
  - These are things that are over and above what can be considered base costs of raising a child (under base costs of raising a child we have things like food clothing shelter) under special or extraordinary expenses, which are ordered under Section 7 of the guidelines, ( we have things like childcare costs medical expenses extracurricular activities things like that )
  - Expenses are shared by both parents and apportioned to the parents incomes
- The base amount (section 3) + the special expenses (section 7) = combined equal the components of child support

Example: Page 218 of statutory materials

- three children entitled to child support; the person who is paying support earns $120,000 a year
  - Base amount:
    - 1. so you want to flip to the table that says province Alberta number of children three in the upper right hand corner
    - 2. Look for income
  - Answer: Pay $2273 in child support for base amount of support
- One child entitled to support; the person who is paying support earns $120,000 a year
  - Base amount:
    - 1. so you want to flip to the table that says province Alberta number of children three in the upper right hand corner
    - 2. Look for income
  - Answer: Pay $1062 in child support for base amount of support
- Compare booth numbers. Why haven't we trippled the number?
  - There are what we call "economies of scale" when children are living in the same household
    - For the recipient parent fixed costs, like mortgage etc, do not change regardless of how many kids are living in the household. There are more variable costs when there are more children such as food clothing etc.
      - The higher numbers are intending to capture the increase in variable costs when you have more children living in the household
    - We don't just simply double or triple the number because we need to account for the economies of scale.

- Section 3 the table amount it states "unless otherwise provided under the guidelines"
  - The court does have discretion under the guidelines to order something other than the table amount but it has to be specifically set out in the guidelines that they have discretion to deviate
  - Circumstances where the courts have permission to deviate from the table amount are under:
    - Section 4 which is incomes over 150,000's,
    - Section 10 which is undue hardship
    - Section 9 which is shared parenting
    - Section 5 which is standing in the place of a parent
      - Considerations here are that the court can order the stepparent to pay something other than the table amount where appropriate, they would consider any other parents legal duty to support that child, the child's needs and circumstances, and they are also going to consider the guidelines objectives in Section 1
        - So under Section 5 standing in the place of the parent that the court really has discretion to move off the table amount. They still have to determine what the table amount would be if they're going to order the stepparent to pay that but they don't have to order the stepparent to pay that if they think in the circumstances of different number would be appropriate
    - Section 3(2) which is adult children - the court has discretion to order something other than the table amount is in
      - The cases we just talked about dealt with how to determine whether someone qualifies as an adult child of the marriage, the next step is determining how we figure out the amount of support that they qualified for
    - Section 8 which is split custody - the court has discretion to deviate from the table amount
      - Split custody is fairly straightforward - essentially what happens here is if let's say there are two children of the marriage and one child lives with father one child lives with the mother well the

father owes support to the mother for the child that lives with her and vice versa. So you determine each parents obligation under their table amount and then do a simple set off.

- Example: the father makes $60,000 a year and the mother makes $45,000 year. The father on his $60,000 year salary would owe $505.00 to the mother for the one child that is in her care the mother on her $45,000 salary would oh $367 to the father for the child that is in his care. When you set off the 505 against the 367 we get a difference of $138 and that is what the father owes to the mother for monthly child support

**Exam:** Be comfortable with the tables - In the tables know how to figure out what the base amount of support is going to be and then keep in mind that that is the presumption, under section 3(1) we are always going to start off with the table amount, the only way that the court can order something different and the table amount is if they have discretion under the guidelines to order a different amount

## October 1, 2020

How do you determine if someone qualifies as child of marriage – Section 2 of Divorce act & 46 of the Family law act

- First step of inquiry when child is over the age of majority is to determine the status – whether they qualify as child of marriage.
- Once we determine they do qualify then the second part of the inquiry is to determine how much support they are entitled to…
    - Decided under section 3(2) of federal support guidelines
        - **s. 3(2)** Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
          (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
          (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
    - The first consideration is the table amount for that child is appropriate – go to the child support tables and you look up what amount of support the child would be entitled to if they were under the age of 18 and then consider if the amount is appropriate for this child
        - If it is appropriate then that amount is awarded
        - If not appropriate then the judge may exercise discretion to deviate from table and give a different amount. Section 3(2) states having regard to the condition, means, needs and other circumstances of the child – meaning that judge can exercise discretion to craft a support order that is appropriate for the circumstances
            - Court discretion – deviation from table
    - The onus to prove support on table is inappropriate is on person trying to alter support
        - i.e the payor parent (father) thinks table amount is to high for child over age of majority then father has onus to prove table amount is inappropriate and deviation should be made
            - Deviation presumption – a circumstance in which court can deviate from table guidelines
- Third step is to combine the amount decided under 3(2) with section 7 (special/extraordinary expenses that are over and above the base amount expenses - childcare, education, etc.)
- The adult child can be ordered to contribute to their own support
    - Is a statutory condition under Family Law Act – s. 49(4) - if dealing with the AB child support guidelines under section 49(4) "Adult children required to contribute to there own support"
    - Under the divorce act they may be ordered to contribute to their own support but it is not required (no statutory requirment)
    - When courts are considering whether the table amount is appropriate under Section 3(2) or when court is considering what amount of section 7 expenses to order the court must take into consideration any contribution by the adult child – section 7(2) of the guidelines

## REQUIRED READINGS: CHILD SUPPORT – CHILDREN OF MARRIED PARTENTS: FEDERAL CHILD SUPPORT - GENERAL

*Wahl v Wahl, 2000 ABQB 10*

Note: whole case is good for adult children issue

*Facts*: Parties separated and had one daughter of the marriage. Father ordered to pay child support until the daughter was no longer a child of the marriage. At 18, the daughter moved out of the mother's home, discontinued contact with her father and applied for university. Daughter and mother applied for reinstatement of child support. Daughter's application dismissed as only spouses could apply for child support. Daughter was entering University program with reasonable likelihood of employment. Attendance at post-secondary school created continued need for support. the daughter's age had not precluded her from being considered child of the marriage in light of her prospective education. Despite breakdown of the father daughter relationship, the father was still obligated to support the child financially. An adult child who is seriously pursuing post-secondary education is a "child of the marriage" and entitled to support. A child's attendance at school is an "other cause", within the meaning of the definition of child of the marriage.

*Results:* Attendance at post-secondary institution created continued need for support. Daughter's age of 19 did not preclude her from being considered a child of marriage in light of her prospective educational pursuits and despite the breakdown of the relationship between the daughter and the father. An adult child who is seriously pursuing post-secondary education is a "child of the marriage" and entitled to support. A child's attendance at school is an "other cause", within the meaning of the definition of child of the marriage. It limits the child's ability to provide necessaries for herself of withdraw from her parent's charge

Issue was whether or not the daughters rejection of a relationship with father was enough to disentitle her from support or reduce the amount of support the father had to pay. Court said **you cannot take parental rejection in account when ordering child support unless it has general discretion to depart from the presumptive amount of support** (i.e in circumstances under the guidelines that allow deviation to occur then the court may have discretion to order the different amount to take into account parental rejection) – that is, even if the daughter unilaterally rejected a relationship with the father without just cause, that is not a reason to deny support. The rejection did not change the fact that the adult daughter was still a child of the marriage under the *Divorce Act*.

- Table amount is regardless of the rejection – court may take it into account under s.3(2) of guidelines court can deviate from table amount if they find table amount inappropriate
- The question becomes does parental rejection make table inappropriate? Not in this case, but child required to assist in her expenses (via student loans & employment income) and share academic progress with her father
    - The amount of support awarded in a case may limit a child's loan eligibility. The corollary to this is that the more loans a child obtains, the less support a parent is required to pay

*Analysis*: Children must no longer live with a parent at anytime during the year or maintain a relationship with the parent from whom they seek support to be entitled for support under the divorce act. Support is a creation of statute. This means that standing to apply for support, entitlement to support, and form, duration and amount of support are all governed by the enabling supports legislation. Student loan scenarios are not clearly laid out in the case. As a general rule it is inappropriate to aware adult child support for a child attending university away from home as if the child were a minor. The court implements a child care budget, as well as takes into account educational tax credits. Any educational tax credits not used by the child must be transferred to the parents in the proportion to the contribution of the Childs costs. Parental rejection can affect only amount or duration of support or the conditions of home which support should be paid. Courts have not been inclined to take parental rejection into account in determining support for adult children. courts must be careful in relying on parental rejection too reduce support to ensure they do not sanction as stepparents ability to unilaterally withdraw from parental control.

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Question: In Wahl the daughter initially applied for child support order not the mother. What did the court say about the daughter standing for that type of application?

→A child is not a party to divorce proceedings – a child does not have standing to apply for their own support, even if an adult child so application has to be made on there behalf by the recipient parent - and there is no provision in the *Divorce Act* to allow a child to claim support or apply to vary an outstanding support order. She cannot bring the application on her own.

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Question: What did the court say about adult children attending postsecondary education away form home?

It is "inappropriate" to order full Table support and add-ons where an adult child attends post-secondary education away from home. As a general rule it is inappropriate to award table amount in situations where the adult child away from home.

One reason is that is duplicates the expenses that the payor has to cover because if looking at table amount of support that amount is intended to cover basic needs but if your also adding on support for post-secondary education expenses, including residence and

food, under s. 7(1)(e) of the Guidelines forces a payor to contribute to the cost of some basic expenses twice – this would be inappropriate as per section 3(2) of the guidelines.

Also Child has to justify why they want to pursue education away from home (how they can afford it, and why school would be better in Saskatchewan rather than Alberta. The Table amount of support is premised on a sharing of housing costs and other common expenses between custodial parent and child, which is lost if the child is not living at home.

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ADD TABLE OUTLINE FROM TWEN – adult children

**Section 9 – Shared parenting**

- When the guidelines were brought into force, the vast majority of parents had arrangement where 1 parent had primary care and the other had access. This worked well with the table but the drafter recognized and had to deal with situations beyond the access structure… i.e shared parenting
    - Shared parenting the child essentially has two homes and there are no economies of scale when dealing with shared parenting.
    - One assumption built into the Table guidelines is that regardless of the number of children are living in the household the fixed costs (i.e mortgage) don't change but in shared parenting these fixed costs are doubled (economies of scales argument no longer works)
- Section 9 allows for a balanced approach and discretion where needed to determine the appropriate amount of child support in the shared parenting situations
- Section 9 is not a deviation provision – it is a complete system on its own

*Federal Child Support Guidelines*

**s. 9.** Where a spouse exercises a right of access to, or has physical custody of, a child for <u>not less than 40 per cent of the time</u> of the <u>over the course of a year</u>, the amount of the child support order must be determined by taking into account

- **(a)** the amounts set out in the applicable tables for each of the spouses;
- **(b)** the increased costs of shared custody arrangements; <u>and</u>
- **(c)** the <u>conditions, means, needs and other circumstances</u> of each spouse and of any child for whom support is sought.

Section 9 explained

- 40% of the time is the threshold for shared parenting – if they don't meet the threshold then shared parenting is not on the table
    - Trigger for section
    - No fixed formula and judges do it in a variety of ways – judge have to consider the 40% over a course of a year, which would equal 146 days, some judges have done reckoning of the hours regardless they are interested in the one with care and control at the relevant time - not necessarily the one who is present physically with child
    - Times when child is away from both parents (school, daycare, etc) – those times will normally be allocated to the custodial parent who the child normally lives with unless child is staying over with access parent
        - Times of sleep (when child is sleeping) needs to be counted for 40% threshold - access parent only gets sleeping time allocated only when child stays the night with them
        - Who has care and control is essential
- Calculated over the course of a year – cannot say on a per month basis but has to be proven over the course of the year because the court wants to ensure it is a lasting arrangement
- "AND" at the end of subsection (b) means the criteria is conjunctive – have to consider all the subsections together and none of them prevail; consider as a whole
- "<u>conditions, means, needs and other circumstances</u>" is code for courts discretion

**Example:** Mid-week after school dinner with access parent qualify to give access parent that full day in terms of shared parenting? The answer is no – for most of the day the child was sleeping, school/day care and all of those times would be allocated to the custodial parent.

**Issue:** May create incentive to get the 40% or try to not get the other parent 40% - the access parent may be tracking to hit 40% while the custodial may be doing anything to deny the access parent

→ Court discusses this in *Contino* – "**cliff effect**": under section 9 before the *Contino* case a lot of practioners were calculating by using the strict set off approach (demonstrated under s.8) – so if you are the recipient parent who is used to receiving a

certain amount of child support and then all of a sudden the access parent hits 40% then you have to do a set-off and your numbers for child support goes down it is like its going off a cliff.

## REQUIRED READINGS: CHILD SUPPORT – CHILDREN OF MARRIED PARTENTS: FEDERAL CHILD SUPPORT – SECTION 9 – SHARED PARENTTING

### *Continoo v Leonelli-Contino, [2005] 3 SCR 217*

*Facts:* The couple were married and had one child

- There was to be joint custody, but the mother had primary care and the father had unrestricted access and to pay child support
- Mother started working overtime shifts and father started watching child more
- The father later applied to vary the child support based on s 9 of the *Guidelines* as a result of his belief that he now had the child for 50% of the time
    - "Where a spouse exercises a right of access to a child for not less than 40% of the time the amount of child support must be determined by taking into account the tables, the increased costs of shared custody arrangements and the circumstances of each spouse."
- Father earned 87 000 and mother earned 68 000
- Original chambers judge used a "set off" approach (688-560 = 128), half of which is 64 (their respective obligations) and grossed it up %)% to 100 to be paid in support;
- Divisional court said there was a failure to account for increased cost of shared custody, set back at 688
  CA took it to 400 and SCC took it to 500

*Issues:* Awarding set table amount seemed inappropriate but what is the correct mathematical solution to determining an appropriate amount under section 9?

*Held:* Must consider all s 9 factors – no presumption in favour of table but also there is no presumption in favour of the set off amount; in fact there is no presumption of automatic reduction due to the fact the parents are in a new custody agreement - after a proper application, the court may conclude that the full amount is justified.

- Have to consider all the s. 9 factors – NO PRESUMPTIONS

*Ratio*: The step-by-step method for quantum laid out by the Court for the purposes of S 9 is as follows:

1. Start with simple set-off amount: determine the simple set-off amount by looking at the tables with no pro-rating or multiplier – s.9(a)
2. Conditions, means, needs and other circumstances: review the child expense budgets by looking at spending patterns of both parents and not just the additional expenses resulting from an increase in access. The expenses should be apportioned between the parents in accordance with their respective income. – s.9(b)
3. Consider the ability of each parent to bear the increased costs of shared custody and the standard of living for the children in each household. The courts should look at the income levels of each parent, the disparity in incomes, and the assets and liabilities of each. The child should have to experience a significant variation in the standard of living from one household to the other – s.9(c)
4. Distinguish between initial orders or agreements and variations

*Reasons:* s 9 creates a separate and different method to determine support in shared custody cases

- S 9 is not a deviation or departure provision which would require the payor to convince the court to depart from the presumptive full table amount
- Equally, there is no presumption in favor of reducing child support downward from the Guidelines amount
    - After a proper application, the court may conclude that the full amount is justified
- There should be no formulaic or mathematical approach to s 9
- There should also be no use of pro-rated set-off or multipliers
- The guidelines do not support a multiplier as currently drafted, there is no research to support any multiplier and the DOJ does not recommend the use of one
- S 9 confers a broad discretion, one which allows direct examination of special or extraordinary expenses as set out in s 7
    - S 7 expenses cannot be excluded from the s 9 analysis
- Key: court does not want the standard of living of the children to vary widely before households – court caution parties to always keep in mind the objectives of the guidelines in section 1 - fair standard of support for children and fair contributions from both parents

Note: cliff effect is felt more strongly in variation cases - a recipient parent may have more validly incurred expenses based on legitimate expectations of how much child support would be provide – this was a key consideration in this case

Problem with *Contino* approach:

- In practice parents struggle with what is mandated, producing budgets is a time intensive task and it is not as predictable as if you were preceding under section 3; under section 9 it is not predictable, very discretionary which may mean litigation is necessary to get the correct amount (costly$ - may dwarf the amount of child support the parents are arguing over

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**Example:** Father's income is $87,315. Mother's income was $68,082. This results in amounts of $688 and $560, respectively, resulting in a set-off amount of $128 per month.

- Next, the father's total child expense budget was $1,814 per month and the mother's was $1,917. If these total expenditures ($3,731) were reapportioned based on the income ratio of 56/44, the father would pay $2,089, or $275 more per month than he was paying. This suggested that the father should pay more than the set-off amount.
- There was a $65,000 difference in net worth. This step suggests an increase from the set-off amount.
- One fact predominated in the final step: The mother moved to a new house in 2000 because she believed it was in the child's best interest, in the reasonable expectation that she would continue to receive $563 a month or more from the father. With this fact, the court set the child support at $500 a month.
- Apart from this final fact, the court may wind up somewhere between $128 and $275

Notes on S 9 Factors:

A. Start with Simple Set off Approach:
   - Determine table amount of each parent, as if seeking child support from the other
   - Amount payable = difference between the 2 amounts.
   - BUT – must avoid "cliff effect" – drastic change in support at the 40% threshold.
B. Consider increased costs of shared custody arrangements:
   - Total costs of shared custody higher than sole custody.
   - Inquiry: "What are…the additional costs incurred by the payor as a result of change in the custodial arrangement?"
   - Requires examination of budgets and actual expenditures (child care etc.) of both parents to identify actual costs.
C. Conditions, Means, Needs and Other Circumstances:
   - "Increased time spent with a child does not necessarily entail increased spending on the child."
   - "It is clear not every dollar spent by a parent in exercising access…results in a dollar saved by the recipient parent."
   - Important to keep in mind FCSG objectives: "a fair standard of support for the child and fair contributions from both parents."
   - "The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances."
   - Legitimate or reasonable expectations of payee parent.
   - Cautions against making awards without "having taken steps to obtain a full record."

ADD TABLE OUTLINE FROM TWEN – shared parenting

Two step approach:

1. 40 % threshold needs to be met
2. Determine appropriate amount of support based on *Contino*

Section 10 - Undue Hardship

- High threshold section – rarely successful
- Why do you think this section was crafted in such a way to discourage parents from using it?
  - Made it hard to prove undue hardship in order to discourage parties from trying to reduce their presumptive obligation under the table – it would undermine the objectives of the child support guidelines if claims for undue hardship were easily allowed

*Federal Child Support Guidelines*

**s. 10(1)** On either spouse's application*, a court may award** an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9*** if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

Section 10 explained

- *Payor or recipient can make application (undue hardship, too much or it is not enough – NEVER by recipient; typically payor)

- Payor argue that table amount makes undue hardship
- Recipient that table amount to little thus causing undue hardship

- ** Court discretion – first determine the child support obligation would be and then determine if deviation is justified for undue hardship;
- *** Could be a combined application – could do *Contino* approach, and payor makes undue hardship claim.
- Can be for applicant or the CHILD that suffers undue hardship (this would be a recipient application – rare.

### Circumstances that may cause undue hardship

**s. 10(2)** Circumstances that may cause a spouse or child to suffer undue hardship include the following*:

(a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
(b) the spouse has unusually high expenses in relation to exercising access to a child;
(c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
(d) the spouse has a legal duty to support a child, other than a child of the marriage, who is
    (i) under the age of majority, or
    (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and
(e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

*** Not an exhaustive list – in general these are the circumstances used to base a claim**

Proving one of these factors does not prove undue hardship – must prove that this factor CREATES undue hardship (that the circumstances relied upon will create undue hardship if the full table amount is ordered

**Example:** Section 10(2)(d) – an applicant cannot use simple fact of a child from a second marriage to reduce support obligations to children of the first marriage – they must prove that there responsibility to support the children from the second marriage somehow creates undue hardship; if a parent re-marries that parent is expected to organise his or her errs as to honour he pre-existing obligation to the kids of the first marriage

### Standards of living must be considered

**s.10(3)** Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.

- This only comes into play after determination of undue hardship. **If standard of living is higher, the claim MUST BE denied.** However the reverse is not true – just because the applicant is able to prove their standard of living is lower than the other house hold it does not require the court to reduce the amount – the court has discretion
    - Even if standard of living is lower, still can deny deviation from table.

### Standards of living test

Either spouse may apply saying that that they cannot afford the child support ordered of them.
**S.10(4)** says you may compare the standards of household livings as per the test set out in Schedule II of the guidline

### Reasonable time

**(5)** Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

**Note:** can make an undue hardship claim that is time limited. If they do grant a undue hardship they must grant reasons for doing it - section 10(6)

**Question:** Under section 10(2) could a payor claim undue hardship due to Bankruptcy? – remember not an exhaustive list - doesn't automatically relieve payor - has to be that bankruptcy is causing undue hardship.

**Note:** Cannot be used for s.7 expenses (e.g., contribution to childcare under s. 7); court has discretion under s.7, so would never come under s.10. Only 3,4,5,8, 9 – base amounts.

*Must be supported by full financial disclosure – cannot just assert hardship but must prove it – must include why it is occurring – onus to prove falls on person seeking deviation.

SEE SCHEDULE II EXAMPLE CALCULATION

- Under section 10(3) if you can prove undue hardship then you must assess standards of living and under section 10(4) the calculation used are a way of assessing standard of living
- First: determine annual income after takes
- Second: adjust each persons annual income as specified – specified in appendix
- Third: add in the new spouses income to get the total house income
- Fourth: determine low income measures
- Fifth: divide total income by low income measures to get ratio to determine lower standard of living after proving undue hardship

EXAMPLE: Mom has two kids and lives in Edmonton, and earns $90,000. The Dad now lives in New Brunswick has a new spouse and baby and earns $$66,000 and the new spouse earns $24,000. The Dad wants to claim undue hardship. He claims that it costs $3500 to fly out to see children. First, you have to deduct taxes. Assume that the net income is then $70,000, $53,000, and $20,000 for the Mom, Dad, and new spouse, respectively. The next step is to deduct the amount it costs to fly as well as the child support he would otherwise have to pay. This may come out to something like $53,000 - $3,500 - $9,492 = $40,508. However, you must add into the Mom's income the amount she would receive from child support which is $70,000 + $9,492 = $79,492. Step 3 is adding the annual income of all the persons in the household. This means we must take into account the new spouses income which means that $40,508 + $20,000 = $60,508. Next, you must determine the applicable low-income measures amount for each household based on the table in the schedule. This results in $17,649 for both Mom and Dad. Next, you must divide the household income amount by the low-income measures amount to get a household income ratio for each household. Therefore, $79,492/$17,649 = 4.5 and $60,508/$17,649 = 3.42. Since the Dad's ratio is lower, the standard of living he offers is lower, and hence he can make an undue hardship claim.

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REQUIRED READINGS: CHILD SUPPORT – CHILDREN OF MARRIED PARTENTS: FEDERAL CHILD SUPPORT – SECTION 10 – UNDUE HARDSHIP

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*Hanmoore v Hanmore, 2000 ABCA 57*

*Facts:* Married couple with no children who remained in custody of appellant since separation with child support being paid by the respondent

- The husband married his wife who had two young teenagers from a different marriage
  - The husband makes $23000
  - The wife is living in a basement with huge student loans
- Appellant applied for an increase in support which was granted, but leave was granted to respondent to bring application for hardship which he has now done
- The TJ found hardship
- The final result was that the respondent had $27k to support four people and the appellant had $28.6k to support three people

*Issues:* Was there undue hardship?
*Held:* No – the ex-husband had to pay child support; found for ex-wife

- CA found no specific evidence was given signifcant to rebut presumption of section 3 and thus applied table amounts

*Ratio:* The onus is on the party applying under s 10 to establish undue hardship; it will not be presumed simply because the applicant has the legal responsibility for another child or children and/or because the standard of living of the applicant's household is lower than that of the other spouse. The applicant must lead cogent evidence to establish why the table amount would cause undue hardship.
*Reasons:* The respondent has to support a new wife and is also legally responsible for his step-children

- He obtains benefits
- The appellant works on a contract basis and does not have any benefits
- S 10 details the circumstances that may lead to hardship as unusually high levels of debt, or if the spouse has a legal duty to support another child
  - However, even if there is undue hardship, if a variation in child support would create a disparity in standards of living, the variation cannot be awarded
- Must satisfy a two-stage test
  - First – requires the applicant party to prove specific facts establishing undue hardship

    - Second – if undue hardship is established, the applicant must show that his/her household would enjoy a lower standard of living than the household of the other parent should child support not be reduced
- Simply saying "I cannot afford this" is no claim for undue hardship, since the Guidelines contemplate the poverty line where no payments are require. If you are above this line, then Parliament has decided you can afford child support. It must not merely by hardship, but "undue hardship"
- "The hardship must be more than awkward or inconvenient. It must be exceptional, excessive, or disproportionate in the circumstances. Further, it is not sufficient that the payor spouse has obligations to a new family or has a lower household standard of living than the payee spouse. The applicant must specifically identify the hardship which is said to be undue. A general claim regarding an inability to pay or a generic reference to the overall expense of a new household will not suffice."
    - Signal from CA that there is a restrictive approach to undue hardship unless it satisfies the test

Class Notes on Case
- Still the leading case on s 10
- Hardship cannot be just be awkward or inconvenient
    - It must be "exceptional and disproportionate in the circumstances"
    - The person claiming hardship must have specific and cogent evidence that hardship exists
- Clear signal courts will take a restrictive approach to claims of undue hardship.
- Onus is on applicant. Burden is a high one
- A lower standard of living in the applicant's household does not suffice
- Legal responsibilities for another child or children not enough.

ADD TABLE OUTLINE FROM TWEN – UNDUE HARDSHIP

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Calculation of income / imputing income
Section 15-20 of the Federal child support guidelines – p.175

INCOME
- Incomes drives outcomes in child support – we need to be able to determine income of people for the purpose of determining child support amounts
    - T4 forms are critical and often relied on – easy cases
    - Own business, interest in Limited partnerships, corporations – difficult cases; had to develop rules to deal with said circumstances
- Spouses often agree on income based on tax form unless they have complicated situations

Determination of annual income
s.15(1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

Agreement
s. 15(2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

Calculation of annual income
s. 16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.
SOR/2000-337, s. 3; SOR/2007-59, s. 4.
- Looking at eachothers total income amount under heading total income to determine your gross annual income is for purpose of child support.
- This does not mean you stop at what the tax return says about the parties but what it does mean is that you consider all the forms and sources of income available to them.
    - kind of income to included beyond employment income that people have: investment income, rental income if they own a rental apartment, pension, income capital gains
        - there's lots of different types of income that get earned could be included in their gross annual income for the purposes of child
- Exception: Generally RRSP Income is not included in determination of guideline amount – do not include because it typically represents a. nonrecurring source of income – people aren't taking money out every year - and RRSPs are generally counted

as matrimonial property division (treated as an asset) – to also treat it as income for the purpose of support would be double dipping. RRSP income is included in property so we tend to not include in child support guideline income

### Pattern of income

**s. 17(1)** If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non- recurring amount during those years.

- Does not necessarily mean they are averaging the last three years of tax return but it gives the judge the ability to consider the spouses pattern of income in order to make the fairest decision

### Non-recurring losses

**s.17(2)** Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.
SOR/2000-337, s. 4.

**NOTE:** If someone is going to say that one year is unusual, the court can look at the past three years to determine an amount that is fair and reasonable in light of any pattern of income. Non-recurring losses may also be taken into account.

### Shareholder, director or officer

**s. 18(1)** Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

**(a)** all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

**(b)** 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.

### Adjustment to corporation's pre-tax income

**s.18(2)** In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

### Imputing income

**s. 19(1)** The court may impute such amount of income to a spouse as it considers appropriate in the circumstances (***meaning* *assign an income to the payor*), which circumstances include the following:

**(a)** the spouse is intentionally under-employed or unemployed, other than where the under- employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

**(b)** the spouse is exempt from paying federal or provincial income tax;

**(c)** the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

**(d)** it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

**(e)** the spouse's property is not reasonably utilized to generate income;

**(f)** the spouse has failed to provide income information when under a legal obligation to do so;

**(g)** the spouse unreasonably deducts expenses from income;

**(h)** the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

**(i)** the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

*Reasons why the court may assume income to you – assume income is higher than what you income tax return states

### Reasonableness of expenses

s.19(2) For the purpose of paragraph (1)(*g*), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

- Just because it is under *Income Tax Act* it does not mean its appropriate for child support

Discussion re: s. 19

The Court can impute income to a spouse as it considers appropriate including when a spouse in intentionally under-employed or diverting income, the spouse is exempt from paying federal or provincial income tax (ex. aboriginals), the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada, the spouse's property is not reasonably utilized (ex. letting your sister live in second house when it could be rented), the spouse has failed to provide income information when under a legal obligation to do so, the spouse unreasonably deducts expenses from income (ex. Running corporation from own house but deducting from corporate income for rent, purchasing a luxury car to drive around in when a much cheaper vehicle would be more justifiable, taking your dad out for lunch vs. important business lunch meeting).

Note that section 19(2) says that just because a deduction is permitted under the *Income Tax Act*, it is not necessarily deducted for the purposes of the *Federal Child Support Guidelines*.

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REQUIRED READINGS: CALCULATION OF INCOME/IMPUTING INCOME

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*Hunt v Smolis-Hunt 2001 ABCA 229*

- RATIO: the only way to impute income on someone under section 19(1)(a) is to prove their intent to evade child support
- The parties separated. The husband was paying a certain amount of support based on his income. He then changed jobs after the divorce (Quits job to find another one) and wife claimed he was intentionally underemployed FOR THE PURPOSES OF avoiding child support obligation. Thus she argued he should have income imputed onto him under section s.19(a)
- The court With divided (there was a dissenting opinion by justice Picard) the majority decision said purposes of section 19(1)(a) said a payor must have the intention to be unemployed or under employed for the very purpose of invading child support. There is no onus on a payor to maximize learning in order to support his or her children and a payor can rely on I bonified career change to reduce support
- according to the Court of Appeal if the payor change your jobs and significantly reduces his income and claims the reason he's doing it is because he simply didn't enjoy his first job or because the new position is going to be better for him in other ways because he'll get to spend more time with his family and if he's able to prove those types of things then according to the case then that's a legitimate career change and it is not a reason to impute income on him under section 19(1)(a).
    - Have to prove it is a legitimate career change – must show proof
    - The only way to impute income on payor under section 19(1)(a) would be to prove the reason Be changed jobs was for the very purpose of evading now obviously that's
        - Applicant would have to prove that he changed jobs for the purposes of evading child support – onus on applicant
            - kind of hard to prove and the way that that generally is proven is by showing a history of amazing child support so by showing a history of not providing financial disclosure during history of being late with payments for non payment or arrears of child before or things like that
- A fairly restrictive test
    - they interpreted intentional in subsection (a), the word intentional, as requiring a specific course of conduct with the intent to avoid child support obligation
    - Put the onus on the applicant to prove that intent to evade child support
- Practical result of this decision: payors who reduce their amount of income after separation are able to state that they wish to pursue employment which makes them happier or allows them to spend more time at home at a lifestyle choice whether that's legitimate or not
    - Becomes virtually impossible to contradict because these are subjective factors
        - proving intention to evade child of work really is only going to be available in situations where you have a history of the pay or trying to eat a child
- Note: almost every other Canadian jurisdiction pays attention to the reasonableness of the employment giving the payors capacity to earn – AB has a strict test
    - So for example they would look acting like the parents capacity to earn the latest such factors as employment history age education skills health available employment opportunities and the standard of living employed during the marriage

- Example: if we had a situation where we had the father who is like a really high powered lawyer in private practice and In the marriage she earned $500,000 a year and then all of a sudden after separation he decided he wanted to become an artist and you know quit private practice and essentially making $10,000 selling his paintings at farmers market in Alberta you would still have to prove that the reason he did that was to evade his child support obligation and he could simply say I was tired of the rat race I've always wanted to change this seems like a good time to do it and that would be really hard to contradict, whereas in other jurisdictions that is the reasonableness test they would look at things like well crazy amounts before separation and you never once mentioned wanting to be an artist before that and you're at an age range that still work for another 20 years in her a lot of money for your children and comma training and skills to high highly successful lawyer and so when those situations a may very well determine that it wasn't reasonable for him to make this clear change Hunt v Somlis-Hunt, where the mother was accusing the father of being unemployed or underemployed and that she wanted income imputed to her at a higher amount based on an income she believed he could be earning if he was employed at the correct level.

## October 6, 2020

**Reminder:** Section 15 to 20 of the guidelines deal with how to calculate income for the person paying child support; in general the starting point is section 16, which states you look at all sources of income (employment, rental, investment, etc) found in their CRA T1 general form and use that income when figuring child support with the tables.

- Easy to do when simple employee situation (all income from employer – line 150 of tax return) but it is complicated when payor receives income from multiple sources, especially if shareholder, officer or director of corporation, cause then you need to determine if corp income and see if it is available for child support
- If court thinks simply looking at T1 general tax return is not enough nor fair for purposes of support the court can look at other methods set out in section 17 to 20 of the child support guidelines;
- Section 17 deals with historical patterns of income, not requiring losses and gives the court the ability to look back at the last three years of that person's income and financial disclosure to make a fair determination of what their income is for the purposes of support
- Section 19 deals with imputing income – so in situations listed in section 19 the court may say that a payor earns a certain amount of income whether or not they actually do. The situation we talked about last day was *Hunt v Somils-Hunt* where the mother was accusing the father of being underemployed or unemployed and she wanted income imputed to him at a higher income level based on an income he could be earning if he was employed at the right level. Imputation of income.
- Section 18 deals with how to calculate income for a spouse who is a director, shareholder or officer of a corporation.

### Calculating income for Shareholder, director or officer

- **Section 18(1)** Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include:
  - (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation years; or
  - (b) 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
- What does this mean?
  - Under subsection (a) you are going to look at the financial statements of the corporation; you are going to look if that corporation is retaining pre-tax income within it and if it is, the question is going to be well how come the payor of the child support is not taking out that corp income for his or her use and why are we saying it is okay to say it in the corporation instead of attributing it to the payor for purposes of child support
    - Considerations you look at under subsection (a) are:
      - # of shareholders of the corporation (different if payor is one of many shareholders with no control of the financial decisions of corp vs. single shareholder and if it weren't for corp structure it all money would be paid out to him personally)
      - Whether or not there is a USA - if there are multiple USA's do they need to all agree what is done with the pre-tax monies and if they do then that needs to be a consideration when determining if it should be contributed to support
      - Historical patten of corp to retain their earnings inside the corporation – so if they always kept a minimum of pre-tax income within the corporation and this has nto changed

- Whether there is any restrictions imposed on the corp by banks or lenders – do they have to keep a certain amount of pre-tax income inside the corp to satisfy their debt obligations
- Level of debt – do they really have that pre-tax income or is it debt
- Plans for expansion and whether expansion was historically financed through those retained earnings
- Look at the salary that the payor spouse has actually taken out – even though they left income in corp they have written a salary to themselves and listed it as an expense on financial statements; is it comparable to industry standards
- Are there any legit reasons for retaining earnings or the pre-tax income in the corp

▪ **Bottom line** is if the spouse is leaving earnings or pre-tax income in the corporation rather than taking it out as personal income, they must justify why they are. If they cannot justify why and the court determines it is available to them personally for purposes of child support (this doesn't mean they have to take it from corporation but it is just the level for income guideline to be set at based on what the court determines as reasonable for them to take out as personal income)

- Under subsection (b) if your not attributing all or part pre-tax income to them, then you can also look at whether or not you should be contributing an amount commensurate with the services that the spouses provides to the corporation; whether or not the salary they are paying themselves is a reasonable salary and (b) may be used in situations where the corp main business is sort of personal services of the payor

- **Section 18(2)**
  - In determining the pre-tax income of courage for purposes of subsection (1) , all amounts paid by the Corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances
  - Example: is the payors new significant other on the pay roll of the company, if yes what are there duties? Are they the bookkeeper and if so, are they earning a reasonable amount for a book keeper? If the payor cannot justify that payment to the new significant other than the amount of that salary is put back in to the pre-tax income of the corporation and the court can then look at all those considerations under section 18(1)(a) to determine whether or not the pre-tax income with the significant others salary added back in should be attributed to the payor for purposes of support
- **Section 19(1)(g):** Income can be imputed back to the payor if …. the spouse unreasonably deducts expenses from income
  - **Section 19(2):** For the purpose of paragraph 19(1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*
  - What this means is that if a corp deduction that is on the financial statement of a corporation of which the payor is a either a shareholder, officer or director, if one of those corporate deductions has a personal element to the payor the amount of that expense may be imputed back to the payor as income for child support purposes
  - Point to make: it may be a very reasonable tax deduction but the question is whether that income is available to the payor for the purposes of child support
    - Note, the court is entitled to find that the expense are reasonable and should not be added back to the spouses income; it is very discretionary but the bottom line is that the guidelines require the court to examine expenses and corp deductions from the perspective of balancing business necessity against the alternative of using those funds for support
  - **Example:** if the corp is writing off expenses for a corp vehicle but the payor spouse is also using that vehicle for personal use (deriving a personal benefit even though they are allowed to write off the expenses as a deduction through the corporation); in that situation the court may determine that a portion of that deduction is actually a personal benefit to the payor and the amount should be added into their income for the purposes of child support

ADD EXAMPLE FINANNCIAL STATEMENT

- Financial statement of ABC corp
- The person who is paying child support whose guideline income we are trying to determine is the sole shareholder of ABC corporation
- ABC corp. has an income of $250,000 and have all of the following expenses: rent, professional fees, insurance, business transportation and salary to sole shareholder
- Payor child support has taken out $50,000 as his salary for the year
- Once you deduct all the expenses from the income of corp you have $100,000 sitting in the corp – being held within the corp
- In this situation what do you think the payor's guideline income is for purpose of child support?
  - Is it the $50,000 he took as salary or something else?

        - Student answer: Could be $150,000 if he could not justify why he is keeping it in the company under the guidelines
            - These expenses are assumed to be legitimate, we don't have to worry about whether or not any portion of the expenses need to be imputed back to him for the purposes of child support
        - The question is whether or not any of the pre-tax income ($100,000) needs to be added into his salary ($50,000) for the purposes of child support
            - Consider the considerations in section 18 of guidelines
            - Will be fact specific and the payor will have to prove why its reasonable for him to be leaving the $100,000 in the company
- So what if we switch this so that instead of insurance fee being an insurance fee is actually salary to the payors father?
    - Would this change the analysis to his guideline income?
        - Student answer: May if he is not able to establish that the payments to his father were reasonable for the work he was doing
        - Section 18(2) of the guideline says that if there is a payment made to a non-arms length person the corp spouse must be able to justify it and if they cannot then it has to be added back into the pre-tax income of the corp
            - If we say the corp spouse cannot justify the salary to the father then the corp pre-tax income would become $125,000 and then we need to go through the process of whether or not the corp spouse can justify leaving the new amount of money in the corp or whether or not this number should be applied back to him for the purposes of child support
- Bottom line: we want to include income available for child support, all income over which the spouse has discretionary control, and it does not matter that income is reported as received personally or reported as received by the corp … if the spouse has control over how that income is spent and there is no legit business reason for leaving it inside the corp then we want to be able to capture it for purposes of child support
    - Student question: What is discretionary control: it will be fact specific as to the business operations of the corp is structured; not about the percent of shares i.e sweeny case – guy was not the boss, he was a minority shareholder, but he was still the one who had the most say in the entities over all financial choices so that justified attributing corp income back to him for purposes of child support

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## REQUIRED READINGS: CALCULATION OF INCOME/IMPUTING INCOME

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*Cunningham v Seveny 2017, ABCA 57*

- The mother, the recipient of child support, made an application for retroactive child support claiming that the father, the payor, had not adequately justified expenses he had deducted from his corporate income; the payor – father - said he provided all the disclosure he was required to provide and it was up to the recipient mother to get an expert opinion if she was alleging his deductions were improper
- First the court did not feel that he had actually complied with his disclosure obligations and they said that the duty to disclose is a continuing part of the obligation to pay child support; the payor must disclose any deductions from which they may have derived personal benefit and if the payor is taking the position that they did not derive personal benefit from the deduction then the onus is on the payor to explain why those deductions should not be attributed to the payor income for purposes of child support
- Ultimately the court was clear that financial disclosure for purposes of child support must be comprehensive enough that the court is able to assess and balance the business necessity of the expense and the alternative of using that money for child support
    - This is the balance we look at under section 18 of the guidelines
        - We are not saying every dollar the corporation makes has to be attributed to the payor for purposes of child support but the court is saying if it is being used for a legit business need that is fine but if it is not and the payor is simply sheltering it in the corporation to artificially lower your income so you do not need to pay as much child support then that is not okay and that is what the provision is trying to stop
        - The way we are able to determine if there is a legit business need or not is through financial disclosure and it needs to be up to corp spouse to provide the financial disclosure because they are the ones who have the information
- In this case the payor father was saying look I have given you all the financial statements I need to give you and now it's up to the mother, the recipient, to hire an expert too actually prove that my expenses are unreliable I have no onus to prove that they are reasonable, she has to prove their unreasonable. The court said no that is incorrect - how the onus goes under section 18 is that the person claiming the deduction has the onus of proving that their reasonable because they're the ones

with all of the information and they are the ones who can explain what the directions are used for and can explain why or why not they haven't derived a personal benefit from that expense or that deduction;

- What did the court say here about the impact that the CRAs acceptance of a deduction has on the assessment of reasonableness under the child support guidelines?
    - The father was arguing while CRA has accepted all of these deductions as reasonable on my tax return
    - The Court said it is a consideration but it is not determinative
        - Page 138 CB – "Moreover, the respondents proposition that the expenses claimed have been approved for income tax purposes and should thereby be found to be reasonable is neither persuasive, nor is it the test for analyzing those expenses when calculating guideline income for child support purposes… child support is the right of the child. A parents legal obligation to pay child support that fairly reflects the parents income in accordance with the Child Support guidelines is not to be constrained or limited by income tax statutes that may confer entitlements in relation to deductibility of business expenses"
            - Income tax vs child support guideline theory behind deductions are different → just because Income Tax Act says it's OK does not mean that it's going to be accepted for the purposes of child support because the theories and the reasons for deductions under the Income Tax Act are very different then the theories and reasons for deductions under the child for guidelines
    - The court is also emphasizing that the level of control that the payor spouse has over the Corporation will equal the level of scrutiny that the court will give towards the expense deductions and they say specifically that "in short the level of scrutiny that is justified will be commensurate with the level of control this corporate parent has over the business entity's overall financial choices"
        - So again if they are the sole shareholder and their writing off of hope and bunch of deductions they have the onus of proving that those deductions are reasonable and that they are not driving a personal benefit from those deduction if they cannot discharge that then those deductions can be added back into their income for purposes of child support

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## REQUIRED READINGS: CALCULATION OF INCOME/IMPUTING INCOME

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*Sweezy v Sweezy 2016 ABQB 131*

*Facts:*

- essentially what happened here was that the mother and father separated the mother had primary custody of the children and the father was meant to pay support. They agreed to a certain number for his guideline income at the time of separation but after separation he was let go from his job on which they base he's got guideline hand and he started his own Corporation.
- He was a shareholder with his new common law spouse and his common law spouse ultimately became the majority shareholder because they used her house as collateral for the purchase of some corporate assets/
- The mother made an application for retroactive and ongoing child support and an issue that came up was what the fathers guideline income should be set at - she was arguing it should be much higher than he was arguing and he said submitted all of his corporate statements showing a bunch of corporate deductions that where reducing the pretax corporate income and which he was getting a personal benefit from some of these deductions as well
- There was also an issue about a salary being paid to the payor fathers new common law spouse - they claim that she drove truck for the company and that she was bookkeeper so she was getting paid salary and that was part of the financial statements of their disclosure

*Ratio*: The onus is on the payor spouse to establish that the expense of the corporation are reasonable and that there are no not-at-arms-length expenses being claimed as expenses

*Reasons:* - Section 18 of the *Guidelines* allows a court to "pierce the corporate veil" and consider all or part of the pre-tax income of the corporation of which the spouse is a shareholder to determine the spouse's annual income if the other income streams do not fairly reflect all the money available to the spouse for the payment of child support

- Section 21(f) of the *Guidelines* impose immediate and mandatory obligations upon an applicant or respondent shareholder spouse who controls a corporation to provide a breakdown of all salaries, wages, etc. of the corporation
- The shareholder spouse must provide at least the following:
    - (1) a brief explanation concerning the nature of payment, how it was calculated, why it was a reasonable corporate expenditure, whether there was any personal benefit to the shareholder, and
    - (2) documentation to support all of the explanations in (1)
- Where a spouse fails to comply with the disclosure obligation under s. 21 of the *Guidelines*, the other spouse may apply to set down a hearing, move for judgment, or apply for a compelling order, the further ignorance of which may result in a contempt order

    - Once the documents are provided, the court should be able to determine the reasonableness of the payments in question
- Factors the courts have considered in determining whether all or part of a corporation's pre-tax income should be included in a shareholder's income for child support purposes include:
    - (1) the nature of the business
    - (2) the historical spending patterns
    - (3) the role of the spouse in the corporation
    - (4) whether the spouse is a sole shareholder
    - (5) the degree of control
    - (6) whether the company's pre-tax income is required to manage the business and ensure its ongoing financial viability.

Class notes:

- Court said unless the corporate spouse can justify these payments it must be added back in the pre tax income of the Corporation that is what is meant by section 18(2) and it is mandatory
        - The court doesn't have any discretion to not add those payments back into the corporation's income and unless the payor is able to justify it
    - Court reiterates that the disclosure obligation is on the corporate spouse and then it must be sufficiently meaningful and clear to allow the other spouse and the court to draw the necessary conclusions
- Court outlined a number of factors (p.147) that the court will look at to determine whether or not some or part of a Corporation pre-tax income should be attributed back to the shareholder spouses income for the purposes of child support
    - the factors which courts have considered in determining the above question include:
        - The nature of the corporation's business
        - the historical spending patterns of the Corporation
        - the role the shareholder spouse plays in the Corporation
        - whether the shareholder spouse is the sole shareholder
        - the degree of control the shareholder spouse exercises, including his or her relationship with the controlling shareholder
        - the benefits received by non arms length persons as a result of payment of corporate expenses
        - weather payments to non arms length persons were for services for which the Corporation would otherwise have had to obtain from a third party
        - whether the company's pre-tax income is required to manage the business an ensure its go ongoing financial viability
    - These are requirements are the ones you're going to look at to say yes this income should be left in the Corporation or noticed income should be attributed to the pay or for the purposes of child support
        - Note: not an exhaustive list
- Even though the father was not majority shareholder, the revenue from the business was due mostly to his effort - he exercises considerable control over the Corporation and his interests align with the majority shareholders because the majority shareholder is his living common law wife
- After the court considered the reasonableness of all of his deductions, and after she considered the fact that he exercised considerable control over the Corporation, she determined that all of the corporate pre-tax income, which was determined after adding back in the unreasonable expenses that were initially deducted, is available for the purpose of child support
    - Who has the majority of shares is a consideration but in this case it was overshadowed by the fact the payor father exercises considerable control over the financial choices and that the revenue generated was due to him
        - If either of those facts were changed, i.e more than one shareholder going through divorce, and then it would certainly affect the analysis about whether all of the pre-tax corporate income is attributed
    - RECAP: The court specified pre-tax income would be included because 1) most do to his effort 2) exercises considerable control over the corp and 3) his interests align with majority shareholders
- REMEMBER: we're not saying that he actually has to take out that income were saying that notionally we're going to assume that his income includes that amount; he can decide whether or not it's a business choice for him to still leave it in the Corporation but because of the control he exercises over it - it would be available to him personally for the purpose of child support
    - It is a fact specific determination under section 18 of the Guidelines
- Student question: Reasonableness requirement – the more information the payor spouse can provide the better – what the principals are clear on is that they have to provide disclosure and onus is on payor spouse to prove it; to their detriment to not take as many steps as they can to prove the expense deductions are reasonable and don't have a personal benefit deriving from those expenses – the more information they can provide the better

- Example: A deduction generally accepted as reasonable is like a depreciation rate off because we know that vehicles and equipment like that depreciate

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Section 7 - Special Expenses

- Two components of determining child support – section 3 presumptive amount of support (the table amount) and then section 7 amount which are special expenses
- Special expenses are expenses that are over and above what is presumed to be covered under the base amount provided for in the table
- Court needs to consider if the expenses are necessary and reasonable
- Section 7 of the guidelines states:
  - 7(1) In a child support order the court may, on either spouses request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interest and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family spending pattern prior to the separation:
    - (a) Child care expenses in curd as a result of the custodial parents employment, illness, disability or education or training for employment
      - Note: contribution to childcare expenses are not required if those expenses are incurred by the non-custodial parent;
        - I.e. So if you have a situation where the kids live primarily with mom and dad has parenting time or access only child care expenses that mom incurs qualifies section 7 expenses because she's been custodial parent
      - Note: Does not cover babysitting that is incidental to the custodia parents recreational activities; the reason the custodial parent needs child care needs to be a reason listed ( Employment, illness, disability or education or training for employment)
      - Note: generally child expense claims will not be excepted for children over the age of 12 years of age because generally they are considered to be able to be left alone or don't need child care as much (there will be exceptions for children with disabilities or kids who cannot be left alone)
    - (b) that portion of the medical and dental insurance premiums attributable to the child
      - Note: the increase (i.e. adding child to benefit plan) is considered a section 7 expense and it would be permitted for contribution
    - (c) health related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counseling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses
      - Note: means anything your paying out of pocket for medical type expenses, if it exceeds $100 over the course of the year is permitted to be included in section 7 expense
    - (d) extraordinary expenses for primary or secondary school education or any other educational programs that meet their child's particular needs
      - Note: routine school fees is general school supplies normal transportation those do not qualify as an extraordinary primary or secondary school expense (considered to be ordinary education expenses which are taken into account under table amount And should be paid out of the table amount that the recipient is already receiving)
    - (e)expenses for postsecondary education
    - (f) extraordinary expenses for extracurricular activities
      - Note: there is no real guidance as to what an extraordinary extracurricular expense would be; depends on the nature of the expense and circumstances of the family
      - I.e. For a middle class or rich family costs associated with community League soccer registration as an example would likely not be considered extraordinary but they might he considered extraordinary for a low income family
        - so when the expense has to be extraordinary we are looking at it in relation to the family and the nature of the expense and their circumstances
  - 7(1.1) - Definition of extraordinary expenses
    - (a) Expenses that exceed those that the spouse requesting an amount for the extraordinary expense can reasonably cover, taking into account that spouses income and the amount that the spouse would receive under the applicable table or where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

        - (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account:
            - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or where the court determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate
            - (ii) the nature and the number of the educational programs and extracurricular activities
            - (iii) any special needs and talents of the child or children
            - (iv) the overall cost of the program and activities
            - (v) any other similar factor that the court considers relevant
        - **Note:** this is fact dependent; what is extraordinary for one family may not be for another family
        - **Note:** only have to assess if an expense is extraordinary when it falls under subsection (d) or (f); all other expense does not need to qualify under extraordinary
            - Post-secondary education does not need to be extraordinary but rather are just include
    - **7(2)** – Sharing of expense → discuss how we share the expense between the parent (do this after we determine the expense qualifies under section 7 as a valid expense)
        - The guiding principle in determining the amount of an expense referred to in subsection one is that the expenses shared by the spouse is in proportion to their respective incomes after deducting from the child expense, the contribution, if any, from the child
            - Talks about the proportionate sharing principle - what it means is that the spouses are going to share the expense in proportion to their combined income
                - Example: so let's say the dad Make $60,000 a year and the mom makes $40,000 year well combined they make $100,000 a year; the father makes 60% 1000 and the mother makes 40% about 100,000 so their father would be responsible for 60% of the Section 7 expenses and the mother would be responsible for 40% of the Section 7 expenses → that's the ***basic proportional sharing principle***
            - **Note**: states guiding principle not mandatory, the court has discretion to order some different split for the contribution or to reduce the non-custodial parents contribution (i.e if the non-custodial parent has high access costs but it doesn't raise to the level of undue hardship claim they can still say section 7 should be reduced to accommodate the high access costs)
            - **Remember**: vast majority of section 7 are proportional sharing but it is technically only a guiding principle and the court does have discretion to order something different
    - **7(3)** – discusses subsidies
        - Subject to subsection 4, in determining the amount of an expense referred to in subsection 1, the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expenses, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense
        - Example: If a recipient gets money from a family member to do an allow the child to participate in horseback riding lessons, that contribution from the family member needs to be taken out before that expense is split between the parents or if the recipient parent receives some sort of subsidy from the community group for the child you know sports registration then that subsidy needs to be taken out of the expense before it split between the parents
    - **7(4)** – universal childcare benefit
        - in determining the amount of an expense referred to in subsection 1, the court shall not take into account any universal childcare benefit or any eligibility to claim that benefit
        -
- We should note from some of the wording in section 7(1) preamble that:
    - Section 7 expenses are discretionary both as to entitlement and amount - so the court can say: I'm not ordering any Section 7 expenses, or am ordering some of the Section 7 expenses that are being claimed by all, I'm going to order them all but I'm not going to accept the full amount being claimed, etc… it's a very discretionary provision
    - Another thing to note from the preamble this list is exhaustive - so it says provide some amount to cover all or any portion of the following extension
        - it doesn't say a following expenses which may include, it doesn't have any sort of open language this is
        - If your expense does not fall into one of the categories in section 7(1) it does not qualify as a Section 7 expense
    - There are two requirements that the court must consider when determining whether to exercise their discretion to include a Section 7 expenses:
        - First is whether or not the expense is necessary in light of the child's best interests; and

- Second is whether or not the expense in reasonable having regard to the means of the spouses and the child and family families previous pending matter
    - Note: However, something to note here is just because it was reasonable pre separation does not necessarily mean that it will continue to be reasonable post separation;
        - the family pre separation spending pattern may need to be reassessed in light of the increased costs generated by the split into two household so some considerations here might include the combined income of the parents the fact that two households must now be maintained the extent of the expenses in relation to the combined income levels of the parents the death of the parents any prospects for a decline or increase in the parents means in the near future and whether the other character was consulted prior to the expensive being incurred
            - those are considerations when determining whether or not the expense is reasonable

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## REQUIRED READINGS: SECTION 7 – SPECIAL EXPENSES

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*T(CJ) v T(GA),* 2012 ABQB 193.

*Facts:* The husband's position is that he cannot afford to pay spousal support and his proportion of s 7 expenses, if he is told to pay them

- He states it is inequitable and that the wife no longer requires spousal support due to her change in circumstances and his change in circumstances
- The wife disputes most of this

*Reasons:* The test under section 7(1)(f) of the Guidelines (the provision dealing with extraordinary expenses for extra-curricular activities) is as follows:

- (1) The Court must first ask whether the expense fits within s.7(1)(f); if not, the inquiry ends
    - The Court may look to section 7(1.1) for guidance
- (2) If the expense is 'extraordinary', the Court must decide if it is in the child's best interests. The starting presumption is that a child's life is enriched through activities
- (3) The Court must determine whether it is a reasonable and necessary expense
    - Was the activity encouraged by both parents while the parties were together? Is the combined disposable income such that the expense is too large a portion of that income? Was there consultation between the parties before the expense was incurred?
- Expense must be understood in the context of this family taking into account the table amount and ask whether the expense is extraordinary in the context of THIS FAMILY when compared to a normal family of the same income
- The expense must also be reasonable and necessary (likely not horseback riding if not done before separation).
- When calculating income for proportioning you must subtract any spousal support paid by the payor from his income and add it to the income of the payee

Class notes:

- There are three principles one must remember from this case:
    - First: is the courts explanation of extraordinary which is quoted on page 159 :
        - "the expression extraordinary implies that the expense must be exceptional or out of the ordinary, either in their nature or in their amount, when compared to the expenses ordinarily in curd by a typical household with a similar Income. Extraordinary in that subsection means extraordinary in relation to the average child. In interpreting the categories there is also a conjunctive test; the expenses must be necessary in relation to the child's best interest and as well reasonable having regard to the means of the spouses, the child and the family spending pattern"
            - So first determine if it's extraordinary in light of that particular child in that particular family circumstances and if it is then go on to consider whether it is reasonable and necessary
    - Second: the factors we consider to determine the reasonableness of the expense:
        - The combined income of the parties
        - the fact that two households must be maintained
        - the percentage of the combined income represented by the expense
        - any debt of the parties
        - any prospect for the decline or increase in the parties means in the future

        - whether that parent who had paid the expense in the past will be able to continue to do so without the contribution of the other parent
        - whether the parent from whom the contribution was sought was consulted about the expense before it was incurred
    - **Third:** Parties can agree to split expenses other than proportionally; and the court has discretion when fixing contribution
        - Goes back to the idea of section 7(2) - the guiding principle is that they split it in proportion to their income; parties can agree on a different split or the court can order a different split → the general way of doing it is the proportional sharing principle but it is not the only way

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ADD SUMMARY FROM CHILD SUPPORT SUMMARY RE: STEPS ASSESSING CLAIMS UNDER SECTION 7

- First step: does the expense come within one of the sub sections of the Child Support guidelines section 7(1)
    - if it does fall into one of those categories you move on to Step 2 BUT if it doesn't you stop – it does not qualify for Section 7 expenses the inquiry is over
- Second step: the next thing you have to consider is whether or not the expense has to be extraordinary in order to qualify as Section 7 expense
    - is it one of the expenses that falls under subsection D or subsection F
        - Is it is if it's an extraordinary expense for school or if it's an extraordinary expense for extracurricular activities then you have to determine whether the expense qualifies as extraordinary → so in looking at that it would turn to Section 7(1.1) and you would go through the factors listed in there as well as you would consider the factors that we just talked about out of the T(CJ) v T(GA) case
        - If it is extraordinary you move to step 3 but if it is not extraordinary then it does not qualify as a section 7 expense and the inquiry is over
        - if it is not an expense that needs to be extraordinary (not d or e) then you don't need to consider the step and can move right on to next step
- Third step: is the expense considered necessary in relation to the child's best interests and reasonable in relation to the means of the spouses and those of the child and the family spending pattern
    - so again we're talking about necessity and reasonableness which is the test set out in the preamble of Section 7(1) you go through that analysis and if you have determined yes it is necessary and it is reasonable then it qualifies as a Section 7 expense you determine the total cost after subsidies and split the expense between the parents in proportion to their income
        - Example: so let's say it's a child care expense. It obviously qualifies under Section 7(1)(a), it does not need to be extraordinary, so you then move on to Step 3. It does qualify as necessary and reasonable, so then you determine the total cost after subsidy so let's say it's $1200 a months but after a subsidy is $1000 a month animal chain that is $12,000 a year and then you take that and you say OK well 60% of that 12,000 year or 1000 a month is attributable to the father, 40% of that 12,000 year or 40% of that 1000 month is attributable to the mother
    - If it fails one of these tests if it either not necessary or not reasonable than it does not qualify as Section 7 expenses in the inquiry is over

Income over $150,000

- **Section 4** of the guidelines
    - Where the income of the spouse against whom a child support orders sought is over 150,000 the amount of child support order is
        - (a) the amount determined under Section 3; or
        - (b) if the court considers that amount to be inappropriate
            - (i) in respect of the first 150,000 of the spouses income, the amount set out in the applicable table for the number of the children under the age of majority to whom the order relates
            - (ii) in respect of the balance of the spouses income, the amount that the court considers appropriate, having regard to the condition, means, needs an other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
            - (iii) the amount if any, determined under Section 7
- What does section 4 mean?
    - The court can either award the full table amount on the papers full income or the court determines that amount is inappropriate, then the court can award the full table amount the section free amount on the 1st $150,000 of the

papers income and for anything over and above that $150,000 its in the court's discretion as to what amount is going to be awarded
    - if you're going to to go off table, so if you have proven that this whole table amount is inappropriate, and you're going to be ordering something different then you must consider the conditions means needs and circumstances of the children the ability of each supposed to contribute and the amount payable under section
- Example:
    - We are going to say there is two children of the marriage → go to Child Support table that deals with two children
        - You will notice that the income column actually stops at 150,000
        - so if we're awarding the full table amounts and the payer makes greater than 150,000 what do we do?
            - Well you'll notice that it gives you the basic amount and then it gives you a plus amount with a percentage, so for any portion over and above 150,000 you only include a percentage
    - Let's say the trailer makes $350,000 a year, there's two children of the marriage; the non-negotiable part is that it takes the full table amount for the first 150,000 so that generates $2133 for the first $150,000, then you take 1.32% of the income over a $150,000 … so if he making $350,000 then $200,000 is the amount of income over $150,000 and you multiple that by 1.32% and you get $2640. You add the $2133 (table amount) + $2640 (over and above percentage table amount) together and you get $4,773, which is the table amount of support If we are awarding the full amount of a payor $350,000
    - The question becomes what would the support be if the court concluded that the full table amount was inappropriate?
        - Well that is kind of a trick question because the court is going to use a lot of discretion. → if they determine that the table amount is inappropriate but we know that it is going to be at least $2133 because the court does not have any discretion for the first 150,000, so we know it's going to be at least 2133 and then for the balance the court can use its discretion taking into account the factors listed in section 4(b)
    - REMEMBER: so things to remember here the actual situation of the children is central and that can be very relative so you know rich families are very different than poor families in the sense of what the children are used to their standard of living their pre separation lifestyle etc
- While standard of living can be considered in assessing me at some point support payments will meet even a wealthy child's reasonable means so the main question that we're looking at under Section 4 is when is the table so far in excess of a child to reasonable needs so as to justify the court ordering a lower complementary amount?

## October 8, 2020

How to order child support when the person paying child support earns greater than $150,000 per year…

- For the amount of this income we are looking at Section 4 of the Child Support guidelines
- The presumption for section 4 is in favour of the full table amount
    - Note: the tables only go up to $150,000 so for the remaining amount greater than the $150,000 you multiple by the percent amount indicated in the table and then you add that amount to the base table amount for the first $150,000 and that's how you determine child support when the payor earns in excess $150,000 per year
- Under section 4 the court has discretion to deviate from the number if it is "inappropriate" - if table amount is found to be inappropriate they still have to award the base amount on the first $150,000 (no discretion on 1st $150,000) and the remaining amount above the $150,000 that we use the percentage (discretion on the amount over and above the 1st $150,000); threshold is that the MUST determine the table amount is inappropriate

*FCSG Section 4:* "Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is"

- (a) the amount determined under section 3; or
- (b) if the court considers that amount to be inappropriate,
    - (i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
    - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
    - (iii) the amount, if any, determined under section 7.

SUMMARY OF INCOMES OVER 150K:

*This means that you can award full table amount on spouses full income then use % in table and multiply by the balance, OR… if court thinks inappropriate order full table amount on first 150k and anything over and above is in the courts discretion to what the amount will be worth. If you are not giving full table amount consider to the "condition, means, needs and other circumstances of the children"*

EXAMPLE: You will see in the table for 2 children: income only goes up to 150k. If payor made 350k we will mandatorily take full table amount of 150k (2133$)

- then multiply balance over 150 (which here is 250k) by 1.3% (this % amount will be listed in the table)
- then add both together (2133 + 2155) = whole payment owed by father

NOTE: If the court decides to change this amount… It will be at least the full table amount if 150k: COURT CANNOT CHANGE THE FULL TABLE AMOUNT (above it was 2133$)

- The payments after will be at their discretion but will take into account the needs, conditions, means of the family and child

*SUPER Quick Summary of Normal Way… How to order child support for over 150k a year:*

- Sec 4 of FCSG: presumption in favour of full table amount – then multiply remaining income by percentage listed in the table then add together

*What if court thinks full table amount is inappropriate?*

What if the normal way is inappropriate? (amount we calculate based on the percentage in the table – since they HAVE to award base amount), What if the second calculation is too excess? See below!

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## REQUIRED READINGS: INCOMES OVER $150,000.00

*Francis v Baker,* [1999] 3 SCR 250.

### ARGUING THE TABLE AMOUNT IS TOO MUCH – PRINICPALS

*Facts:* Here husband said that the amount was so excess court should make an inference that it was too much – court says no… we cannot make this inference; you need to bring evidence. So, he failed.

*Issues:* What considerations are involved when one spouse is a very high (>$150k) income earner under s 4 of the *Guidelines*?

*Reasons:* The child has a right to the table amount unless you can demonstrate there is a reason, they should not receive that much

- Parliament always intended a presumption in favor of the table amount
- Onus on the payor to prove that an amount is inappropriate
- An inappropriate table amount means that it is unsuitable, not inadequate
- A high amount does not automatically get excluded
    - One of the objectives is that the child benefits from the income of both parents

Class notes: Key principals when dealing with incomes of $150,000

A. Always presumption in favour of the table amount
    I. Can be changed if person seeking to change this amount (seeking the deviation amount) can prove /rebut the presumption that the table amount is inappropriate
        - Onus is on the person seeking the deviation to prove the table is inappropriate; always the payor
    II. Needs to be able to provide an articulable reason why the table amount is inappropriate – requires clear and compelling evidence and court must review circumstances of family and children "conditions, means needs, and other circumstances…" = courts discretion
        - When looking at section 4(b) (section that deals with deviation) there is the common phrase indicating courts discretion → ""conditions, means needs, and other circumstances…"
        - Requires evidence for the court to consider and the circumstances of family/children are key to the analysis
    III. May require reference to childcare budget – but this is not a given, not mandatory under s4 like it is under s9 where it stated "budgets are required to determine the correct amount of child support to be paid in shared parenting relationship"; in section 4 it is not required but best practice is to include a budget to show the child care expenses
B. Test here will be a "reasonable test" to see is budget is indeed reasonable. – this test looks to see "if the budgeted expenses are so high as to exceed the generous ambit of which reasonable disagreement is possible" then it is likely the court will find the full table amount under section 4 is inappropriate
    i. Person seeking to rebut the presumption of the table amount must prove that budgeted expenses are so high that they are unreasonable (a child could not possibly use/need that money every month)
    ii. Just arguing the sheer size of the award makes it unreasonable is not enough – that is arguing that costs are high is not enough – need to produce actual EVIDENCE about why this amount is unreasonable
        - In Francis v Baker the father adduced no evidence; he was simply arguing that the court should make an inference that the sheer size of child support being suggested/mandated under the tables was so far in excess what the children needed it made it unreasonable – the court said while it may be true, the court is not entitled

to draw that inference so the payor must produce evidence; the father failed and had to pay the full table amount

C. **"Inappropriate" means unsuitable or inadvisable** (need to prove awarding this much would not be a good idea, not that its simply not meeting children's needs) –
   i. The court defined the word inappropriate for purposes of section 4 – the father was arguing that inappropriate means inadequate and he said you know based on this interpretation there is no way that anyone could say that the support I would be giving these children even if allowed off table would be inadequate because they're clearly well provided for;
   ii. So what did the court say about the father's argument? what does inappropriate actually mean in the context of Section 4 of the guidelines?
      - it was unsuitable but not inadequate ; said that inappropriate in the context of section 4 means either unsuitable or inadvisable → essentially it would not be a good idea,, not that it simply wasn't meeting the children's needs because if you're making over $150,000 a year chances are you're meeting the children's needs
      - An example they gave of what would constitute an unsuitable or inadvisable amount of child support so that it becomes inappropriate under the Section 4 of the guidelines would be you know "if such a high number that it constitutes a transfer of wealth to other spouse rather than child support"
         - questions this conclusion by the court because there saying in the mother's budget that she forward, she put in line items like oh I need money to take children on vacation that are the same you know level of luxury as vacation set the father takes them on because it's not fair that the father takes luxurious vacations and then the mother can't afford to do so and then their standards of living are different between our households that was one of the line items in her budget
         - Court agreed with her and said that its true the children should not be going back and forth from a Household where the standard of living is like this to a household really standard of living is like that so we need to make sure that the mother has an amount of support to be able to give her children the same type of lifestyle that they got when they're with their other parent; and the author of the annotation in Westlaw says OK so how does that not constitute a wealth transfer to the other spouse when the mother is using the wealth to take herself on vacation
            i. court did not address this point in their reasoning but did give this wealth transfer as an example as what constitutes inappropriate and inadvisable under section 4 of the guideline

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## REQUIRED READINGS: INCOMES OVER $150,000.00

*Simon v Simon* (1999), 46 OR (3d) 349 (CA).

*Facts:* short term marriage and husband is NHL hockey player. He was making good money when she was pregnant, and they split up. They entered into separation agreement with child support. Said portion needed to be put in trust for the child of the marriage for later uses (like university). Later dads contract changed and he was making millions a year (for short term contract). Mother applied for variation based on dads increase in income. Father argued that the new full table amount would be inappropriate based on 3 million contract

- His income jumped from $180k to $1mil and his ex applied for an increase in child support as per the guidelines table (from $2200 to $9215 per month)
- He wanted to get out of the table amount because it was really high, and his income was only going to be earned for an undetermined number of years
- The TJ increased support to $5000 per month, $1000 of which was to go into a trust fund for the child

*Issues:* Whether the TJ erred in not increasing the support to the table amount

*Ratio*: Uncertainty of future income does not allow for deviation from the table amounts for child support. Variations will be made at the appropriate time

*Reasons:* *Francis v Baker* established that the burden in on the paying spouse to demonstrate that the table amount is inappropriate

- This means that the mother should not be required to justify her child care budget
- Custodial parents need not justify each and every budgeted expense
  - Courts should be wary of discarding the figures included in their budgets too quickly
- The precariousness of Simon's income doesn't matter because if his salary changes, he can apply to have the child support varied
  - The other factors relied on by the TJ – sudden increase in salary, uncertainty about Simon's salary in the future – are irrelevant
  - The table amounts are determined by the *income* of the paying spouse
- Requests for some of the child support money to be directed into a trust is only appropriate if there is evidence that the payee parent will mishandle the money (trust them to act in the child's best interest).

**Question**: Can the court order money to be diverted to a trust fund?

- General rule: Custodial parent's discretion re: expenditure of child support should not be fettered.
- Custodial parents are presumed competent to make spending choices in BIOC. Payor parent would have onus of rebutting this.
- It would be a rare case "where a court would find it necessary to find a mechanism to control that spending."
- Definitely can't substitute own judgment for parents.

**CLASS NOTES:** Court identified two Issues:

1. **Temporary income: While dad's income was very high it would be temporary** (only signed a 2-year contract guaranteeing him this money)
    - Court says fact that payors income could be *temporary does not justify variation from table* under section 4 – if the payors income goes down later on they can apply for variation later but currently when they are making the high income the child is entitled to share in the payors father economic success (right of the child);
        i. remember the foundational principal of child support is the right of the child; each child has a moral and legal responsibility to financially support their children – the children should be able to share in their parents financial success and enjoy a standard oof living commensurate with the income that there parents earn (these are principals listed in section 1 of the guidelines)
        ii. If the court were to say they are going to allow a deviation under section for just because your income is temporary it undermines those objective that the child should be able to share their parents income/financial success while they are making it
    - BOTTOM LINE: So he needs to pay it while he is earning that much, when contract changes again he can petition to vary it again
2. **Whether or not appropriate / does court have ability to direct recipient spouse with particular way she can spend the money/child support she receives**
    - Under separation agreement Mother and father agreed some of the money of the child support would be put in trust for later on for education or other expenses – as the case was being appealed the trial judge had ordered mom to increase the amount that should go in this trust in proportion to the increase in father income. Mother cross-appealed and said no one asked for an alteration of the amount going into trust each month – I am the recipient spouse and you can't tell me how to spend it, thus you erred in varying the agreement in that manner .
        i. Court of appeal agrees with mother, court cannot tell recipient how to use the money – the integrity of the guidelines depend upon the recipient having control over how the support is spent; the **discretion of custodial parent, with respect to the expenditure of child support monies, needs to be upheld, via unfettered discretion, unless non-custodial parent can prove/establish a valid reason not to.**
    - Court concluded that they could not force the recipient mother to put a portion of the support money in trust for the son, if she chose to and had an ability to then that was for her to decided but she needed to have unfettered discretion as to how to spend the child support money unless the father was able to establish a valid reason why they needed to direct her monies to go to certain places and in this case there was no proof of financial irresponsibility so no need to force her
3. **Does lifestyle factor in?** Father says he is making millions but living a modest lifestyle (lifestyle does not reflect the amount of money he is making) so when the child comes to stay with him he is not living a fancy lifestyle but also living a modest lifestyle – does not make sense to give mother huge amount of child support if his lifestyle does not reflect that or justify the amount of money
    - IRRELEVANT: Court said it is irrelevant, the payors choice of lifestyle had no bearing on the amount of child support he was obligated to pay - what matters is his income, ability to pay, and child's needs: lifestyle choice does not factor in.

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SEE SUMMARY FOR INCOME OVER $150,000

## Effects of Agreements

- Under section 15.1(5) under Divorce Act, court may deviate from guidelines if parties have made special financial arrangements between themselves, and the application of the guidelines (table amount) would be inequitable given these arrangements
    - Note: there are ways under the child support guidelines that are justified in deviating in the guidelines – section 4 is deviation provision but the court can also deviate under section 15.1(5) of DA if the parties have an arrangement as between themselves and the court is satisfied the application of guidelines would now be inequitable

- But under 15.1.(7) of DA: court needs to be satisfied reasonable arrangements have been made for the children – the court can give effect to the agreement and the parties consent to deviate from guidelines as long as the court is still of the opinion reasonable arrangement have been made
    - Main point: So, parents cannot contract out child support. Only if they fall under 15.1.5, or 15.1.7 of DA, and the court at all times retains authority to review the child arrangement agreed by the parties; arrangements need to be made for children can they make agreements among themselves that go against the table amount

Retroactive Child Support

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REQUIRED READINGS: RETROACTIVE ORDERS

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*S(DB) V G(SR), 2006 SCC 37*
*(LEADING CASE FOR RETROACTIVE CHILD SUPPORT)*

*Facts:* 4 cases, 2 dealing with retro support under *DA*, and 2 under the former *FLA*. Court addressed it as if *DA* is federal law governing it and would apply to the provincial law as well – so covers all 4 cases. However, did say provinces are free to espouse their own paradigm for child and retro child support under special preventions in provincial legislation. So still need to go look at provincial statue to determine if they have enacted any special provisions re: retroactive child support if your dealing with application under provincial legislation
This was the first case SCC dealt with retro support, there were not clear rules on how to address it or analyze it. No section in the guidelines to deal with it – Initially it was not even clear if did court have jurisdiction? Argument was that you could you go back and vary and retroactively impose order on someone when it didn't exist before or wasn't available at the time it was du. Both orders were variation applications, made under section 17 – the couples both had existing support order and were making application to retroactively make them pay for differences in support (claiming not enough support was being paid under the existing court orders and now want to retroactively vary those support orders – want to collect on difference)

- Where not original applicants but were variation applications

*Issue/Analysis:* To what extend does the court have jurisdiction to award retro support?
DA: says that section 17 of DA, which you apply under when you want to vary an order, it explicitly says that award can be varied retroactively – " while an application for variation is necessary trigger to courts jurisdiction, the Court may still retain power to make a retroactive order once it is properly ceased of the matter" – they have jurisdiction to make retroactive orders

- Point out it is not truly a retroactive order they are not trying to impose an obligation but they are simply enforcing as legal obligation that was in existence and was not satisfied. Just because the court order didn't specify the correct amount or just because their court order was not in effect doesn't mean that the payor did not still have that free standing obligation to their child to pay child support to them. Even if they did not discharge that obligation to the correct amount,they are justified in having that obligation and forced even though the date may have passed – not creating an obligation in the past that did not exist, it existed it just wasn't satisfied
    - So yes, jurisdiction and no it is not unfair!
- Once the SCC It has decided yes we have jurisdiction, no it's not unfair because we're not making it truly retro after we're simply enforcing a past obligation , they said now we have to go ahead and we have to determine how we analyze these types of applications and what principles apply to these types of application:

STEP ONE: Should the award be made? (Emphasize that matter needs to be looked at holistically (all four factors are important and no one factor takes precedents) AND addressed on every application for retro support); these four factors need to be consider on any retroactive child support application

A. Is there a reasonable excuse why the recipient parent did not seek increased support earlier (
    a. Why did they not seek the increased support when it became due - why have a wait until this point in time and now they're trying to collect retroactively?
    b. so they the onus is on the recipe and parents to prove that they had a reasonable excuse for their delay
    c. Court outlines some examples of what might constitute a reasonable excuse:
        - so there might be you know they fear the payers reaction to their request
        - the payor has been intimidated
        - had threatened retaliation if they seek increased support – especially re: custody
        - spouse has been threatened or intimidated
        - lacked emotional or financial wherewithal to bring a court application - so maybe they've already gone through you know a five year legal battle with their ex spouse and they went out trial after trial at a door broke and can't afford to pay a lawyer to go after retroactive child support or be you know the litigation

just took so much out of them and strained their relationship with their child or something like that and they are not willing to go through that again at this point that might be a reasonable excuse why they never initiated the retroactive child support proceedings earlier
    - possible they got wrong or inadequate legal advice and if that's true they should not be barred from speaking the correct amount of support

Note: fact specific situation – will depend on the circumstances

B. What was the payors conduct? If payor engaged in blameworthy conduct then that will factor in, just like the reasonable excuse
    a. Court Define blameworthy conduct in the case as anything that privileges the payor parents own interests over his/her children's right to an appropriate amount of support
        - If actively hiding income, threatening all of these constitute blameworthy conduct
            * blameworthy conduct and reasonable excuse are kind of two sides of the same coin - if the reasonable excuse of the recipient is that the payor with threatening or intimidating them well that threating and intimidating behaviour probably constitutes blameworthy conduct
    b. However, failing to go to court immediately when income increase is not necessarily blameworthy
        - i.e If they get a raise on a Friday they don't necessarily on Monday have to go an increase their amount of child support; but if the recipient is asking for financial disclosure and certainly have to give it
    c. This will go against the payor in favour of awarding retro support
C. What are the circumstances of the child?
    a. Was the childs standard of living negatively impacted because of lack of or deprivation of support (looking at past and present needs of the child is addressed) – if yes goes in favour of award
        - so in the past at the time that the support should have been paid was the child impacted because they weren't having enough child support being paid to their but also at the time of the application is the child in need of the support, is their standard of living being impacted because they are not receiving the correct amount
        - Note: What interesting is that the notion of the children's need creeps in here but the guidelines are supposedly not about the children's needs so it's a bit of a return to pre guideline jurisprudence under this factor because the guideline amount isn't supposed to take into account the child means necessarily because it's not supposed to be an individual family exercise you're supposed to pay whatever you're mandated to pay based on your income not because your child needs X or Y
D. Would there be a hardship occasioned by a retroactive award?
    a. Emphasized that they need to balance the payors interest in certainty with fairness and flexibility
        - so especially in situations where the payor is following an existing court order they are entitled to rely on the fact that they are discharging that obligation by following the court order they have an interest in certainty in that situation however if they know that they're paying child support according to an income that is set out in the court order that is much lower than what they are actually making certain TR that interest in certainty or their right to certainty sort of disappears because they probably are aware that they're not discharging their obligation appropriately
        - we also need to look at fairness and flexibility and we're not going to prioritize the payers interest in certainty over a child's right to a correct amount of support;
            * IMPORTANT! This will not come above child's needs for support
            * However, they will impact the certainty of the payor
    b. retroactive awards of large amounts can cause payor to say "I don't have that money" and this will cause me financial hardship
        - Court says we need to craft retroactive orders to reduce hardship because they disrupt the paayors financial management in ways that prospective awards do not;
        - A practical strategy here if you're ever arguing retroactive child support application is that you should suggest payment installments rather than lump sum - It turns out that you know if you're retroactive awardable to be made the payor would owe $20,000, he or she would probably argue that they don't have $20 grand ordering me to pay that would force me to take out a loan or force me to do this, or forcing me to do that and it would cause me hardship, you can say it doesn't have to be a lump sum - it can be a payment plan
            * You should have creative strategies so the court could say If we do it in this manner it's going to reduce or eliminate the hardship to the payor
E. REMEMBER: none of these factors are decisive and at all time the matter needs to be looked at holistically

→ Once you determine that yes are retroactive pay should be made then we have to determine how far back the order should extend

STEP TWO: HOW FAR BACK SHOULD THE AWARD EXTEND

- In the case the court looked at four possible dates - At the date of the application, the date a formal notice, the date of effective notice, and the date that the increased report should have been paid
    - and they ultimately landed on the date of effective notice from the recipient to the pay or that support needs to be increased
        - so that's how far into the past those orders can extend.
        - For example: so let's say that the application for retroactive child support and being heard on January 1st 2020 and the recipient had given the payor effective notice on August 15th 2018 that increased support need to be paid – from august 15 to janauary 1 that would be time period with regards to retroactive award
- Date of effective notice that the payor was told the award needed to be increased
    - If recipient had given effective notice 2 years ago that increase in support needed to be paid – they owe 2 year of retro award
    - NOTE: Effective notice means just broaching the topic, does not need to be initiating court order/legal action – it could be something like sending an email, asking for financial disclosure getting lawyer to talk to them – it is something that in some way alert them that you are looking at the support situation and are considering the increase support may be required or necessary
        - "After the date of effective notice the payor can no longer assume the status quo is fair to the child and his or her interest in certainty in the management of her his or her financial affairs is less compelling"
            - so once they have any sort of indication that they may not be paying enough. they no longer have as strong interest in certainty and following the order or following the status quo because they've been alerted that something needs to be changed
        - After the notice the payors argument for uncertainty has less weight since they been given a heads up
            - If they continue to refuse to negotiate, to increase, to disclose their income then that goes to blameworthy contact
    - Bottomline: typical goes to date of effective notice
    - EXCEPTION MADE BY THE COURT: is not advisable or fair to go back more than 3 years after formal notice ( formal notice means filing application or court order)
        - 3 YEAR CAP – CANNOT GO 20 YEARS IN THE PAST except if…
            - The cap does not exist if there is blameworthy conduct, and court can go back as far as they wants to the day the circumstances changed if wanted to
        - Example: If 5 years ago they were given notice and they starting hiding money/ threatening, and another 5 years after spouse made formal order, court could go back 10 years
    - Note: Interesting feature in AB – in order to reduce retroactive application, so after STD came out, the Ab gov justice services says OK we want to reduce these retroactive applications, we don't want to have a ton of them clogging up the system. So Alberta courts put a provision now in every single child support order that each party must share their tax returns every year - so it's actually going to be a term of every court order dealing with child support that the partners have an obligation to exchange financial disclosure once a year so we're hoping to do here is that alert parties when income is changed and support needs to be changed so that we're not constantly dealing with these retroactive support applications

STEP THREE: What quantum should be award

A. Presumption is that it should be in accordance with guidelines unless:

- It stretches back before *FCSG* came into force (1997) OR;
- if there is a new hardship, if the payor can prove that awarding the full amount would cause undue hardship under section 10 of guidelines – this will constitute its own analysis
    - Would constitute its own analysis; it is a high threshold but if proved court can order a different amount other than what the guideline suggest
    - go to section 10 in your CAN for steps to prove OR;
- other situations where court can deviate from guidelines like shared parenting or adult child of the marriage OR;
- unreasonable delay in bringing application – i.e gave notice and waiting 10 year before making application
- Note: court makes a comment re: "at the material time"
    - Section 2(1) of guidelines – definition of child of marriage – it discusses that the child at the material time was 18 years old or over the age of 18 but unable to withdraw from the parents charge and the court needed to just determine what that phrase at the material time meant; if the child was a child of the marriage at the time support should have been paid can the court award retroactive child support for that child notwithstanding that they are no

longer a child of the marriage; so is there a child of the marriage child with the marriage child of the marriage at the time support should have been paid and then at the time we're hearing the application there no longer a child of marriage can we still order retroactive child support for them? NO!

- If child is no longer child of the marriage at time hearing, no relief can be sought, at time of filing application they need to be defined child of the marriage – jurisdictional bar that when you fill retroactive child support application your child must still qualify as a child of the marriage otherwise court cannot grant it

NOT TESTEABLE BUT IMPORTANT FOR FUTURE PRACTICE! New Case in heard by SCC in September 2020 opened door on this point in SDB (Michelle v Gramen) – a BC case under there provincial statute – so its not directly overturning SDB but the comment made by majority and concurring judgment touch on SDB

- Mother applied for retroactive child support under BC Family law Act at the time when the daughter was an adult and no longer qualified for a child of marriage under BC Family Law Act definition of child; the SCC held that it does not matter that the child was an adult and no longer fell withing the definition of child at time of application was brought – it contradicted the SDB point – the majority decision was based on the statutory definition of the family law act (only directly applicable to that legislation) – both majority and concurring opened the door for reconsideration. Majority specifically said the issue re: whether the child still needs to be a child of marriage at time of filing application, the issue under the Divorce Act this issue might merit reconsideration on the SDB point but he did not find it necessary to discuss in the context of the appeal. The concurring opinion said the question of a jurisdictional bar on historical child support sought by orders under the Divorce Act is ripe for reconsideration, however given it is unnecessary to resolve this issue in the appeal they decline to make a determination
- Neither overrule SDB on this point but they do open it up for reconsideration of this issue by SCC
- RULE: SDB is still the law for retroactive child support applications

## REQUIRED READINGS: RETROACTIVE ORDERS

***Lavergne v Lavergne,*** 2007 ABCA 169.

*Facts:* As income increased, the father voluntarily paid more child support

- The father claims that support for the year is to be paid on the income of the previous year, not the same year
- If the opposite is true, then the father is in arrears of $10,500

*Issues:* How should child support obligations be calculated: on the payor's current or past year income?
*Held:* Current income

- The use of the past year's income tax return, without subsequent adjustment to reflect the actual income, is inconsistent with the *Guidelines*' multistep approach to determining income and with the general discretion granted to the court to specific annual income for the purposes of calculating child support obligations.

*Reasons:* As per S(GB) retroactive child support should be calculated by the effective date of notice, and as a general rule should not extend back more than 3 years

- However, where there is blameworthy conduct, the presumptive date of retroactivity moves back to the time when circumstances changed materially
- Section 2(3) of the Guidelines says that the most current information must be used. Section 16 does not indicate any year to be considered
- While the Guidelines method is more complicated than relying only on historical income information, it better fulfills the objective that children should continue to benefit from the financial means of both parents after separation by providing them with those benefits on a more timely basis

Class notes

- Basic principal is that child support is payable on the income made during the year in which the support is due; the child is entitle to be supported according to the payors current income if ascertainable, and if not by a reasonable accurate estimate of the payors current income with an adjustment at years end once the actual income is noted
- In this case the father was attempting to argue that "we actually used last years tax return to figure out child support for this year, so for 2020 support based off 2019 income and in 2021 support is based off 2020, etc
- Court said no – it is current income, and that the amount you made in the current year the child support is owed is what will be due!
    - If basing 2020 support based off 2019 income and in 2020 income comes out and it is off, adjustments need to be made

        - Basing amount off previous years financial disclosure but there is going to be an adjustment once you receive the actual income information for that year
- **RULE**: base on current years income

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## Variations

- Either spouse can apply to proactively or retroactively vary support
- Dealt with section 17 of Divorce Act

*Section 17 of DA*

- **17(1)** A court of competent jurisdiction may make an order varying varying, rescinding or suspending, prospectively or retroactively,
    - (a) A support order or any provision thereof on application by either or both former spouses; or
    - (b) a custody order or any provision thereof an application by either or both former spouses or by any other person
- **17(2) and 17(3)** variation of custody orders
- **17(4)** Factors for child support order
    - Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the Child Support order or the last variation order made in respect to that order
    - What does that mean?
        * Cannot just apply for variation because you don't like the order you need to show that a change of circumstance have occurred at justifying the variation
        * Subsection specifically says that a change of circumstances has occurred in accordance with the applicable guideline → so that means we need to consult the federal child support guidelines
            - **section 14 of the guidelines** provides instances that are allowed for variation
                - **Section 14 of Guidelines:** Circumstances for variation
                    - For the purpose of subsection 17(4) of the act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect to a child support order:
                        * (a) In the case where the amount of child support includes a determination made in accordance with the applicable table, any change in the circumstances that would result in a different child support order or any provision thereof;
                        * (b) in the case where the amount of child support does not include a determination made in accordance with the table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
                        * (c) in the case of an order made before May 1st, 1997, the coming into force of section 15.1 of the act, enacted by Section 2 of chapter one of the statutes of Canada
            - **BOTTOM LINE: IF it is a change that would have meant a different outcome for the original order = variation can be made**
                - i.e. Payors change in income and all of a sudden there making a lot more money → that's a change in circumstance that would justify a variation
                - i.e. change from custodial parenting to shared parenting → that's a change in circumstances that would justify a variation
- **17(6.1)** guidelines apply to variation order
    - A court making a variation order in respect of the Child support order shall do so in accordance with the applicable guidelines
    - **Note**: Just because you're varying the order doesn't mean that you're varying the process used to determine the amount of child support
        - you're still going to be using the presumptive table amount in section 3 and the table amount is still going to be in the presumption again unless you can prove deviation under one of those other sections
            - Table amount is still presumed: however just because you proved undue hardship the first time, this will not be presumed – court will go through whole guidelines process again
- **17(6.2) to 17(6.5)**

- What you need to know about these provisions is that they stipulate that variation can occur that are different from the guidelines, so you can agree to a variation that deviates from the guidelines as long as the court is satisfied that reasonable arrangements have been made for the children;
- Note:this mirrors those provisions under section 15.1 that couples can deviate from the guidelines, they can make their own agreements regarding child support but the court has to be satisfied reasonable arrangements have been made and retain authority to review and order something different; the same is true for variation orders and agreements
    - you can agree to = variation that debars from guidelines if adequate plans have been made for the child, and retain authority to change these agreements

- CHANGE WITH BILL C78: new provision added to section 17 with BILL C78 (will be subsection 6.6), this will say: section 16.3 of Divorce Aact applies when child support order and spousal support order are being varied at the same time
    - So if your making an variation application and you're trying to vary both child support and also support at the same time 16.3 of the divorce act is going to apply to that variation application; and what section 16.3 of the divorce act says is that child support takes priority
    - Example: so if we're in a situation where the payor is seeking a variation application and the payor saying I can't afford to pay both child support and spousal support because my income has decreased and if the court accepts that argument, they're going to make the Child Support order first – give child support priority and then determine whether or not there is anything remaining to satisfy the spousal support order

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## REQUIRED READINGS: VARIATION OF CHILD SUPPORT ORDERS

*Haisman v Haisman* (1994), 7 RFL (4th) 1 (Alta CA).
TEST FOR WIPING OUT ARREARS

*Facts:* dealing with arrears of child support – arrears meaning a debt of child support that the father (payor owes). Arrears emerge when a payor does not pay in accordance to a court order agreement. Payor father was in arrears of child support and he made application to wipe out these arrears and say he did not owe them anymore; wanted the court to say he did not owe the money anymore
*Issue:* in what circumstance should a court retroactively vary an order to wipe out the payors arrears?
*Analysis::* present inability to pay arrears is not a full reason why they should be terminated; There are certain factors to consider ...

- Look at:
    - Nature of arrears and support obligation
        - was it contractual, statutory,judicial?
            - Was it in a court order? Seperation agreement? What was the nature of it
    - Did you have ability to pay it when it was due
        - If you could afford it originally and you just chose not to pay it then that's a consideration
    - What is your ongoing financial capacity
    - What are the ongoing needs of recipient spouse and child
    - What is reason for delay in seeking relief
        - If the payor has let arrears accumulate for months or years comes to court and says well I couldn't afford it at a time that it was due will it help me to come to court earlier if you knew you couldn't afford it why did you just let these arrears pile up when she come back and try to vary the order earlier
    - Undue hardship on the payor if the arrears are enforced
- Onus is on the applicant – the person trying to remove the arrears; But the court will not treat termination of arrears casually it's going to be a very very high threshold
    - Court will not treat termination of arrears lightly.
    - In the absence of some special circumstances, judge should not vary the obligation of child support such to reduce or eliminate the arrears unless the court is satisfied on a balance of probabilities that the former spouse or judgment debtor cannot then pay and will not at any future time be able to pay the arrears
        - Main test: THE ONLY EXCEPTION is if they cannot now pay or will not ever be able to pay the arrears.

*Held:* Court says no; simply building up a lot of arrears is not a reason to forgive them.
*Ratio:* Short periods of inability to pay arrears will not justify vacating the whole amount. To vacate arrears there must be an inability to pay for a substantial period of time and no foreseeable likelihood you will be able to pay them in the future (burden on payor on balance of probabilities)
*Reasons:* Mere accumulation of arrears without evidence of past inability to pay is not sufficient reason to wipe out arears

- Delay enforcing child support order is irrelevant and short-term inability to pay will not justify accumulation of arrears

- One needs evidence of a past inability to pay in order to vary an order

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## Arrears vs. Retro child support

- Arrears: court order that was in place that was not followed (told to pay 500 dollars, and did not pay or only paid part)
  - Delay from recipient to bring order is irrelevant – child should not suffer for the payors delay
- Retro: an obligation that was present but was not necessarily in a court order (you were paying 500, but income increase, and mom wants you to be paying 1000)

ADD IN RETROACTIVE CHILD SUPPORT REVIEW

## REVIEW: GENERAL STEPS IN A CHILD SUPPORT ANALYSIS

1. Does the person being asked to pay child support qualify as a parent? (***See Who Is a Parent/Who is a Child in TWEN***)
   - If yes, move on to step 2
   - If no, end of inquiry

2. Does the child for whom support is sought qualify as a child for the purposes of support? ***(See Who Is a Parent/Who is a Child in TWEN)***
   - **Note:** Often it's going to be obvious they are under the age of 18 so they qualify; if they are over the age of 18 obviously you're going to need to go through the analysis (from those cases we talked about to determine if they still qualify as a child of the marriage)
   - If yes, move on to step 3
   - If no, end of inquiry

3. Is this a variation application? [See *DA*, s. 17]
   - If yes, has there been a change in circumstances? [see *FCSG*, s. 14 to determine]
     - If yes, move on to step 4
     - If no, end of inquiry
   - If no, move on to step 4

4. Determine the Guideline incomes for each parent ***(See Calculation of Income Summary in TWEN)***
   - Note: Determine income guideline for each parent – payors parents income is going to be the most relevant were talking about table amounts and that sort of thing but don't forget that the recipient parents income is going to be relevant in certain circumstances - In shared parenting remember we need to have both of their incomes so we can do the set-off amount because that's one of the first considerations that we talk about under section 9(a) of the guidelines; its going to be a consideration in split custody under section 8 of guidelines; income relevant if dealing with undue hardship claim and standard of living comparison; when talking about section 7 expenses in determining each parent's contribution towards section 7 expenses

5. First determine the base amount of child support owed by the payor ***(See Child Support Summaries in TWEN)***
   - Section 3(1) of the guideline the presumption is always in favour of the Table amount

   Second consider if there a reason to award something different than the Table amount? Whether or not there is a reason why the court can deviate from the table amount:
     - Agreements under s. 15.1 of the *Divorce Act*
     - Split custody
     - Standing in the place of a parent
     - Adult child
     - Shared parenting
     - Undue hardship
     - Income over $150,000
   - If none of the exceptions apply go with table amount as indicated under section 3(1) of guideline

6. Determine which section 7 expenses should be included in the child support order **(See Child Support Summary Part 2 in TWEN)**
   - Guiding principle = split between the parents in proportion to their incomes

7. Amount determined under step 5 + amount determined under step 6 = payor's monthly amount of child support owed

## October 13, 2020

History of spousal support

- Around for a long time; originally called Alimony in 1800s in Britain
    - Basic premiss was that a husband had a duty to support his wife
    - in the historical context of Britain back then it was very difficult to get a divorce - divorce wasn't codified by statute in Britain until the matrimoniale causes act of 1857
        - before 1857 in Britain the only way that someone could get a divorce was by a private act of parliament; which meant most people if they decided to end their marriage stayed legally married but they lived separate lives but did not go through the hassle of going through parliament
            - because the husband and wife were still legally married the husband had a legal duty to maintain and support his wife via alimony payment
                - it was notable that only the husband had the duty to support the wife and the wife did not have any sort of duty towards the husband
                - And that's because at this time in history the men were the property owners and income earners; the wife did not have a means of supporting herself so she was relying on her husband
                    - the marriage contract and by virtue of the fact that they were still married he still had a duty to support her
- 1968 in Canada – the first time that we have a divorce act introduced; it's the first time divorce is allowed by statute; and it's the first time that spousal support is codified federally across Canada
    - Prior to that if spouses were divorcing and they were looking for spousal support, at this point we are no longer calling it Alimony, before 1968 spouses are divorcing and are looking for spousal support there the options were to go to provincial statutes
        - so before 1960 before the divorce act there was a patchwork of spousal support regulations in provincial statutes across the country but generally it was only the obligation of the husband again to support the wife and only he committed some kind of marital misconduct (deserted her; cheated on her) but there had to be some sort of misconduct and it was only money flowing from husband to wife
- Divorce Act of 1968 – first time it is codified in Canada; it allowed on both husband and wife to apply for spousal support from each other
    - it does maintain an elemental fault in it - it doesn't necessarily have to be based on adultery but the courts can consider adultery or desertion or some sort of misconduct when they're asking is file support claim
        - there was a large overhaul to the divorce after 1985 and that's when the misconduct or the fault element of a spousal support application or spousal support claim was removed
            - At this point in history, 1985 in Canada, that's the first time that we have sort of a pure spousal support claim that doesn't have to do with someone committing adultery or some other sort of marital misconduct - looking at the conditions, means, needs and other circumstances of the spouses upon divorce
- 1985 was sort of a watershed moment for spousal support in Canada - it's where a lot of the provisions came into force for the first time; its when we first started having to deal with them
- it wasn't until 1992that we had the first Supreme Court of Canada decision, *Moge v Moge*, where the court started sort of pronouncing what those provisions in the divorce act meant and how claims for spousal support were supposed to operate

Interplay between property settlements and spousal support

- property settlements and spousal support are not mutually exclusive;
    - they're actually very very different and the theories behind them and why they are awarded are very very different
- so property is a presumptive statutory entitlement whereas support is not
    - support is highly discretionary and the person speaking support needs to be able to prove entitlement
- property will be relevant in determining the means and needs of the recipient and in some cases the most important asset to consider is not a piece of property at all but it's the future income stream of one of the spouses
    - is obviously when you're a married couple and potentially your marriage to a high income earner one of the sort of property or financial benefits you get is that you get to share in that high income earners financial stream or income streams and upon divorce when you lose that income stream that is you know can be considered one of the most important assets that you need to determine whether or not needs to be equalized between spouses

        - but of course an income stream is not considered property for the purposes of property division under the family property act so we need to look at different ways to equalize that income stream it's appropriate
            - and that's where spousal support comes in
            - for some couples in fact sharing this income stream so the spousal support claim will be much more important than the property division claim and that's true in cases where there aren't very many matrimonial assets
- Spousal support also achieves different goals than property settlements
    - properly settlements are looking at equalizing property between the spouses
    - spousal support is looking at meeting the needs of the recipients else and looking at compensating there for some of the outcomes that they are experiencing by virtue of the fact that they were in this marriage
- so those are the differences we need to keep in mind when we're talking about the interplay between property and spousal support

Factors to be considered and objectives for awarding spousal support

- spousal support is governed by both the *divorce act* and the *family law act*
    - the divorce act spousal support provisions are obviously going to be used when the couple is seeking divorce
    - the family law act support provisions are going to be used if the couple is unmarried or if they are married but for whatever reason aren't seeking a formal divorce that would access the support provisions of the family law act
- Most of the provisions between the two between the divorce after the family law act are identical; but there are some minor differences
- Regardless of the statute that you're proceeding under, **there are four basic steps to a spousal support application**:
    - The first step is the threshold step which is **entitlement** to spousal support
        - if you were acting for the person requesting spousal support it's not a given that they get it - they have to prove that they are entitled to spousal support
        - so in this way is different from child support - child support is a right of the child, if they qualify the child of the marriage it is automatic you don't have to prove entitlement; install support every single case you have to prove entitlement is the 1st at is the threshold step
    - The second step once you have proven that entitlement exists, is you need to address the **form** of this global support payment
        - are you going to have periodic payments, which you know would be monthly payments at the norm
        - are you going to have a lump sum payment, are you going to have you know the recipient spouse get one giant payment right at the beginning and that's going to potentially satisfy the spousal support obligations for the rest of time
        - there are certain considerations to think about when you're arguing for periodic versus lump sum payments
            - most spousal payments are periodic, meaning monthly - this is because it's taxable when its periodic - so the recipient has to include there spousal support in their income for the purposes of income tax and the payor get deduct their spousal support payments for the purposes of their income tax return
            - Lump sum Payments are tax neutral - no one has to include it in their income; no one gets to deduct it; so lump sum is more akin to child support in terms of its tax treatment (child support is tax neutral)
    - The third step is **quantum**
        - So how much are we actually going to award this recipient either on a monthly basis or lump some if that is the route there going again
        - Generally courts and lawyers are going to resort to **spousal support advisory guidelines (SSAG's)**
            - now these are different from the Child Support federal guidelines in the sense that they are not mandatory; the courts do not need to follow them at all - and they don't give one specific number they give a range (i.e. if the person is entitled to spousal support then they should be receiving between X&Y per month)
            - Often the courts will follow the advisory guidelines or at least take them into account but they are by no means bound by them;
            - they are also relatively new - they have only been enforced in Canada since about 2008 and again when I say enforce do not mean mandatory but they are advisory guidelines
                - they've only been around as since 2008, so that's only about 12 years of having them here, so some people still don't use them and they just sort of make up their own number but the point is that they're there to assist and even if the judge or the lawyers

are arguing that you should not use the guideline numbers, there at least there to sort of frame the conversation

- Before the SSAG's there was absolutely no method of even determining what number should be used to start the conversation for spousal support – the quantum Barton was highly discretionary there was not really a great pattern in the case law should try and figure out what number you should be using it became a little complicated to have their child support number also
    - the SSAG's have helped simplify the determination of quantum in spousal support claims
    - the big point you need to remember is that they are **advisory only – courts and lawyers do not have to follow them**

- The fourth step is **duration**
    - How long are we going to be paying support for
        - so again this is a little bit different than child support - remember under child support you pay child support for as long as the child qualifies as a child of the marriages and its an enduring obligation
        - for spousal support it may not be appropriate to pay support for the remaining lifetime of the recipient; it may only be appropriate to pay their social support for a couple of years while they're transitioning and getting back on their feet;
            - it's really a very fact specific inquiry and analysis
    - the options we have in terms of duration are:
        - **definite** orders - so that means that is a very specified time period and after that amount of time spousal support ends
            - so you will see that sometimes with the course will say "OK yes Mrs X is entitled to support for three years and then it will terminate" - so that three year is considered definite duration spousal support award
        - **indefinite** orders - that doesn't mean that it goes on forever, but this means that there's no specified end date
            - So it's sort of open-ended say "yes Mrs X is entitled to spousal support at Y amount of dollars for an indefinite period of time"
                - So what that means is that spousal support award is going to stay in force until there's reasons for a variation - until there's a change in circumstances that justifies revisiting that order that indefinite order is going to be staying in plate
            - Sometimes indefinite orders will mean for the rest of the recipients life
                - Again it's a very fact specific inquiry
                - especially if the spouses are older when they're getting divorced and it was a long term marriage, the duration indefinite support might very well work out to be that the payor is paying spousal support for the rest of the recipients life
            - REMEMBER: fact specific inquiry and the older the spouses are at the date of divorce the more likely the indefinite is going to equate with forever
        - **Until a specified event occurs** - So you could say OK this spousal support award is going to be in effect for an indefinite period of time or until Mrs x remarried and if she re marries then it's justified in bringing the order back for review;
            - there can be a condition attached to it so it creates a built in review period
                - Examples: until she obtains work; upon remarrying; upon the children moving out
            - When that event occurs they could be saying "ok actually the order is going to terminate at this point or subject to review at this point"

*Divorce Act* & Spousal Support

- Governed by section 15.2 of the Divorce Act
- 15.2(1) Spousal support order
    - A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a supposed to secure pay, or to secure and pay, such lump sum or periodic some or such lump sum and periodic some as the court things reasonable for the support of the other spouse
        - Notes re provision:
            - Grounds the courts jurisdiction to order support

- Basically it is saying either spouse can apply, court has jurisdiction to order support on such an application and it is not mandatory (may order it) and they can either order periodic or lump sum payment
- Securing payment means court has discretion in ordering some sort of security for the payment
    - If worried payor wont follow through with paying support obligation the court has the discretion and jurisdiction to order security for these payments (not common to do)

- 15.2(2) interim order
    - where an application is made under subsection 1, the court may, on application by either or both spouses, make an interim order requiring exposed to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection one
        - Notes re provision:
            - Court has jurisdiction to order interim order
            - I.e. sole earner and upon divorce the wife has no means at her disposal to live or meet basic needs as they are going through the divorce proceedings, the court can order temporary spousal support to support while the issues in divorce litigation are being determined
            - As soon as divorce proceedings have been commenced the court has jurisdiction over spousal support
- 15.2(3) terms and conditions
    - the court may make an order under subsection one or an interim order under subsection 2 for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit an just
        - Notes re provision:
            - Speaks to duration (discussed above): definite; indefinite; or until an event occurs
            - Impose conditions
                - i.e. requirement for payor to take out life insurance policy as a security to provide the recipient with spousal support in the event of the payors death
                    - most common condition imposed by court
- 15.2(4) factors
    - in making an order under subsection one or an interim order under subsection 2, the court shall take into consideration the conditions, means, needs and other circumstances of each spouse including
        - (a) the length of the time spouses is cohabitated
            - Cohabited because that in most cases cohabitation signals economic integration, reliance, certain expectations, dependence, interrelatedness – all speak to entitlement; once you are living together and likely sharing expense those kinds of situations are relevant to entitlement of spousal support
        - (b) the functions performed by each spouse during the cohabitation; and
            - i.e. thing such as how the couple organized in terms of labour and who is going to be income earner, how they structured their respective careers, did one of the spouse have departure from career for children, etc…
        - (c) any order, agreement or arrangement relating to the support of either spouse
            - Relevant if any prenup in place or something of that sort that pre-emptively addressed the issue of spousal support
    - Notes:
        - These factors need to be addressed with regards to the question of entitlement
            - If your making an application for spousal support and you have not addressed these factors, it is a problem – the court will always consider these factors
        - "Shall" court is required to consider these factors
        - "Conditions, means, needs and other circumstances" – code for full discretion of the court
            - What does this phrase mean?
                - Under conditions: You're going to be looking at the conditions obviously of either spouse
                    - this is going to mean things like their age whether or not their sets a suffering from any illness or disability the presence or absence of any dependence or children that one of them has to care for, what their training is, their work history, is their station in life etc
                    - anything like that will go to consideration of their condition
                - Under means: is referring to their financial picture

            - Not simply looking at income – we are looking at any financial asset available to them to get a clear picture of what each spouses means are
            - I.e. income, inheritance, property, debt, capacity to access assets or capacity to earn, etc
            - Bottomline: we need to look at both parties overall financial situation
            - Keep in mind: the presence of substantial assets does not dispose of this consideration nor of spousal support claim
        - Under needs: This is defined in relative terms - we need to look at the needs of each spouse in the context of the marriage; not looking at just basic subsistence needs but looking at needs relative to the marriage
            - Might look at budgets, pre-separation standard of living
        - Under other circumstances: anything that doesn't sort of fit under conditions means or needs can fit under other circumstances
            - Likelihood of remarriage for spouse would be included under this category
            - Retirement or cessation of employment would be included
    - Have to consider factors but maintain discretion over whether or not support will be ordered
- 15.2(5) Spousal misconduct
    - In making an order under subsection one or an interim order under subsection 2, the court shall not take into consideration any misconduct of a spouse in relation to the marriage
        - Note: just because one spouse may have engaged in misconduct that does not automatically entitle the other spouse to spousal support or if the recipient engaged in misconduct that does not automatically disentitle the spouse from support
- 15.2(6) Objectives of spousal support order
    - An order made under subsection 1 or an interim order under subsection two that provides for the support of a spouse should
        - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or the breakdown
            - It means that we want to recognize that in certain situations marriages can economically disadvantage a spouse
                - i.e. so the classic example of that is the stay at home mother - if they make an agreement at the couple that once they have children the wife is going to stay home and care for the child and the husband is going to remain in the workforce and provide for the family
                    - that might work well for them as an arrangement when they are together but when they split up that ways has become economically disadvantage by that arrangement she has lost out on years in the workforce, she has lost out on income, she may not be able to obtain a position in her chosen field, and depending on how long she has been out of the workforce she is missed out on promotions, on seniority things like that and so she has been economically disadvantaged because she would not be in this economic situation if she had not made the decision to stay home basically for the good of her marriage or for the good of her family;
                        - she would not be in this economic situation if she had not made the decision to stay home for the good of marriage/children/family
                    - the husband has been economically advantaged by the wife sacrifice; he has been able to go out into the workforce And continue his career and advance his career without the constraints of sort of domestic responsibilities you know he's not gonna have to worry about staying home if the kids are sick because he knows his wife is going to be home staying home with children when they're sick, he is going to potentially be able to work overtime and earn extra money and climb his way of the corporate ladder because he knows that his wife is going to be there to take care of the household and so in this sense because of her domestic Labour at home he has been economically advantaged
                        - he has had uninterrupted time in the workforce he has had the opportunities for advancement he has had the opportunities to build up his seniority or to access promotions or things like that and so now at the end of the marriage he's sort of up here and she sort of down here

        - One of the objectives of spousal support is too recognize that disparity – disadvantage and the corresponding advantage – and try to make an award that remedies that
    - (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
        - So what this is talking about is the built-in impacts of raising children that are not already included in a child support
            - If there are dependent children of the marriage, there is child support and the child support is already going to be address the base amount of child support the section 7 expenses (going to address sort of the basic costs of raising a child) but there's also built-in impacts to the custodial parent of raising these children that are not included in the base amount of support under a child support order
                - Justice laurdebue talks about it in *Moge* - the wife, generally it's the way forward talking about these types of applications, when she is now the custodial parent for single parents and is expected to re-enter the workforce career is still going to be taking backseat to the children (i.e work around kids schedule and child care)
            - there may be financial consequences arising from care of children and from what a wife suffered as a consequence oof the marriage by giving up her career to care for the child
    - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage
        - Focus is on post-marital need of both spouses, but in general the recipient spouse
        - so we're looking at a recipient spouse who without spousal support is going to be unable to you know meet her basic expenses and obviously she's suffering an economic hardship caused by the breakdown of marriage because the marriage had stayed intact she would not be in this position where she struggling to meet her expenses
            - that's something that needs to be addressed by the court
        - The question is what does the recipient need in order to prevent hardship?
    - (d) insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time
        - This is a signal to the recipient spouse that they cannot just rely on spousal support to meet their expenses and that they need to work towards self sufficiency of their own
            - its qualified in so far as practicable
                - this means in certain situations is self-sufficiency maybe an unrealistic goal
                    - i.e. if we have a divorce that's happening very late in life and let's say the recipient spouse is 60 or 70 years old and she's been out of the workforce for 50 years and even before that she didn't have very much training or education because she got married very in that circumstance it may be very unrealistic to assume that she's going to achieve self-sufficiency
            - It's a factors to consider but it is not absolute; factor that needs to be looked at in the context of the couple and whether or not it is reasonable to assume the recipient spousal will be able to become self-sufficient without spousal support
- Points to highlight re objectives:
    - It's obviously a combination of a means and needs analysis and a combination of compensatory objectives
        - Subsection (b) is looking at means an needs and what do they need to prevent hardship
        - Subsections (a) & (b) we are looking at compensation
            - this recipient has potentially suffered an economic disadvantage from the marriage, from the care of the child and might still be suffering the financial consequences – what do we have to do to compensate the recipient for those sacrifices
    - often see in the case law that they discuss compensatory and non-compensatory objectives; generally subsections (a) & (b) are classified as compensatory (saying an economic sacrifice was made and need to compensate for that) and (c) & (d) are looked at as non-compensatory objectives (looking at means and needs of the spouse and saying ok what kind of support order are we going to need here in order to meet the persons needs and prevent economic hardship, promote self-sufficiency)
    - No single objective is more important than the others
        - Re *Moge* justice says "self-sufficiency is not the paramount consideration, all four objectives need to be considered and no single objective is more important than another"
    - The objectives Frequently overlap but they obviously can operate independently

        - these objectives apply equally to all of types of family (high income, low income, etc)
        - there are not fixed rules but you need to consider them in the context of a spousal support application
- Section 15.3
    - 15.3(1): priority to child support
        - Where a court is considering an application for a child support order and an application for spousal support order, the court shall give priority to child support in determining the applications
    - 15.3(2): Reasons
        - where, as a result of giving priority to child support, the court is unable to make a spousal support order or the court makes disposal support order in an amount that is less than it otherwise would have been, the court shall record its reasons for having done so
    - 15.3(3): consequences of reduction or termination of child support order
        - where, as a result of giving priority to child support, a spousal support order was not made, or the amount of US Postal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the purpose of applying for a spousal support order, or a variation order in respect of the spousal support order , as the case may be
    - What this means?
        - Child support takes priority
        - Does not mean the spousal support application is automatically cancelled but rather just at that point it cannot be granted due to insufficient funds but at any point circumstances change and the recipient spouse can still prove entitlement to spousal support then the opportunity to apply for spousal support may be revived

[ENTITLEMENT]

## REQUIRED READINGS: FACTORS TO BE CONSIDERED AND OBJECTIVES FOR AWARDING SPOUSAL SUPPORT

*Moge v Moge,* [1992] 3 SCR 813.

- Followed as the leading case today and often *Moge* and *Bracklow* are considered sort of the twin pillars to spousal support
- This case was released by the Supreme Court in 1992 and it was actually the very first Supreme Court interpretation of section 15.2 of the divorce act; it was a unanimous decision by the court and of course there was a concurring opinion

*Facts:*

- It was a long marriage, 20+ years, with children. Both the husband and wife were immigrants; the wife had only a grade 8 education and she spoke very poor English. The husband during marriage worked as a welder during the day and the wife works during the day as the homemaker taking care of the children cooking cleaning etc and then when the husband got home at night she would go and work as a janitor in a hotel.
- when they separated in 1974 the wife was receiving $150 per month in combined child and spousal support; so she had still one dependent child at home at the time of the divorce or separation and she was receiving $150 to cover both that child support and her spousal support;
- in 1987 this $150 dollars month was increased to $400 so 200 was meant to go towards transport 200 was meant to go towards spousal support;
- in 1989 the husband has been applied to very the spousal support and it was terminated altogether – in 1989 she was no longer receiving any spousal support notwithstanding that by this point she had lost her job she was living on unemployment insurance and she was basically subsisting radical poverty lines
- Meanwhile the husband who is by no means independently wealthy, but he was making much more than the wife, and he had remarried so he had assistance in contributing to the finances of his household,
    - Notwithstanding all of these factors the spousal support was terminated when the husband made his application to vary
- The wife appealed to the Manitoba Court of Appeal and support was reinstated at $150 per month for the wife and the husband appealed this to the Supreme Court of Canada and that's how we get *Moge* → that's how we get this decision

*Issues:* The main issue is whether or not the wife was entitled to spousal support for an indefinite period of time?

- At this point she already had been receiving spousal support for almost 15 years and the husband was arguing that that was enough and that her spousal support should be terminated
- so the court had to consider how we can determine this issue and what kinds of considerations do we need to lookout when we're looking at a spousal support application

*Held:* Appeal dismissed – economic self-sufficiency is only *one* factor

- The husband appeal was dismissed and the order of the Manitoba Court of Appeal was restored; was required to continue paying spousal support for indefinite period of time

*Ratio:* Marriage is a joint venture.

- There should be an equitable distribution of the disadvantages or other economic consequences of marriage upon marriage breakdown.
    - All four objectives are equally weighted, none of priority, all must be considered and balanced
- All four of the objectives defined by the two sections of the Act must be taken into account when spousal support is sought to be varied. No single objective is paramount
- There is no presumption that support is to be time limited, or have a definite end

*Discussion:*

- Court went through the history of spousal support theory in Canada up until that point
    - so up until *Moge* there was the pellet trilogy - the court talks about this - there were three cases that were sort of leading spousal support cases of untill *Moge* and they were called Pellet, Richardson and Karen
        - they were three separate cases and they basically all said the same thing and they operated on what was called at the time a "clean break" analysis
            - Say OK yes in some circumstances a wife may be entitled spousal support on the breakdown of the marriage; but it should not be for an indefinite period of time it should not be for a long period of time we need to promote the clean break from the relationship
                - If the relationship is over then the party should go their separate ways and they should not have these ongoing financial obligations to each other
            - within the clean break analysis was the concept of deemed self-sufficiency
                - so the wife notwithstanding that she might have been out of the workforce for years, she was deemed to be self-sufficient when she came out of this marriage, she needed to go out and get a job and support herself and there was no consideration of whether or not she was going to be able to do that. The court just assumed that that was something that she would be doing . It was very needs focused and a very narrow perspective
                    - so if the wife had just enough money to meet her basic expenses then spousal support was often not ordered or if it was it was ordered in a very small amount for a very short period of time ( such as a transition period)
        - the focus was on what does she need, if she already has it she doesn't need more, we need to promote a clean break from the marriage and get her back on her feet so she is self-sufficient
- *Moge* takes us back to the objectives in section 15.2(6) of DA
    - Give full breadth to compensatory objectives found there
    - L'Heureux-Dube analyzes the four objectives in s 17(7) and s 15.2(6) of the *Divorce Act*
        - 1. Economic disadvantage from the marriage breakdown
        - 2. Apportionment of financial consequences of care of the children
        - 3. Economic hardship resulting from the breakdown of the marriage
        - 4. Promotion of self-sufficiency of the parties within a reasonable timeframe following the breakdown of the marriage
            - Self-sufficiency is not attained simply by finding a full-time employment at minimum wage; the recipient's employment and earnings must be at least somewhat related to the marital standard of living and that enjoyed by the payor's spouse
- So justice L'Heureux-Dube specifically typically says (at page 203 CB casebook) that the focus of the inquiry backing spousal support after the marriage has ended must be a fact of the marriage in either impairing or improving each party's economic prospects though
    - is that notion of did the wife making economic sacrifices for the good of the marriage and if she did she deserve to be compensated for that
- Moge emphasizes that all four objectives must be considered equally
    - so here the husband was arguing you know after 15 years of me paying support to her she should be self sufficient by now it's an objective in the divorce act and we need to essentially terminate styles of support to show her that she's switching the self-sufficiency
    - Court said no that is not how the objectives work under the divorce act; self efficiency is but one of the factors, it is a consideration, but it cannot be paramount
        - No single objective is paramount, and the promotion of self-sufficiency should not be given more weight than the others
- Court says that each spouse will still have an obligation to contribute to their own support in a manner commensurate with their ability; but that's the point there is that it needs to be assessed in a manner commensurate with their abilities.

- so the wifes abilities in this situation were very limited she'd been out of the workforce for awhile she didn't speak very good English she had a domestic responsibilities at home she didn't have a very high level of education she had no skills or training so self-sufficiency for Mrs Moge in this case would look very very different then self-sufficiency for a wife that maybe was only in the marriage for three years who had you know who was a lawyer who would maybe only stay home for limited months to care for the child, etc.
    - Need to be assessed in a manner commensurate with there ability
        - And the flip side just because self-sufficiency may have been attained does not necessarily dispose of the matter there are so three other objectives that need to be considered under the divorce act and in particular the compensatory objectives have nothing to do with self-sufficiency
        - so even if the spouse is self-sufficient they may still deserve or they may still be entitled to spousal support because they are entitled to compensation under the compensatory objectives
        - Still have to assess whether the spouse is entitled to compensation to account for the economic disadvantages caused by the marriage or its breakdown
- Court detailed analysis on compensatory objectives – gives detailed analysis on the types of economic advantages and disadvantages that can go along with your long term marriage; she demonstrates a deep understanding of the economic consequences of marriage and its breakdown as well as the dramatic economic impact of childbearing and child rearing
    - so this is where being the custodial parent after the marriage breakdown comes into play - so the economic disadvantage may continue to build after the marriage if the wife is solely responsible for the care of the children;
        - quote at page 210 that sort of addresses this impact:
            - *"often difficulties are exacerbated by the enduring responsibility for children of the marriage. The spouse who has made economic sacrifices in the marriage also generally becomes the custodial parent. the diminished earning capacity with which an ex-wife enters the Labour force after years of reduced non participation will be even more difficult to overcome when economic choices reduced, unlike that of her ex husband, do to the necessity of remaining within proximity of schools not working late remaining home when the child is ill etc."*
                - so not only are we looking at the time period of the marriage to assess where there's been economic advantages or disadvantages or financial consequences arising from the care of the children, but we also need to keep in mind that those financial consequences arising from the care of the children may endure for the custodial parent even after the marriage is over.
- there was also a lot of discussion in the case about the notion of the traditional versus the modern marriage
    - This traditional versus modern dichotomy was talked alot about in case trilogy's leading up to Moge - they were often saying "OK maybe in a traditional marriage where the wife stayed at home and did all of the domestic Labour husband went out and did all of the labour, maybe in those types of situations spousal support may be warranted, but in modern marriages where the wife is working outside of the home, there's no reason why she can't be self-sufficient once the marriage ends …so in those situations is going to be much less likely that she's going to be entitled to spousal support at the end of the marriage"
    - And this was actually one of the arguments that the husband made on his appeal to try to terminate the support with that
        - Stated listen this was not one of those traditional marriages like yes she took care of the children but she also worked outside of the home for the entirety of our marriage so for this reason then you know we should be considered a modern marriage and spousal support should be terminated
            - And the court said no this doesn't really matter the court should not put too much weight on the notions of the modern versus the traditional marriages each marriage needs to be looked at on its own facts and what might prove entitlement in the context of one marriage may or may not prove entitlement in the context of another marriage so just because Mrs Moge didn't work outside the home during the marriage does not mean that she didn't make economic sacrifices for the marriage, It doesn't mean that she wasn't still economically disadvantaged her employment was secondary to her husband's employment and on top of that she was responsible for all of the domestic responsibilities so even if she wanted to go out and work during the day she couldn't because she had children to care for at a house to clean and cooking to do and laundry to do and etc so her husband gotta work during the day and come home and be done where she worked at home during the day and then went out and worked cleaning hotel rooms at night in a job that was completely secondary to her husband's daytime employment
                - so that's what we have to look at, not whether or not she worked outside the home and therefore it qualifies as a farm marriage
- The Court also said that notwithstanding self-sufficiency sufficiency there still may be a need for compensatory support

- there may still be entitlement even if the spouse doesn't "need the support", even if the spouse is able to meet their basic means would be income they have on disposal - that does not end inquiry, they still might be entitled to spousal support on the basis of the compensatory objectives;
- The goal is equitable sharing of the of the economic consequences occasioned by marriage and its breakdown
  - when we're assessing the equitable sharing of economic consequences occasioned by the marriage and its breakdown, standard of living is going to be relevant
    - We need to look at both pre separation and post separation standard of living;
      - in terms of pre separation standard of living we need to look at what the marriage was like in order to determine if one spouse requires non-compensatory support
        - So this is a means and needs analysis and remember where this goes back to the factors and objectives this is a consideration under section 15.2(6)(c) economic hardship
          - hardship is not just assessed in light of how they lived during the marriage, and we don't want their standard of living to go from here during the marriage to all of a sudden down here post marriage because they're the only ones bearing the economic consequences of the marriage
    - that needs to be shared - so standard of living during the marriage is going to be relevant to assess whether or not that recipients post separation standard of living is reflecting an economic hardship
      - What the court said is that you also need to look at post separation standard living because discrepancy between these two spouses standards of living after separation might be indicative of a disadvantage suffered by one spouse because of the marriage
        - we're looking at while they were both here during the marriage and now they're separated and the husband is here and the wife is down here well in terms of a meet the needs analysis she needs some support to bring her back up to the pre separation or the marital standard of living but she might also deserve some support to apportion that those economic consequences of the marriage between them because if he's appearing she's down here that's pretty clear evidence that she suffered an economic disadvantage because of the marriage or its breakdown
    - so standard of living is relevant both during the marriage and post separation
  - the court also says that the duration of the marriage should be taken into account
    - Justice laure deabu said "The longer the relationship endures the closer the economic union the greater will be the presumptive claim to equal standards of living upon its dissolution"
      - if you have a long marriage like the Moges and they have been living together for 25 years and they were both here During the marriage for 25 years and then all the sudden they separated he appeared she's down here well that's not going to sit very well with court they're going to say it's not fair that after 25 years she should be plunged into poverty in he should be reaping the benefits of her sacrifices
  - The length of the marriage is relevant and both pre separation and post separation standard of living is relevant
- L'Heureux-Dube, writing for the unanimous Court, said marriage should be thought of as a joint venture, and if economic consequences fall disproportionately on one spouse, spousal support can redress the balance
  - While spouses would still have an obligation after the marriage breakdown to contribute to their own support in a manner commensurate with their abilities, the ultimate goal is to alleviate the disadvantaged spouse's economic losses as completely as possible, taking into account all the circumstances of the parties, including the advantages conferred on the other spouse during the marriage
- Ultimately: basically stands for is that under the new divorce act the means and means test is no longer the exclusive criterion for support, compensation and entitlement must be considered
- Notes: So there are two additional points for *Moge* to bring your attention:
  - They're sort of opener discussion in the context of spousal support but it's very interesting and arguments that you could potentially use one day if you're ever arguing you spell discord application
  - First: The Court talks a lot about the feminization of poverty - in other words she acknowledges demonstrates that a gendered understanding of how marriage differently affects women's and Mens earning capacity and socialized roles. She specifically says the feminization of poverty is an entrenched social phenomenon – divorce and its economic effects play a role in this… men tend to maintain the standard of living they had before a divorce, while women and children Sink into poverty → support can be a significant factor in alleviating this situation.

        - so that's something to consider under the means and needs or the non-compensatory objectives of spousal support - specifically under subsection 15.2(6)(c) where it talks about economic hardship arising from the breakdown of the marriage;
            - if the women and children are constantly sinking into poverty and support can help alleviate that, its going to help achieve one of the non-compensatory objectives
    - Second: both judgments use econometric data – both the majority and concurring opinion said "it is not always, or even often Necessary to prove the extent of compensatory entitlement" - So what you're saying is you don't actually need to prove that because the wife was out of the work place she missed a promotion, you don't need to point to a specific promotion she would have gotten if she stayed at her job – some of these things can be assumed because it is something we can accept when we look at the economic data;
        - person making this spousal support application dose not have to prove that because you've been out of the workforce for 20 years you've lost future earning power …that pretty self-explanatory; you shouldn't have to improve that conclusively – some of these conclusions will flow naturally
        - Some general factors that could lead to compensatory award would be things like:
            - loss of future earning power
            - Loss of seniority
            - Missed promotions
            - Lack of access to fringe benefits
            - Inability to upgrade skills through employer
        - Factors that can be assumed from the conclusion you have been out of the work force for a long time and things that need to be considered
- Bottomline of *Moge:*
    - Understanding what it means to being entitled to compensatory support is important
    - Not only am I meeting my basic needs but I also need to meet my needs in comparison to my standard of living during the marriage in addition to that even if I'm able to meet my needs even if I'm able to still maintain my marital standard of living I might still be entitled to spousal support on the basis of compensation because I made economic sacrifices and those sacrifices and financial consequences are going to continue now even though the marriage is done and it is not just about economic sacrifices for the recipient but also about economic advantages for the payor
- Conclusion: what it is generally talking about is entitlement -we're talking about how do you qualify or how do you prove that you are entitled to spousal support
    - Court says look at the objectives, prove it either based on compensatory or non-compensatory objectives; but that's still only step one spousal support
    - Moge addresses entitlement – need to still consider form, duration and quantum

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## REQUIRED READINGS: FACTORS TO BE CONSIDERED AND OBJECTIVES FOR AWARDING SPOUSAL SUPPORT

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*Bracklow v Bracklow,* [1999] 1 SCR 420.

*Facts:* The parties were married in December 1989 after living together for four years

- During the first two years of their relationship, the appellant paid two-thirds of the household expenses because she was earning more money than the respondent and because her two children from a previous marriage were living with them
    - After 1987, they shared the household expenses equally and this continued while the appellant was working
- When she became unemployed, the respondent kept the family going
- The appellant had had various health problems from the beginning of the relationship and, in 1991, she was admitted to hospital suffering from psychiatric problems
- She has not worked since and it is unlikely that she will ever work again
    - Except for periods when the appellant was too ill, the parties divided household chores
- They separated in 1992 and were divorced in 1995
- The respondent has remarried, and his new wife is employed
- The appellant obtained an interim spousal support order of $275 per month, increasing to $400 per month on May 15, 1995
- She also receives $787 monthly in disability benefits
- The trial judge found that no economic hardship befell the appellant as a consequence of the marriage or its breakdown, nor were her health problems due to the marriage
    - He also found that there was no express or implied agreement between the parties that they were responsible for each other's support

- The trial judge concluded that the appellant was not entitled to support from the respondent, however, he ordered the $400/month payments to continue until September 1996, "a decision based upon the [respondent's] proposal not upon the necessity of law"
- The Court of Appeal affirmed the decision.

*Note:*

- what happened in bracklow is we had the exact opposite situation then what we had in Moge.
  - In Moge was had a long term marriage and the wife had both great financial need and large compensatory entitlement at the end of the marriage
  - whereas in Bracklow we have a marriage of short duration (3-4 years), but the wife had health problems that left her unable to work. The husband knew that the wife had health problems that would set up the relationship, Anna these health problems worsened during the course of the relationship to the point where the weight was unable to work at the time of separation and was completely dependent on husband financially
    - So we had very few compensatory elements here but we had great need on the part of the wife
      - the loss of financial support constituted an economic hardship to the way under 15.2(6)(c)
      - she had non-compensatory entitlement because she would completely financially dependent on the husband
- When the case came out about 7 or 8 years after Moge, it was hoped that this case it would expand our understanding of how spousal support would play out in a purely non-compensatory scenario; unlike Moge which had both compensatory and non-compensatory elements, bracklow had only noncompensatory elements.
  - Decision did not answer that or expand our understanding
- What it did do was help set the stage for the development of Spousal Advisory guidelines because it demonstrated the difficulty of answering the question of how much for how long – which what the SAGG's were developed to address

*Issues:* Is there an entitlement to support when there was no economic hardship created by the marriage or on the marriage breakdown?

*Held:* The wife's entitlement was on a need only basis, so the spousal support would be less. But spousal support should be awarded

*Ratio*: There are three bases for support in Canada – compensatory (*Moge*), contractual (based on agreement), and non-compensatory (*Bracklow*)

- Non-compensatory support orders are need where there is a disparity of needs/means after marriage breakdown, even if that disparity is not causally connected to the marriage
- Where the support is non-compensatory, it may be that only part of that need can be addressed by spousal support

*Take away of Bracklow:*

- 1. justice McLaughlin says there are three heads of support: contractual (like if you have if you pre contracted for support in a prenuptial agreement or something like that), compensatory, and noncompensatory
- 2. The same factors that speak to entitlement also speak to quantum and duration
  - for example if you have some entitlement, you have some sort of entitlement but it's not extremely strong like Mrs Moge, if there's some entitlement but not a lot and we're not really sure then you can address that by awarding support on that weak entitlement but by ordering a smaller quantum and duration
  - Spousal support can be designed to fill a partial need – do not have to make the recipient completely whole if there entitlement is somewhat dubious
- 3. Non compensatory support is based on a social obligation model
  - upon marriage dissolution the primary burden of meeting the need in disadvantaged falls on his or her former partner rather than the state; so in this situation Mrs Bracklow had no option if she wasn't going against all support and she was going to be going on social assistance – court said (Mclaclin J) when you get married you are agreeing to certain things and one of those things is the support of spouse, it is aa social obligation model of marriage. So in divorce if the recipient spouse is financially dependent then that responsibility falls on you as their spouse – it should not fall on the state but on the spouse because of marriage and social obligation.
    - Non-compensatory analysis – we are looking at marriage and spouses as having the primary responsibility to support each other; in some marriages there is a basic social obligation to pay spousal support BUT "Marriage per say does not entitle you to spousal support" - so just by the fact that you were married to this individual does not automatically mean that it is relevant or appropriate
      - marriage is not an insurance policy boring meal ticket and therefore will not necessarily provide a basis for support you still have to prove your entitlement
      - In Bracklow, Mrs. Bracklow proved her entitlement on a purley non-compensatory basis – she needed that support because she was to ill and based on the social obligation model of marriage the responsibility fell on her husband but because it was a weak entitlement the court said they are going to address this at the quantum and duration stage to make up for the fact that it was a short marriage - will set it at a certain amount for a certain duration (definite period – 5 years)

# October 15, 2020

Review: Four steps in spousal support inquiry/application

- Entitlement
    - This is the most important question of the application as it is the threshold
- Form
- Quantum
- Duration

*Note: quantum and duration are typically decided together – the question of "how much for how long"?

Review: Entitlement

- Talked about the compensatory and non-compensatory objectives for ordering spousal support;
    - The compensatory objectives cover economic advantages and disadvantages arising from the marriage or its dissolution/breakdown or financial consequences arising from the care of the children in the marriage (per *Moge)*;
        - The first compensatory objective is to cover economic advantages or disadvantages; stereotypical example to prove compensatory entitlement is the long term marriage with husband and the wife is the stay at home homemaker cared for all the children and all of the domestic Labour at while husband was out in the workforce. Especially in long term marriages.
            - this means that the wife gave up her career for the good of the family - she is missing out on not only an income stream, promotion, seniority fringe benefits, on the job training, increased earning potential, lots of different economic factors → that's an economic sacrifices she made for the good of the marriage that she deserves to be compensated for upon marriage breakdown
            - on the other hand the husband has probably received an economic address which because of the wax Labour he has been able to go over freely seek paid employment because he doesn't have to worry about staying home when the children are sick or getting home in time to make dinner or those types of things he's freed up from the domestic Labour and able to feed pain employment and for that reason he's been economically advantage
        - The second compensatory objective Is to compensate a spouse for any financial consequences arising from the care of the children - this doesn't just mean departures from the workforce in order to have the children although that is part of it you have to take maternity leaves and things like that into account but also if they you know choose to leave their career altogether to stay home and also the ongoing financial consequences that came through the children even after marriage breakdown is the way it's going to be the custodial parent meaning that her job is still going to take backseat to raising the kids because she's the only one at home is she going to have to forgo overtime or pick a more flexible job that allows for sick leave when their children are for that those types of days… if those considerations diminish her choice in terms of career paths and their financial consequences on-going financial consequences arising from the care of the children that changes are compensation.
    - The two non-compensatory objectives (per Bracklow) reliving any economic hardship arising from the marriage or its break down or promoting self-sufficiency of each spouse
        - this is more of a need based analysis - if the spouse needs support after the breakdown of the marriage in order to cover their expenses and then those are the non-compensatory objectives that we're looking at
        - standard of living is going to be relevant under these two objectives you need to look at the <u>pre separation standard of living</u> to see what the level of the couple lived at while they were living together as well as the <u>post separation standard of living</u> of each spouse to determine what the recipient spouse is need as post separation
        - No longer the day where spousal support only covered basic needs of recipient and now we want to bring the recipient to a level of comfort as close as possible to the marital standing.
        - Self-sufficiency is a goal of SS but not paramount and it is not the only factor the court needs to consider – a spouse has the responsibility to contribute to their own support after the breakdown of the marriage but only commensurate with their abilities and in certain situations self-sufficiency may be completely unrealistic
            - Example *Moge* is one of those situations that it was unrealistic to expect Mrs Moge - who was untrained, had low education, poor English skills, with getting older and had been out of the workforce for a while - to become self-sufficient at her age

## REQUIRED READINGS: FACTORS TO BE CONSIDERED AND OBJECTIVES FOR AWARDING SPOUSAL SUPPORT

*Chutter v Chutter,* 2008 BCCA 507.

*"This case displays the problem of rich women who apply for spousal support"*

Note: this case demonstrates the real application of the *Moge* principals

- It gives you a real life example of how the principals apply

*Facts:* The couple was very well off – the spouses quit their jobs to open a water slide business together

- On divorce, after a long term marriage, each received about $4mil in assets
    - The husband kept the business while the wife got the house, RRSP and shares
- Prior to and during the wife was employed as a dental hygienist but at the time the marriage ended she was only working part time and she was assuming it was not going to last much longer due to physical ailments.
- Also during the marriage she worked as a dental hygienist but she structured her career around carrying for the kid – this was requested by the husband (he did not mind if she worked but he wanted her home everyday when the son got home from school); she found a job which allowed her to be home by 3 every day and her career took a back seat to raising the son and her domestic duties
    - She noted at one point in the marriage she wanted to re-train as a real-estate agent but they decided it was infeasible career choice based on the husband career and how much he travelled for business and thus her need to raise the kid
- At separation she was working part time not withstanding her large property settlement
- she was applying for both compensatory (economic sacrifices she made) and non-compensatory settlement (because of her inability to work full time due to physical ailments and considering her pre-divorce standard of living)
    - Facts to support her compensatory claim - Early on the marriage she quit her job to move with the husband to assist in a joint buisness venture running a campground with a water slide and she did a lot of physical work that summer while they prepared the campground to open, she oversaw the renovations, she did clerk work, She was also the one doing the domestic work caring for the couple's infant son and cooking all the meals for the workers. Eventually after that summer they sold the campground and they bought exclusively into the manufacturing scale of water slides and this job proved very lucrative for them as a family but it took the husband all over the world he was constantly traveling he was very busy with the business and that left the wife at home doing the majority if not all of the domestic Labour and child rearing;
- She applied for support

*Issues:* Whether the wife was entitled to spousal support either on a compensatory or non-compensatory basis, and if so, whether the *Spousal Support Advisory Guidelines* ought to be applied in determining the amount and duration of the support

*Held:* Yes, entitled to spousal support – compensatory and non compensatory.

- Consideration must be given to the *SSAG* in arriving at the support to be paid

*Reasons:* s 15.2 of the *Divorce Act* is the main provision governing entitlement to spousal support. S 15.2(6) provides that a spousal support order should meet the following objectives: (see *Moge*)

- In order to achieve a fair and equitable distribution of resources, all 4 of these objectives should be examined
- Having regard to these policy objectives, the courts must consider the conditions, means, needs and other circumstances of the spouses, including the factors set out in s 15.2(4)
    - A) the length of time the spouses cohabited
    - B) the functions performed by each spouse during cohabitation
    - C) any order, agreement or arrangement relating to support of either spouse
- The claim for support in this case was based on compensatory and non-compensatory principles

  ***Compensatory Support*** – intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic disadvantage upon the other spouse
    - Rooted in the "independent" model of marriage
        - Each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have suffered otherwise
        - The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success

  ***Non-compensatory Support*** – grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his/her former partner rather than the state.
    - Aims to narrow the fap between the needs and means of the spouses upon marital break down
        - Is therefore referred to as the "needs and means" approach to spousal support

        - The concept of "needs" goes beyond basic necessities of life and varies according to the circumstances of the parties
    - Need does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence
- Self-sufficiency, a spousal support objective primarily related to non-compensatory support, is a relative concept informed by the standard of living previously enjoyed by the parties

*Application*

- the husband said she was not entitled because of her large property settlement, that goes to the assessment of her means (one of the factors under section 15.2(4) is you have to consider conditions, means, needs and other circumstances of each spouse); she had large means as she got this large property settlement – so she should not be entitled
    - Here because the court got away from not awarding spousal support because the recipient already had enough they said just the mere fact that the recipient has a high amount of assets does not preclude spousal support - the wife here had an entitlement based on compensatory elements; she had as a result of the marriage and there had been a corresponding advantage to the husband
- *Compensatory grounds*
    - the husband argued that because she was working as a dental hygienist both at the time of the marriage and at the time of the marriage breakdown this proved there was no economic disadvantage
        - the court disagreed with this - they said no
        - at page 227 the court quotes "the fact that the support seeking spouse when employed outside the marriage or engaged in the same career at the end of the marriage at its start does not necessarily preclude entitlement to spousal support on compensatory ground"
            - so just because she was a dental hygienist at marriage and a dental hygienist and separation does not mean that she doesn't qualify for compensatory support in this case; her employment prospects were restricted by her domestic role and at the specific request of her husband her career was secondary to her role as a mother and that proves an economic disadvantage
    - at page 227 of your casebook the court quotes "the business was started in their home with the appellant assisting the respondent by acting as secretary and taking orders these facts highlight the joint efforts of the party in establishing the business. Moreover it was because the account took on the role as the parent primarily responsible for the care of their style that the respondent was able to pursue an expand whitewater both in canada and abroad the accounts direct contribution to the business as well as her indirect contribution by acting as the primary caregiver and the household manager offered an economic advantage to the respondent in that he has gained many years of national and international business experience so not only has the wife suffered an economic but the husband has gained a corresponding economic advantage because of her efforts"
    - Court found compensatory entitlement on those grounds
        - The appellant's direct contribution to the business, as well as her indirect contribution by acting as the primary caregiver and household manager, offered an economic advantage to the respondent in that he has gained many years of national and international business experience
- *Non-compensatory grounds*
    - also said that relative standards of living are important to consider - at page 226 of the casebook there's a quote that says "an analysis of the support seeking spouses needs under non-compensatory support (IE the objectives of sections 15.2(6)(c) and (d) of DA) requires some consideration of the standard of living enjoyed by the parties during the marriage And by the other spouse after the marriage. in the context of a long term marriage involving a sharing of resource is the concept of need should take into account the relative standards of living of this process following the marriage breakdown
        - so this is something we saw in *Moge* and it's something that's being repeated in *Chutter.* We are not ordering support just for basic subsistence (not just too cover basic need) – it is not fair for the recipient spouse to have a certain standard of living during your marriage and then because of the marriage breakdown all of a sudden be plunged down into poverty; especially if she's subsisting down here and the husband up here because he gets to keep a lot of the economic advantages that he gained during the marriage - so we need to not only look at the marital standard of living but must try to give both spouses of lifestyle that brings them close to the marital status but we also need to look at their respective post separation standard of living
    - Court also discusses self-sufficiency: self sufficiency again is a relative concept and is about more than basic subsistence
        - the husband was saying the wife is self sufficient - not only does she have career, not only is she able to meet her basic needs and her basic expenses but she just got $4,000,000 in property; there's no reason

that she needs support for me - she's not starving, she's not at the poverty line, her income exceed her expenses, she's good, she doesn't need support → she's self sufficient already.
    - the CA said we're not looking at self-sufficiency just as whether or not she's able to meet her budgeted expenses but it is a relative concept and is about more than basic subsistence
    - Page 226: "self sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation and that they can reasonably anticipate after separation" - the relative standards of living analysis goes not only to whether or not one spouse is suffering economic hardship but also goes to whether self-sufficiency has been obtained
  - In terms of non-compensatory support, if the appellant must encroach on her capital assets to maintain a standard of living comparable to that which she enjoyed during the marriage, then arguably she is suffering hardship from the breakdown of the marriage and experiencing the loss of marital standard of living, since her capital would deplete over time and eventually she would be in a worse position that had the marriage continued
    - She has not established self-sufficiency based on what she had before
    - The husband has
    - While no evidence that she missed promotion or further opportunity as a dental assistant does not mean that her future prospects for financial success were not diminished
    - Also failed to consider that both parties quit their jobs to start this business which is now the source of the husband's income and retaining it gave him many business opportunities she does not have
    - Resumption of a career post marriage does not preclude a finding of economic disadvantage
    - Entitled to compensatory support because her income earning capacity was reduced while his was advanced by the mutual decision to stay home
      - Therefore, entitled to non-compensatory support
  - The court found she had non-compensatory entitlement as well because when assessed according to the marital standard of living she did need support to address those non-compensatory objectives
- Property Assets: the big sort of issue that came up here with the wife's property settlement
  - there's no denying that she was very well off, she had $4,000,000 in matrimonial assets after disposable, and this was the husband's main argument (if she's already had $4,000,000 in the bank or in other assets why am I still being tapped to support her after the breakdown of our marriage)
  - Court said property is important to consider in the sense that property division effects the relative conditions, means, and needs of the parties. However, the presence of a property settlement should not operate as a barrier to spousal support if entitlement is otherwise made up
    - Page 230 – "as the consequences of their respective roles in the marriage the appellants earning capacity has been negatively affected and conversely the respondent training capacity has been enhanced. In cases such as this courts have recognized that the fact that the wife continued to earn a reasonable income post-separation does not entitle her to spousal support. Similarly the fact that the appellant has received substantial assets does not of itself operate to deny a claim to spousal support. The respondent received roughly the same value of assets and the asset division did not take into account the question of entitlement to spousal support"
      - Saying yes she got assets but so did the husband and more so the husband got those assets without having to say he is giving up entitlement to support;
    - Property is relative but not determinative and we cannot just preclude support based on the fact the spouse received a high settlement because the husband is receiving the same but is not having the economic consequences of the marriage breakdown that the wife is having
    - Husband mentioned selling or renting out a room – the court said we should not require the wife to encroach on her capital obtained in the matrimonial property settlement
      - "If the appellant must encroach on her settlement capital to maintain a standard of living comparable to that which she enjoyed during marriage, then arguably she is suffering hardship from the breakdown after marriage and experiencing the loss of the marital standard of living, especially since her capital would deplete overtime and eventually she would be in a worse position that had the marriage continued"
        - Saying $4,000,000 in assets but that doesn't mean that she's earning an income stream from these assets; it is inappropriate to tell her to cash in those assets and use the money for her needs because we're not telling you tell it to do that
      - The TJ's emphasis on finding that the assets received in the division of property can provide the wife with a standard of living comparable to that which she enjoyed during the marriage overlooks

the principles underlying compensatory support where one spouse has been disadvantaged by the marriage or its breakdown relative to the other spouse
        - Therefore, the wife is entitled to compensatory support as she has been economically disadvantaged, and the respondent advantaged by the marriage and its breakdown
    - You need to consider property settlement when addressing means, needs and conditions of each spouse on the spousal support application but property does not preclude support
- Spousal Support Advisory Guidelines
    - Not mandatory - Use only once entitlement has been determined
    - Useful tool in determining quantum and duration
    - Denote a range, not a set figure
    - Suggested range was $4000-$5000 and decided hers should be lower because
        - The RRSPs would have a tax shelter increase in value and the husband now had no RRSPs
        - The wife chose to keep an excessive house
    - Gave her $2800 because individual factors lowered award

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Impact of about property settlements on spousal support

- Property division should always be determined first because it does have an impact on spousal support
    - it goes to the means of the party under the conditions, means, needs and other circumstances analysis - so when we're going to a determination of spousal support the property division has to be done or should have been done first
- *Per Chutter:* a large property settlement will not automatically dis intitle exposed to support and this is particularly so where the conceptual basis for support is predominantly compensatory
- Need to consider whether the matrimonial assets received are income producing or non-income producing
    - In *Chutter* case: the husband received the same value of matrimonial assets as the wife but his were generally income producing assets while the wife's were not (hers were capital assets) - and there is going to be a difference between the two… so if the recipient spouse is applying for spousal support but they received a large property settlement and a large portion of that property settlement contains income producing assets well that likely reduces that recipient spouses needs – so it likely will give her a weaker entitlement on the non-compensatory objectives when talking about an income producing asset
        - There will be a distinction made between income producing assets and non-income producing asset; an asset that is income producing may affect at least non-compensatory entitlement to spousal support
    - generally the rule is a recipient spouse should not be required to encroach on their capital in order to meet their basic needs
        - this rule works both ways - a financially dependent wife, who is incapable of achieving economic self-sufficiency will not be expected to erode her capital assets to support herself while her former spouse continues to build and retire and nestage preserve her asset base but conversely a husband with insufficient income to pay spousal support is also not obliged to erode his capital assets for the purpose of paying support, where the overall means of both spouses are relatively comparable

Note: if spousal support and your divorced you go under divorce act but if you are applying and your legally married and not seeking divorce you use family law act and if your applying for adult interdependent support you apply under family law act (in addition to proving you qualify as an adult interdependent partner)

Spousal support provisions under *Family Law Act*

- The provisions governing spousal support or adult interdependent partner support in the family law act are found in sections 56 to 63
- Section 56: Every spouse or adult interdependent partner has an obligation to provide support for the other spouse or adult interdependent partner
    - Mutual obligation of support
    - The first step under this inquiry is to prove you qualify under the term spouse or adult interdependent partner
        - Spouse – legally married
        - Adult interdependent partner – in a relationship of interdependence etc.
- Section 57(1) spousal or adult interdependent partner support order
    - Subject to this section, the court may, on application by a spouse or adult independent partner make an order requiring a spouse or adult interdependent partner to provide for the other spouse or adult independent partner
        - Able to make an application for court to enforce this obligation

- **Section 57(2):** sets out pre-requisites for awarding support
    - Under divorce act the pre-requisite is that divorce proceeding have been commenced but under the family law act the pre-requisites for awarding support are set out in subsection 2
    - The court may make an order under the section only if
        - (a) in the case of spouses,
            - one or both of the spouses have obtained a declaration of irreconcilability under section 83
            - the spouses are living separate and apart
            - although the spouses are not living separate and apart:
                - this spouses are, in the opinion of the court, experiencing such discord that they cannot reasonably be expected to live together as spouses
                - one spouse has without sufficient cause refused or neglected to provide the other spouse with the necessaries of life , including food, clothing and shelter when capable of providing them
        - (b) in the case of adult interdependent partners
            - one or both of the adult interdependent partners have obtained a declaration of irreconcilability under section 83
            - the adult interdependent partners are living separate and apart
            - although the adult interdependent partners are not living separate and apart:
                - the adult interdependent partners are, in the opinion of the court, experiencing such discord that they cannot reasonably be expected to live together as spouses
                - one adult interdependent partner has without sufficient cause refused or neglected to provide the other spouse with the necessaries of life, including food, clothing and shelter when capable of providing them
- **Section 58:** Factors
    - See statutory material
    - Note: section 58(a) lists the same thing as the divorce Act in section 15.2(4)
    - (b), (c) and (d) is not in the divorce act
        - Note: section 58(c) and (d) The new partner contributing to the household does not necessarily have to be a romantic or conjugal partner if either one of the former spouses are now living with a roommate and that roommate is contributing to insuring expenses that can be considered as a factor the court can look at when deciding whether or not there's entitlement to supporting
- **Section 59:** Misconduct
    - Remember under the divorce act spousal misconduct is irrelevant - the courts cannot consider spousal make contact whatsoever when deciding whether or not to order support
    - Under the family law act spousal misconduct is considered irrelevant except as far as it either:
        - (a) arbitrarily or unreasonably precipitates, prolongs or aggravates need for support
        - (b) Arbitrarily or unreasonably affects the ability of the spouse or adult interdependent partner having the support obligation under the order to provide the support
    - **Bottomline**: misconduct is irrelevant unless the misconduct somehow effects the recipients need for support or effects the payors ability to pay support, then it may be considered on application as well the consideration of misconduct is mutual - it's not just about what they payor may or may not have done to the recipient but is also about what the recipient may or may not have done that affects the paper
- **Section 60:** Objectives of spousal or adult interdependent partner support order (identical to DA objectives under section 15.2(6))
    - a spousal or adult interdependent partner support order should
        - (a) recognize any economic advantages and disadvantages to this poses or idle interdependent partner arising from their relationship or its breakdown
        - (b) apportion between the spouses or adult interdependent partners any financial consequences arising from the care of any child of the relationship over and above the obligation apportion between the spouses or adult interdependent partners pursuant to the Child Support order or a child support agreement
        - (c) relieve any economic hardship of the spouse or adult interdependent partner arising from the breakdown of the relationship
        - (d) insofar as practicable, promote the economic self-sufficiency of each spouse or adult interdependent partner with a reasonable period of time
    - First two = compensatory; second two= non-compensatory
- **Section 61:** Priority of child support
    - This is also a provision in the divorce act

    - if a recipient spouse is making an application for both child support and spousal support or if the payor is being obligated to pay both child support and spousal support and the payor does not have the ability to pay both then child support trumps
    - In subsection 3 It says a reduction in child support is a reason for a spouse to apply to vary spousal support; so if child support obligation disappears that is a reason why the recipient spouse might be able to make an application to revive that spousal support obligation or entitlement (section 15.3 of DA)
- Section 62: spousal or adult interdependent partner support agreement
    - subsection (1) outlines that couples can make an agreement providing for spousal support or waiving the right to spousal support
    - however, under subsection (2)they cannot make an agreement varying an existing support order - so there's already a court order in place stipulating spousal support they cannot make an agreement that overrides that work order;
    - subsection (3) talks about variations to existing agreements so the court is only justified in interfering in an agreement and making award that differs from the terms of that agreement if the agreement is inequitable and one of the listed circumstances exists
        - high bar need to prove the agreement is inequitable and that one of the listed circumstances occurred
    - Note: no corresponding provision in DA regarding agreements – the principals surrounding agreements are in case law
- Section 63: termination of support
    - Subsection (1) Except where the core orders otherwise, a spousal or adult interdependent partner support order terminates on the death of the spouse or adult dependent partner in respect of whom support is paid
        - Under DA 15.2(3) the court can attach terms, conditions or restrictions to support order and it was noted a condition could be a life insurance policy in order to secure support on event of payor death; well under the family act the same thing can occur – general rule is death terminates a support order UNLESS otherwise ordered by the court
    - Subsection(2) the termination of a spousal or adult interdependent partner support order does not affect any arrears owing under the order before it is terminated
        - If the payor is in arrears at time of the death that death does not wipe out arrears

[FORM]

Interim spousal support

- Support can be awarded pursuant to section 15.2(2) of DA – specifically outlines courts jurisdiction to order interim support
    - it's essentially the same jurisdictional provision as a permanent support order just specifies that it can be an interim support order
- the purpose of such an order is Is to provide a reasonably acceptable short term solution until settlement negotiations occur or the matter goes to trial where an indepth examination can be undertaken
- so this is the situation where the parties have separated and are not in a place to be in doing final negotiation - maybe they haven't figured out parenting our property or child support yet they haven't gathered their financial disclosure you know there's sort of rate for beginning of their separation, trials down the road settlement, negotiations are down the road - but the recipient spouse needs money to live in the meantime - so that's where an in terms also support allocation comes in
    - probably special chambers application in order to fully canvassed the arguments for entitlement which means the longer application, the afternoon chambers but it's all gonna be based on affidavit evidence and it's apparently summary procedure just as sort of like a holding pattern to get the recipient to be able to move her way through the process and cover her basic needs and expenses and etc while there figuring out all of the details of the divorce and separation
- because of this the nature of this interims support order the court does not have to embark upon a detailed examination of the merits of the claims as would be required for permanent spousal support
    - So this is because interim support proceedings are summary in nature and they provide what lawyers like to call “rough justice” at best;
    - so it's not going to be a perfect solution but it's going to be something to get the recipient through until a final determination on spousal support and other issues can be made
- Student question: if there way off in either direction – either too much or too little – for interim support does the judge order that the difference be made up at some point?
    - essentially just because interim spousal support has been awarded at a certain amount does not fetter the trial judges discretion to order something completely different at trial and the trial judge also has discretion to retroactively vary the interim support order to address any overpayments or underpayments
        - so as an example let's say the way was awarded $5000 a month of interim support and at trial, the judge decided that that was too high she should have only been getting $2000 a month in support they have the

discretion to go back and retroactively vary that order and say OK she should have only been getting $2000 the payor overpaid by an amount so we are going to satisfy that repayment and there are crafted ways to do repayment (ie. May get more property division, may pay off by certain reduction in support, etc.)

- there are certain general principles governing interim support
    - you need to show a basis for entitlement – needs to be an argument that there is a basis for entitlement
        - Often said it should be only awared where there is a prima facie Has been made out
    - issue generally is on an interim school support order is that because of the judge is deciding it based solely on affidavit evidence thus it is generally pretty hard to determine whether or not compensatory objectives are present
    - So this means that the applicants needs and their respondents ability to pay assume greater significance on an intern application than they would on application for permanent support ; it becomes a bit more of a needs focus inquiry at the interim stage
        - Typically because the marriage breakdown was recent time – had less time to find suitable employment or obtain requisite skills to become employed so they might be in like a very dire need situation
        - the property of the spouses still remains to be divided so the court isn't going to have the opportunity to look at that full picture so they're looking sort of just needs at this time
            - so it becomes more of a non-compensatory analysis at the interim stage
                - Does not mean compensatory objectives cannot be assessed when trying to determine a prima facie case for entitlement but it just means it generally is harder to prove by affidavit evidence
    - Should be sufficient to allow the applicant to be living at the same standard of living if the payors ability to pay warrants it (relative standard of living both pre and post separation)
        - again all of the objectives need to be taken into account and the courts should not unduly emphasize any one of the statutory considerations above the others
            - in particular the need to achieve economic self-sufficiency by the point of an internal order is usually a less significance as there just been less time for the recipient too seek self-sufficiency or work towards self sufficiency
- Interim support is generally going to be awarded within the range suggested by the *spousal support advisory guidelines* unless truly exceptional circumstances exist and this is because it's a summary type of proceeding and *the spousal support advisory guidelines* are going to be sort of your safest bet to get you in an acceptable range as sort of a holding pattern or stock definition until you get to trial
- trial judges not bound at all by the interim order; court has unfettered discretion to determine the appropriate disposition at trial, after a full investigation of the facts, and if the trial judge finds it appropriate can retroactively vary interim support order to address any overpayment or entropy they have discretion to do so
- Appeals from interim orders are really discouraged - it's generally better to just move the matter on quickly to trial an argue for the trial judge to retroactively vary the order to address overpayments or underpayments than it is to appeal the interim order - you would really only appeal the interim order if the trial was way way off and payor could not make those payments
    - Generally, the better option is to move that matter on to trial and letter the trail judge deal with any potential defects of the interim order

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## REQUIRED READINGS: INTERIM SPOUSAL SUPPORT

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***Anand v Anand 2016 ABCA 23***

*Facts:* Husband was making huge amounts of money

- Wife was only making modest amount
- Wife applied for interim spousal support until the divorce trial was heard
    - Awarded $5000 in interim support until they could address the matter in an vivo noche special chambers hearing
    - At the special chambers hearing the interim order for support was increased to the amount of $15,000 per month
- Husband appealed the interim order of $15,000 per month

*Issues:* What amount of spousal support is reasonable on a temporary basis pending trial?

*Held:* ABCA upholds the $15k support order

- Court emphasised the following principles:
    - On an interim application the court is doing its best to provide Rough justice based on limited evidence
        - page 242: court of appeal has recognized that interim orders are often made on an incomplete record - and chambers judges do the best they can to set an internal balance between the parties until the matter can go to trial.
            - Court basically stating that it is not going to be perfect you're just trying to get something in place to allow the parties to get through to trial until final determination can be made

- The nature of an interim spousal support inquiry is slightly different than a final determination of spousal support
    - in particular the focus is generally on non-compensatory objectives or a means and needs analysis
        - they say that interim orders of spousal support are often treated differently than spousal support awarded after trial
            - In the evidence concerning family assets and economic consequences of the marriage breakdown may not be fully developed so greater significance is placed on the parties means and needs while the other factors and objectives are to be taken into account as far as practicable
                - so just because the focus becomes on means and needs at the interim stage does not mean you completely ignore all the other factors in objectives you still need to consider them insofar as you're able to based on the affidavit evidence in front of you but it just means those types of analysis are going to be harder at the interim stage so that's why the focus becomes on those non-compensatory outcomes
- the court says the marital standard of living is relevant to assessing the recipients in term needs
    - so we're seeing this time and time again marital standard of living is relevant - we're not just talking about basic needs - were talking about what can allow the recipient to remain as close as possible to the marital standard of living
    - the court says what considering needs, the court must consider need relative to the station in life the parties have achieved before the collapse of the marriage, through this prism where there is an ability to pay the court must determine a reasonable standard of living
- the court emphasises There is a very high standard review and this should discourage parties from routinely appealing in term orders
    - the very last paragraph of the judgment states this court has repeatedly urged that parties not waste finite time and money appealing in term orders; time and money better spent achieving an equitable settlement or getting the final determination at trial of all matters in issue
    - Appeals should under taken in rare circumstances and the better strategy is to work to get the matter to final resolution; only in those rare circumstances where it would be impossible to meet the order and trail is a long way off that you would consider appealing

<u>*Ratio*</u>: Considerable deference is owed to spousal support orders due to their fact-based and discretionary nature

- Support orders, especially interim support orders, should not be overturned on appeal "unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong

<u>*Reasons*</u>: In *Moge,* the court made three general observations: the distinction between "traditional" and "modern" marriages is not very useful

- The support provisions of the *Divorce Act* are intended to deal with the economic consequences for both parties of the marriage on its breakdown
    - What the Divorce Act requires is a fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown for both spouses
- Interim spousal support orders are often treated differently than spousal support awarded after trial, in that evidence concerning family assets and economic consequences of the marriage breakdown may not be fully developed, so greater significance is placed on the parties' means and needs, while the other factors in s 15.2(4) and the objectives in s 15.2(6) are to be taken into account as far as is practicable.

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Lump sum Spousal Support

- Divorce Act Section 15.2(1) and (2): when talking about permanent orders and when talking about interim orders it says the court has the ability to order such lump sum and periodic sums as the court thinks reasonable for the support of the other spouse
    - So those are two options for form - form is generally going to be either lump sum or periodic that means:
        - Lump sum: you're going to get one big stuff at the beginning and then that wipes out the spousal support question for the rest of time because you've received all of your spousal support money up front or
        - Periodic: periodic is the same as child support where you're just getting a payment every single month
    - There is also the ability for a court order a combination of the two
        - for periodic support to continue for a certain amount of time and then end with a lump sum payment then terminate the spousal support operation
        - have a lump sum right off at the front and then a time limited amount of periodic support at an that terminates disposals cord obligation

        - Those are all possibilities under the court's jurisdiction but generally we're going to be looking at either purely lump sum or purely periodic
- For the most part periodic payments are going to be the norm but it is still important for you to remember that the court does have jurisdiction to award lump sum payments or a combination of the two
- In either situation the same statutory criteria applies: so you still must prove entitlement first with reference to the factors and objectives set out in section 15.2 (4) & (6)
    - Court is careful when ordering lump sum to caution the parties that it is not to be used as a mechanism for redistributing property under the guise of spousal support
        - so it can't be that the court thinks the property division was unfair so they're going to give a lump sum spousal support to equalize the property division - that's not a proper use of a lump sum support payment
            - it cannot be used as a way to redistribute problem
- Remember: re lump sum v periodic payments - Is that they have different tax treatments; so that these tax consequences must be taken into account when deciding whether to order a lump sum award
    - periodic payments are taxable – the recipient has to Include spousal support in their taxable income for the purposes of paying income tax; payer gets to deduct their spousal support as a deduction or to reduce their taxable income tax
    - lump sum is tax control neither party it has to pay tax on it and neither party gets a deduction for it so this tax consequences need to be considered when determining whether a lump sum awarded appropriate
- Examples under which a court might decide that a lump sum payment is appropriate:
    - Well one might be the pair has substantial assets but limited income so if they're not going to be able to pay a monthly award of periodic support because their actual income stream per month is limited but they have a lot of assets that they'll probably able to use to fund a lump some support that might be reason to order lump sum
    - another reason might be that the payor has a history of default with respect to periodic payments so the recipient's not going to be receiving her periodic payments so it might be a better idea to give it all to her up
    - the payor has an unstable employment record or his income is unpredictable
        - we don't want to open the door to constant applications for variation based on situations and payors income - so it might just be a good idea to order a lump sum right up at the front and then not have to deal with spousal support as the income fluctuates
    - one other reason might be is if the recipient needs some transitional capital to either kick start some education or some training or allow her to purchase a suitable residence for her in the children or something like that so a transitional capital need is sometimes a reason that courts were people order lost some support
    - often lump sum support will be ordered in order to allow the parties to achieve finality without further contact or conflict
        - So if this is a situation where you know maybe it's long term marriage with no kids or a domestic violence situation or something where it would be in both parties best interest to not have continued contact with each other once all of the divorce issues are finalized then a lump some support payment maybe appropriate in that type of case because it doesn't hurt her doesn't require the parties to continue in contact while these payments are being made; can make a clean break once the lump sum is paid out
    - However, you need to keep in mind Whether or not the payer has the ability to pay a lump sum support payment without undermining his future self sufficiency; so we don't want to say OK yeah along some going to be a good idea in this situation for these factors but the payor doesn't actually have the ability to pay that, so we're going to do it anyway, he can figure it out… that's never going to happen
        - Must be consideration of whether the payor has the ability to pay lump sum; if doesn't have the ability then no lump sum
- General principals: lump sums are highly discretionary and fact specific and periodic payments do remain norm

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## REQUIRED READINGS: LUMP SUM SPOUSAL SUPPORT

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*Davis v Crawford 2011 ONCA 294*

- the wife was awarded $135,000 in lump sum spousal support and the husband appealed
- Ultimately the appeal was dismissed
    - the husband had argued that lump sum payments are sort of an unusual remedy and the court should only order them in unusual circumstances
    - the court disagreed with this argument and said it's not restricted to ordering lump sum payments in unusual circumstances. Said if parliament intended that lump sum payments were only supposed to be used in exceptional circumstances they would have said so somewhere in the legislation but the jurisdiction to order lump sum support

is contained in the exact same provision as the jurisdiction to order periodic support so it is not to be construed as an exceptional remedy
    - however they did accept that a payors ability to pay a lump sum support is an important consideration and that a lump sum payment should not be made under the guise of spousal support as a way of redistributing matrimonial assets/property
- Confirmed those two general principles however it did say that there is a distinction between the purpose and the affect of an order
    - So the court recognized that every time a order of a lump sum is award the affect is going to be that we are transferring assets from the payor to the recipient; The real question in any particular case is the underlying purpose of the order
        - so if the purpose of that locks on payment is to achieve some other objectives other than transferring assets then it's acceptable → need to distinguish between the purpose and effect
            - the effect is always going to be transferring assets but the purpose cannot be – the purpose needs to be for a reason justifying the support order (not a method of redistributing property)
- Page 245: "any court considering a lump sum award must weigh the advantages against the disadvantages this is going to be a highly fact specific inquiry but they do set out some examples of possible advantages is or possible disadvantages so again these are laid out at page 245 the case
    - The advantages of making section award will be highly variable and specific, they can include but are not limited to, and then they go through something examples of what advantages of a lump sum might be
        - Terminating ongoing contact between is the possible advantage; providing transitional capital to meet an immediate need on the part of the recipient spouse might be an advantage; And ensuring adequate support will be paid in circumstances where there is a real risk of nonpayment of periodic support might be an advantage;
    - but again the court is very specific that it needs to be weighed against the possible disadvantages and they also set out some examples of what reconstitute our disadvantage of along some award
        - so why might be and this is a very big one the real possibility that the means and needs of the parties will change overtime leading to the need for a variation
            - so remember we talked about child support and it's going to come up again in spousal support that once a permanent order is in place in order to change that order you need to prove a material change in circumstances and then the number could go up or go down for spousal support based on what that material change is, if you have a lump sum support there's no ability to vary it you can come back ten years later and say oh actually now my income has gone down and I need to call back some of that lump sum award - that's not a possibility. You are paying it out to completely satisfy your spousal support obligation and it doesn't matter what happens in the future and it also doesn't matter what happens to the recipient in the future so if they fall on hard times and there needing extra support they can't come back to their former spouse and ask for an increase in support because they've already accepted the lump sum in full satisfaction of their support entitlement
                - so this is a real large disadvantage of a lump sum payment; it means both sides are giving up their rights to apply for variation if there's a material change in circumstances
        - Difficulties in calculating an appropriate award for lump sum support – from the payors perspective The fact that they don't get a tax deduction for paying support is also a disadvantage of an worker
        - These are examples of what a disadvantage might be and they specifically say that its going to be variable and highly fact specific;
    - The courts reiterate the importance of weighing the advantages and disadvantages of ordering the lump sum award before making that order
- Lump sum payment was awarded In order to facilitate a clean break between the parties and because there was a real concern that the payer would not pay periodic support - that's what the trial judge found that's why she ordered lump sum support and that award was upheld on appeal

## October 20, 2020

REVIEW:

- *Chutter* Case which expanded part of on the compensatory a non-compensatory at basis for entitlement to install support - and in particular it was sort of an example to give you guys about how the principles from mode would be applied in a school support application and it also demonstrates well the interplay between pretty and spousal support
    - remember property division is always going to be determined before spousal support is determined because it's relevant to the means any of the parties which is something that needs to be considered under section 15.2(4) DA
        - but a large property settlement does not mean that the recipient or the person applying for spousal support is automatically disentitled to spousal support - still have to look at all the factors and objectives in particular
            - if the recipient has a strong compensatory basis for spousal support high property settlement would not be a reason to erase that
        - also need to consider whether the assets that are being received through the matrimonial property settlement are income producing or non-income producing
            - Because generally they're not going to be asking support applicants to encroach on their capital in order to meet their needs
                - if the asset produces income it's certainly reasonable to assume that the recipient can live off part of that income stream but depleting their assets by encroaching on the capital is generally something courts aren't going to do when thinking about the interplay between property and spousal support
- Interim orders and lumps on orders
    - In what circumstances those will be ordered
- Four basics of spousal support: Entitlement, form, duration, and quantum

Duration of spousal support orders
(Variation of spousal support & Termination of spousal support_

Quick Summary: Duration, as contemplated in **section 15.2(3)** of the *Divorce Act*, can take a number of forms
- An **indefinite** periodic award does not mean indefinite but rather there is no end date
- Another type of award is a **time-limited award** where there is a discernible end to spousal support
- Another type of award is a **review de novo award** which operates as a sort of "check-in" after a certain even happens
- **Section 17** allows for variations when there are material changes in circumstances (note that remarriage does not automatically terminate spousal support, but things like losing your job, becoming employed, retirement, etc.)
- There are **staggered awards** where the amount of spousal support changes over a set time, or on the triggering of an event. There is much discretion given to the court in deciding the type of award and duration of spousal support.

- Duration types spelled out in the *Divorce Act* 15.2(3)
    - 15.2(3) Says the court make an order under subsection one, which is a final order for social support, or an interim order under subsection 2, which is an interim order for spousal support, for a definite or indefinite period or until a specified event occurs and may impose terms conditions or restrictions in connection with the order as it thinks fit or just
- What are the options for the duration of Spousal support order
    - **Indefinite** – does not necessarily mean forever but means no specified end date
        - No end date - runs until vary or terminate the order
        - Basic premiss for variation is that there needs to be a material change in circumstances or reason to vary the order
        - An indefinite order will run Until there is a material change in circumstances justifying a variation or until there is a reason to terminate the worker
        - the two biggest reasons to terminate the order are remarriage or death
            - there are certain considerations that go along with each of those
    - **Definite/time-limited –** order that lasts till the happening of a specific event

- Courts will sometimes say one is entitled to support until an event occurs and upon the event the support will terminate
    - Specific event at which support will terminate
- Used generally as aa means to promoting a dependent spouse return to economic self-sufficiency - where that spouse could be responsibly excepted to upgrade skills and become sufficient in the near future
    - Promotes the dependent spouse to generate self-sufficiency because support will run out
- Courts generally said definite or time-limited orders are more appropriate in circumstances where there is not a large compensatory entitlement
    - i.e Bracklow – short marriage and wife did not have much compensatory basis for support (compensatory entitlement was weak) but she had a large non-compensatory entitlement and the court ordered time-limited support
- Courts said definite or time limited order may not be appropriate or have no place in certain circumstances, especially when the dependent spouse lacks marketable skills or has suffered a permeant disadvantage from the role assumed during a lengthy marriage; on-going parental responsibilities may make fixed term support in appropriate
    - i.e. moge – long term marriage, had huge economic disadvantage arising from breakdown of marriage, minimal marketable skills, poor English, older … in that type of situation a definite or time limited support order is not appropriate
    - i.e. marriage with young children – it may not be clear how long the custodial roles will be ongoing so it may be inappropriate to order a specified end date while that parent is still dealing with the financial consequences of her ongoing parental duties/responsibilities
- Once time-limited support ends/expires they can make an application but onus on dependent spouse to prove why they need that support extended
    - Presumption is that support and the payor doesn't need to do anything to argue that support should end that the term of the court order and if that court order needs to be varied the recipient spouse has the onus of proving why it needs to be varied and why it needs to continue

- Order subject to review – either after specified event or after a fixed period of time
    - Does not terminate automatically but subject to a review
        - Court will look at the order and see if support should continue and if it is appropriate
        - Does not necessarily mean onus is completely on the recipient to justify why support should be continued but gives the opportunity for the court to revisit and review the order in cases they think indefinite support may not be appropriate
    - Distinguishable from a variation order
        - Variation orders effect duration but need proof
            - If apply for variation need to meet the threshold that a material change in circumstances has occurred before the court will consider variation
        - orders subject to review can be reviewed without proof – gets reviewed no matter what the circumstances are (changed or unchanged)
    - Reviews will generally be granted for a specific reason that is reasonably contemplated at the time or the original order but about which there is no certainty
        - Often used iin situations where the recipient is working towards partial or full self-sufficiency
            - so if one of the considerations is whether or not the recipient is going to become employed full time in your future the court can say OK we're going to order support until such time as she becomes employed full time as a teacher and the reason they're doing that is because if she is employed full time, it may affect the entitlement or the quantum or the duration of the support order but due to the fact not existing at the time of the original application it needs to be subject to review – it is reasonably likely to occur but not in existence at time of application so the court needs to recognize that and not be subject to the high threshold of material change in circumstances
        - Reviews should be limited to when facts are uncertain but will be determined by time of review
            - Appellate courts said courts should not use review as indiscriminately- they are an expensive return to litigation that can be tough on the ongoing relationship
            - So it's not something that courts should order at the matter of course it needs to be limited to circumstances where it's likely that the circumstances are going to change in the near future and it's reasonably foreseeable at the time of the application
    - Reviews are not mandatory termination periods
        - it is not the same as definite or term order, it is a review not mandatory termination

        - the court must consider the factors and objects under DA in accordance with the scope of review granted in the previous order once coming to its decision on a review application
    - Review applications are not a rehearing – only consider the scope of review granted in the actual order
    - **Example**: if the court says your entitled to X amount per month until such a time if you become employed full time as a teacher and then the order is subject to review - they can only consider the review in the context of how the employment full time as a teacher
        - has changed the circumstances so I had to change the conditions means needs or the other spouse
        - has it alleviated any of the non-compensatory objectives
        - but they have to limit it to that very narrow inquiry of how the employment full time as a teacher has changed things as that was the original scope set out in the order
- **Termination**: When courts are discussing duration and they make an order subject to termination upon an event the court has full discretion the courts have in determining termination event
  Two events most used: remarriage or death
    - Sometimes it will be the court instituting the termination clause of the order or sometimes it is one of the parties applying for variation based on one of those circumstances (remarriage or death)
    - **1. Remarriage/cohabitation** (typically of recipient but of either party)
        - Historically was automatic – considered as a terminating event – provision removed
        - Now requires application under section 17.1 and 17.4.1 of DA
            - if applying it is a variation so go under variation provision
            - Person applying needs to show the remarriage or cohabitation constitutes as a material change in circumstances
                - Remarriage and cohabitation do not automatically constitute a material change in circumstances and even if it does, it is only one factor to be considered on the termination application
                    - Change from historical ways – historical evolution
        - Where remarriage of recipient spouse is relevant the burden falls on him or her to prove continued support is justified notwithstanding the re-partnering
            - If the payor applies for variation based on recipient remarriage, the burden is on the payor to prove that the remarriage is a material change in circumstances; if proved the burden shifts to recipient to show why continued support from the payor is neccesary notwithstanding the remarriage
                - Ultimately the effect of the remarriage should be determined in light of the rational upon which the original order was based
            - If a needs-based order – an order based almost exclusively on non-compensatory objectives (i.e *Bracklow*)
                - so it needs based order for spousal support, it may be terminated by a court if the recipient remarries because the recipient is now sharing expenses with or being supported by a new partner and therefore her need is reduced or eliminated - it takes away the basis for that order if she no longer has need or non-compensatory objectives
                - When considering the implications of a recipient's remarriage upon a needs-based order there is two questions that need to be asked
                    - **Does the recipient spouse have a present need for support?**
                    - **Does the new partner have a legal obligation to contribute to the expenses?**
                        - Are they legally married?
                            - i.e *Bracklow* – social obligation model of marriage
                        - Cohabitation
                        - Fact specific
                    - These questions will be considered in the analysis under section 15.2(4) when considering conditions, means, needs and other circumstances
                    - **Note**: Its not automatic that because she remarried support is terminated – court discretion – open to the judge
            - If the spousal support was compensatory in nature remarriage may not justify its termination
                - Where prior spousal support order contains a compensatory component the following questions are appropriate

            - Has the recipient spouse overcome the economic disadvantage arising from her/his role in the marriage so that there is no basis for compensatory support?
            - Has compensatory concerns been fully addressed as the date of the termination application
        - Summary: there are two sets of questions that need to be consider on a termination application that is brought about by virtue of the recipient's remarriage
            - two questions relating to the non-compensatory objectives
                - needs based
            - two questions relating to the compensatory objective
            - And if the original order was based on both types of objectives then you have to go through the analysis on both sets of questions
                - These are the types of questions courts will ask to get to the kinds of information they need to know if the recipients marriage constitutes a change in material circumstances and if it does whether or not the underlying basis for the orders continues such that she/he has remarried and is still entitled to support
    - 2. Death
        - termination on death - the general rule is that in the absence of any specific direction that the spousal support order should survive the death of either party (payor or recipient) the support order terminates on the death of either spouse
            - a specific provision in the *family law act*, section 63, talks about the death of the recipient - so unless the court orders otherwise if the recipient dies the support order terminates
        - general rule applies globally across both family law and divorce act for the payoff so if they were dies and this court order terminates unless there has been a special terminal condition inserted into the spousal support order binding the payers estate
            - remember we talked about that sometimes the court will order after her restriction such that the pay or is required to take out a life insurance policy and name the recipient ask the beneficiary in order to secure his payment of spousal support
                - sort of a situation where notionally the support is continuing after the death of the payor

Spousal Support Advisory Guidelines

- *Bracklow* outcome got Practitioners across the country talking about the possibility of creating some sort of spousal support guidelines to address the kinds of issues they were hoping *Bracklow* was going to address and resolve but didnt
    - Even though *Moge* offered a good explanation of the compensatory principles underlying entitlement to spousal support, neither *moge* or *bracklow* gave much guidance on the question of quantum or duration
        - So even if parties could agree that there was an entitlement in a certain case there was very little direction for them in existing case law about how to determine the questions "of how much for how long"
            - as a result these steps, the determination of quantum and duration, in the spousal support analysis were marked by a high degree of inconsistency and unpredictability and essentially it forced to spouses to litigate because they could not predict with any certainty what the award would actually look like
            - entitlement was one thing the grounds for entitlement became more clear in 1990s after cases emerged but Practitioners and courts were still struggling how to quantify and determine duration of orders
- In 2001 FDJ – this retained professors C.Rogers and R.Thompson to explore the possibility spousal support guidelines that were similar in nature to the federal child support guideline
    - Lawyers and judges were used to using child support guidelines so wanted to generate spousal support guidelines
        - Convened an advisory working group on family law, which included judges practitioners and mediators from across the country - this group looked at case law from all across the country, to identify principles and trends regarding the quantum and duration of spousal support and to develop guidelines that would inform the exercise of judicial discretion in this area
            - where opinions were divided among the advisory group professors Rogerson and Thompson exercised the final decision-making authority and were the sole authors of the final report
                - even though they received input from their advisory group if there was any sort of bone of contention, they were the two that made the final determination about how the advisory guidelines were going to look on that

- The draft proposals were issued in January 2005 and then after three years of seeing how they worked in practice the final report and proposals were the revised draft was rereleased in 2008

- SSAGS
  - the most basic premise of the spousal support advisory guidelines is that they are based on income sharing as distinct from a budgetary analysis
    - so before the guidelines came into force that is generally how lawyers would argue appointment duration is they would do what most practitioners would call the battle of the budgets - it would become very detail oriented budgets and there would be cross examination on every line item and it was hugely time excuse me consuming hugely expensive and that was the only method that we had before this SSAGs to determine quantum and duration
    - The SSAGS removed the prior battle of budgets and the SSAGS became a model on the basis of income sharing
      - Does not mean equal sharing of the combined income of spouses – but rather they introduced mathematical formulas to determine the proportion of the spousal income that is to be shared
        - Portion of income should be shared but does not need to be equalized
        - This premise is consistent with existing legal principals – not changing anything but just making it explicit in the guidelines
  - SSAG – are advisory guidelines , not legislated enforced and are not mandatory nor legally binding
  - A tool for judges and lawyers to use to frame their discussion around quantum and discussion - a guide
    - The report envisioned the guidelines to be used as a starting point for negotiations or for the court to use the ranges as prescribed by the guidelines as a cross-check to assess arguments regarding quantum and duration at application or trial
    - Essentially they are meant too be a practical tool to provide a framework and to structure the exercise of judicial discretion conferred onto judges by the divorce act
    - In practice lawyers will always do a SSAG calculation when dealing with spousal support BUT are used a starting point for conversation or argument on application
      - Lawyers have discretion too suggest stuff outside the range and judges are free to order outside the range of quantum or duration
  - SSAG are ALWAYS CONSIDERED WHEN LITIGATING A SPOUSAL SUPPORT ISSUE

## RECOMMEND READINGS: SPOUSAL SUPPORT ADVISORY GUIDELINES

Gordon, M, QC, "Spousal Support Guidelines for Dummies,"

DISCUSSION CLASS RE READING

Advantages of SSAG's:

- Provide a starting point – biggest advantage
    - Framework for a discussion rather than picking numbers out of thin air
- Reduce conflict and encourage settlement
    - if the parties have a reasonable range of what they might be able to expect if they went to trial, they may be more reasonable or likely to settle on something within that range as opposed to sticking hard to their original position because they don't know what the court would order
- Reduce cost and improve efficiency of the system
    - Do not need to spend days going over parties respective budgets
- Avoid budgets and simplify the process
- Provide basic structure for further judicial elaboration
- create consistency and legitimacy

Disadvantages of SSAG's:

- to rigid
- to complicated to be addressed by guidelines
- judicial discretion under the DA should be preserved because it allows the judges to engage in intuitive reasoning
    - Allow judges to say based on factors this number feels right but when guidelines it limits their intuition in tterms of decision-making process
- Regional variations to great to be addressed by the guidelines
- Litigation will be foreclosed – prevent parties from going to court
    - prevent people from seeking justice in own individual case

Note:

- Entitlement is the threshold issue that must be dealt with – must be determined prior to SSAG consideratios
    - SSAGS are only used to address issues of quantum and support
        - Need to determine compensatory and non-compensatory entitlement before SSAGS are even relevant
- SSAG's are not meant to be used for variation applications
    - only meant to be used to determine quantum and duration for first instance applications for spousal support
        - if you have a spousal support order in place already and your trying to vary the SSAGS are not meant to be used in such situation because there is different considerations for first time verses pre-existing order variations

The two different formula's developed are the **without child support formula** (no children or children no longer children of marriage (no longer support for kids)) and the **with child support formula**.

- Both formulas provide ranges for quantum and duration rather than fixed amounts for periods
- The main differences between the formulas is are situation when they are going to be used:
    - Children vs no children
        - when there are children and when there are no children – different formula if kids are involved
    - How income is calculated
        - Both determine each payors gross annual income using income calculation methods from FCSG but …
            - Without child support – relies on gross income
            - With child support – relies on net income
                - After getting gross income from FCSG there are certain deductions and certain additions that need to be added in order to get the Net Income
- Both formulas have floors and ceilings
    - If less than $20,000 per year spousal support will not be ordered under the SSAG's – or there will be no ranges generated under SSAG's as they don't make enough

- If more than $350,000 SSAGS won't work so use judicial discretion for determining quantum or duration
- Between $20,00 to $350,000 use SSAGs

- SSAGs restructuring:
  - this is the process of trading off quantum for duration for quantifying an appropriate lump sum
  - What that might mean is that your range under without child support formula is ….. but you can restructure the range but you can restructure that range while keeping within the global range as determined by the SSAG calculation
    - As long as the restructured award remains within the total amount generated by the formula when quantum is multiplied by duration then restructuring can be an attractive tool in negotiations
  - Basic premise: you are trading off quantum and duration but keeping the overall range of SSAG
  - restructuring is more likely under the without child support formula just because the durations under this formula are more certain
- both formulas also include exemptions
  - Involve a departure from the basic formula rather than restructuring the outcome under the formula
  - Circumstances that allow for exemptions to SSAG's:
    - Compensatory entitlement s
      - here if we as an example have a short marriage that has generated a really disproportionate economic loss or gain to one individual it might be a reason to move out of this SSAG formulas because they're not really designed to address that type of situation
    - illness or disability
      - which affects the ability to achieve self-sufficiency if it's a really pronounced illness or disability that might be a reason that you should argue for an exemption from say
    - debt payment
      - if one party has disproportionate responsibility for excessive were unusually high family debts - that's obviously not something that is generally considered in the formula so it might be a reason to ask for an exemption from today
    - prior support obligations
    - Interim support
      - you know maybe there are compelling financial circumstances at the interim stage that justified an interim spousal support order but those have disappeared by the time of trial

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Gordon, M, QC, "Spousal Support Guidelines for Dummies," Notes

The idea of spousal support guidelines was first addressed by the judiciary in *Moge* in L'Heureux-Dube's comments. But it was the ambiguity and lack of help in *Bracklow* that really spurred the development of the guidelines.

→ underlying theory of child support is very different than the underlying of spousal support; child support is automatic – a right of the child and an obligation of the parents - whereas spousal support is not a right or obligation and is highly discretionary

The spousal support advisory guidelines have nothing to do with entitlement. Entitlement must be proven or agreed upon. The main intent of the guidelines was to give guidance on quantum and duration.

Note: These guidelines are not binding. They have not taken off the way the Child Support Guidelines have. They have kind of crawled along since implementation.

- For lawyers and mediations, it creates a principled basis for negotiation and provides a test for reasonableness of offers to settle based on a budgetary analysis
- For judges, it creates a ranged based on prescribed formulas
  - Somewhat of a litmus test to assess parties' positions in pre-trial conferences, and formulas to provide some structure/assistance for judicial discretion conferred by the *Divorce Act*
- The most fundamental aspect: based on income sharing, NOT a budgetary analysis
  - Income sharing does not equal sharing of combined income of spouses
    - Instead, it is a mathematical formula to calculate a range of spousal support
    - Just assume lawyers have a calculator to solve this

THE WITHOUT CHILD SUPPORT FORMULA (no dependent children or children no longer dependent)

(1.5% - 2.0%) x (Years of Cohabitation up to a maximum of 25 years) x (Gross Income difference)

**Basic premise:** merger over time – as the marriage lengthen the spouses become more economically integrated
**Elements:** two basic elements – gross income difference between the spouses and number years of cohabitation

Two sub formulas: one to determine quantum and one to determine duration

**Determine quantum**: range from 1.5% to 2% of the differences between the spouses gross income for each year of cohabitation up to maximum of 50%. The range remains fixed for marriage for 25 years or more at 37.5% to 50% of income difference
**Determine Duration**: range from 1/2 year to 1 year for each year of marriage; support will be indefinite if onen of two situations applies: (1) marriage is longer than 20 years or (2) rule of 65 – the marriage lasted at least 5 years and when you add the length of the marriage and age of recipient spouse at date of separation it adds up to 65 or more

This formula tries to accommodate the factors in the *Divorce Act*. The formula only permits a period of cohabitation up to 25 years because that would create a 50% situation where the spouses are at absolute equality. There is no basis for changing the standard of living so you cannot go about 25 years.

- This is a simpler formula than the "With Children" formula

**EXAMPLE:** PAGE 249: Arthur and Ellen & PAGE 256 (RESTRUCTURING EXAMPLE)

**CLASS EXAMPLE:** Edith and Harold have been married for 15 years (they did not live together before marriage). Edith (the support recipient) is 45 years and earns a gross annual income of $35,000. Harold (the support payor) is 52 years old and earns a gross annual income of $105,000. They have no dependent children.

→ Use without child support formula

Quantum

Step 1: determine each party annual income = Edith $35,000 and Harold $105,000
Step 2: determine the gross income difference between parties = $105,000 - $ 35,000 = $80,000
Step 3: determine the applicable percentages by multiplying the length of cohabitation by 1.5% and 2%
1.5%x15 = 22.5%
2% x15 = 30%

Formula yields 22.5% x $80,000 = $18,000/year 30% x $80,000 = $24,000/year
This is equivalent to $1,500 - $2,000 per month.

**Duration:** Does not meet either of the indefinite rules – not the rule of 65 & not 20+ years
Duration range is between ½ to 1 year
0.5 x 15 – 7.5
1 x 15 = 15
Formular yields duration range = 7.5 years to 15 years

Restructuring

Minimum award = $1,500/month for 7.5 years = $135,000
Maximum award = $2,000/month for 15 years = $360,000
Restructured award = $4,000/month for 5 years = $240,00

- Right in the middle of the range or after applying tax impacts, could come to a mutually agreeable lump sum amount (provided it was in the range oof $135,000 to $360,000)

DEFINITIONS

Income calculation – Spousal income is defined according to criteria in *FCSG*.
Income Tax Rules – Unlike child support, spousal support IS subject to income tax inclusion/deduction rules.
Floor and Ceiling – The formulas don't apply when payor's gross income is <u>below $20 000</u> (subject to exceptional circumstances) or <u>above $350 000</u>.
Quantum Range – 1.5% to 2% of difference of parties' gross incomes per year of cohabitation.
Max – Equalization of Net Income (no more than 50% of parties' net disposable income)
Duration Range – 0.5 years to 1 year per year of cohabitation.
Max – Indefinite, where length of cohabitation > 20 years or rule of 65 (+ 5 years cohabitation, years + age > or = 65).

## Calculation of Income

1. Gross Income (without child support):
    - As prescribed by FCSG, ss. 15-10 + Schedule III
    - Generally: All income under T1 form Line 150
    - Adjustments for allowable income adjustments under FCSG, averaging income, imputing income
2. Net Income (with child support):
    - Gross income (-) income taxes, payroll deductions, (+) benefits, tax credits
3. Individual Net Disposable Income (INDI):
    - Payment of child support, special & extraordinary expenses & credits deductible for, tax consequences of spousal support etc.
    - MAYBE life, extended health benefits
    - NOT RRSPs, Savings plans, garnishments, gym memberships

## Calculation of Time

Minimum – without child support:

- Length of the relationship
- Age of recipient (date of separation)

Additional – with child support:

- Ages of the children (date of determining spousal support)
- Tax benefits, credits and deductions available to parties
- Length of time until youngest child starts school
- Length of time until youngest child leaves school

## THE WITH CHILD SUPPORT FORMULA

This formula is a bit more complicated because child support is not taxable and spousal support is taxable. Generally, you need a computer to calculate the amount. Generally, what you have to do is to calculate the Individual Net Disposal Income (INDI).

Apply where the separated couple as still has dependent children - A different formula is going to be used when there are independent children present for a number of reasons:

- First because child support obligations impact the pay or inability to pay spousal support
    - remember one of the factors that the court has to consider is that condition means needs and other circumstances of the parties and whether or not a person who is being asked to pay spousal support also paying child support is going to affect the means of that payor
        - Conversely child support and being received by the recipient and the applicant for spousal support is going to factor into the analysis on her or his end as well
- Second reason is child support must be given priority
    - it needs to be factored into the determination of whether or not spousal support is appropriate
        - even in cases where entitlement has been made out which we're assuming once we're at the stage where we're calculating under the SSAG (already proven entitlement as SSAG don't address entitlement) - that's when we're using the with child support formula – it may be possible that no spousal support will be ordered under the with child support formula if the payor cannot afford it
            - If payor cannot afford both the formula is going to tell us that because it takes into account the child support obligations
- Third reason is that there are income tax implications of child support that differ from spousal support
    - Child support is tax neutral and spousal support is taxable for the recipient and ductable for the payor when it paid periodically
    - the with child support formula also considers child related government benefits and credits because that's considered part of the means of the recipient parent
- The basic premise here is the parental partnership model
    - so we have to look at past loss as well as the continuing economic advantage that results from ongoing parenting responsibilities
        - remember the basic premise under the without child support formula was the merger overtime
- Difference between the two formulas
    - the big difference between the two formulas is that the without child support formula used to gross income of the payor and the recipient and figured out the gross income difference, whereas under the with child support formula they use the net income of both the recipient and the payor

- With child support formula is more complicated than without child support formula
  - Recognized by courts and case law – thus require software to determine the ranges

Basic steps

- 1. Want to determine individual net disposable income of each spouse
  - Payor: You take their guideline income that you determined using the federal child support guidelines and you subtract from that number the spousal support that they paid and any taxes and deductions and they might have
  - Recipient: You figure out the recipients net disposable income is again you start with a guideline income that you determined under the federal child support guidelines, then you subtract the notional child support that the recipient would pay if they were paying child support
    - so basically you pretend that the recipient is the payor of child support and you figure out their table amount and you subtract that from their guideline income , also subtract their taxes and deductions but then you add back in any government benefits or credits that they may receive
- 2. Once you determined those numbers, you add together the individual net incomes you just determined under step one and then determine the range of amounts that would be required to leave the lower income spouse with between 40% to 46% of the combined individual net disposable income
  - so once you figured out the pay was net income and the recipient's net income add them together and then the range for quantum is going to be 40% to 40% to 60% of that number that you just added together

Duration

- You have two tests for duration – set out at page 252 of CB
  - First Test is the longer marriage test for duration
    - so if the length of the marriage exceeds the number of years remaining for the last or youngest child to finish high school and the maximum duration under this formula would be the length of the marriage still subject to the same provisions under the without child support formula for indefinite support after 20 years
    - Examples that they give to demonstrate how you would determine duration under the longer marriage test for the with child support formula
      - if a couple were married for 11 years and had two children aged 8 and 10 at separation the maximum duration would be 11 years well the why if you're looking at the youngest child and the time it would take for them to finish high school at age 18 years that's ten years into the future well the marriage is longer than 10 years it was 11 years long so the maximum duration is going to be the length of the marriage
        - Note: this actually produces the same result as it would prove produce under the without child support formula
          - reviews and variations may occur prior to 11 years but it is assumed that 11 years under this example would be the maximum duration for this marriage
      - if we want to change those numbers a little bit and let's say that the youngest child is actually 6 years old at the date of separation and the marriage was still 11 years it's actually going to be 12 years into the future until the youngest child finishes high school – so max duration is going to be 12 years because we are assuming that the Child Support is going to at least until the youngest child finishes high school
  - Second test is the shortage marriage duration test
    - Is applicable where the marriage is shorter than the period of time until the last or youngest child finishes high school
    - under this formula this support would be subject to review where the child are preschool age no later than the month after the last or youngest child finishes full time school or where the children are under the age of 12 no later than a month after the last or youngest child reaches the age of 12
      - So the maximum duration under this test would be the date when the last for youngest child finishes high school

Restructuring

- Technically possible but harder to do because durational limits are not clear and therefore the global amounts are harder to calculate

How do we determine which number to choose in the range?

Factors to consider and points to work into an argument when you are trying to argue for a specific number under the range:

- Basis for entitlement – want to bring the argument of quantum and duration back to what the basis for the spousal entitlement is in the first place
    - Example: if you are representing a recipient whose basis for entitlement to spousal support is like a very high compensatory basis - again like the example we had in *Moge v Moge,* where there is a severe economic disadvantage suffered by the recipient as a result of the marriage and they need to be compensated for that - a strong compensatory entitlement usually points towards the higher end of the range
    - Example: if you're looking at a more needs based order and the recipient has great need because of their age, illness, disability, that type of thing…that is also going to point towards the higher end of the range
    - Example: if you have a spousal support order that is based on compensatory entitlement but the entitlement is sort of middling or on the weaker end, then you might be looking at quantum iteration in the lower end of the range
    - Example: if you have a need based order where they have need but it's not really great need or it's based mostly on the comparison to the marital standard of living as opposed to basic or pure need where they can't meet their expenses and that type of needs based order or noncompensatory entitlement point more towards the low end of the range
- Look at length of marriage
    - generally speaking you want to look at the length of the marriage - longer the marriage has lasted will generally go to higher end of range
- If using with child formula look at age, number or needs of children
    - Demands of vary young children or children with special needs may have a significant impact on caring parents earning potential which would point to higher range of spousal support
- Look at needs and means of payor – if limited means then might look at lower end of range
    - Example: if the payor earns a fine income but is not rich by any means but they have mandatory pension deductions taken out of their paycheck - that can ultimately be a significant number and it's not something that we consider in the formula
    - those kinds of mandatory deductions that do effect the means and needs of the payor can be considered at the quantum and duration stage in determining what point in the range you are going to award support
        - So mandatory pension deductions that are significantly reducing the payor's disposable income might point towards an award at a lower end of the range because it has not been considered anywhere else in the formula
    - Example: if the payor is paying significant but reasonable costs to exercise access to his children - if the kids live in Alberta and the parent lives in Ontario and he or she has significant access costs that are not considered anywhere else in the formulas but it might be a determination when considering what end of the range you will award support on
- Consider the impact of matrimonial property division – property division is not only relevant to consider at the entitlement stage it's also relevant to considered here at the quantum and duration stage
    - Example: if there was absolutely no property divide, if they had lived in a rental they leased their vehicle, there is nothing to divide then that might point to a higher range award because the recipient does not have other means to support themselves
    - Example: if there was a substantial settlement it may point to an award at the lower end of the range
- Note: Important to note the objective of self-sufficiency can push both ways when talking about quantum and duration
    - So on the one hand a spousal support award at the lower end of the range could be used to encourage a spouse to make greater efforts to achieve self-sufficiency
    - or Alternatively an award about higher end of the scale might facilitate the recipient spouses pursuit of retraining or it's medication for the purpose of achieving self-sufficiency
    - so that at once kind of going to be a middling factor you're going to argue one side or the other based on who you represent

Bottomline: the spousal support advisory guidelines is that they are not mandatory but they are a useful and practical tool to frame settlement discussions and guide judicial discretion

- you will still need to look at the facts of each case especially the basis for entitlement to determine whether the range is appropriate and if so where within the range the award should fall

SPOUSAL SUPPORT CONTRACTS

In the case of *Miglin v Miglin*, the court considered a contractual agreement between parties. As we already studied, courts are not bound by agreements related to spousal support but may only generally consider the agreement weighed against the law for an ultimate

decision. But what happens when a couple enters into an agreement for spousal support between themselves. Perhaps there is a waiver of support.

In *Miglin*, there was a waiver of spousal support by contract that was open to renew in five years. Husband did not renew and so she applied for spousal support. At the Supreme Court of Canada, the Court had to decide on the weight given to the waiver that was voluntarily signed. Before *Miglin*, the courts exercised discretion. However, the SCC said for the most part, we are going to hold people to their bargains. This is because we do not have time for people to come to court and say "that is not fair." It was a very mercantile and business approach that says if you make your bed you must lay in it.

There is a two-part test in *Miglin* that the Court must consider at the time the matter comes to court. Take a look at the agreement in the circumstances at the time of its signing. You must look at the circumstances of the signing. Was there vulnerability, pressure, threats, duress? Or, was it an openly signed agreement as a result of negotiation on proper legal advice? Then you have to ask the extent that the agreement met the objectives of section 15.2(6). The second part of the test is to consider the agreement in the current situation. How does the agreement serve the current situation?

SPOUSAL SUPPORT GUIDELINES TREATMENT – ABCA

- *Lust v. Lust* (2007) and *Lapp v. Lapp* (2008): "A useful starting point"/ "A guideline is a guideline" – judges must still consider objectives and factors in legislation.
- *Sawatzky v Sawatzky*, 2008 ABCA 355: Error in principle to simply apply SSAG without considering objectives and factors in s. 15.2 (4) and (6) of Divorce Act. Chambers judge had fettered his discretion by doing so. Remitted for reconsideration as a result.
- *Rockwall v Rockwall*, 2010 ABCA 278: The fact an award exceeds the SSAG range is "irrelevant. These guidelines do not have the force of law. In any event, a trial judge cannot rely on the recommendations generated under them when his or her own proper analysis requires a difference conclusion."

See SSAG outline on twen

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RECOMMEND READINGS: SPOUSAL SUPPORT ADVISORY GUIDELINES

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*Fisher v Fisher,* 2008 ONCA 11

*Facts:* The wife sought support on the basis of economic hardship created by the husband's unilateral termination of their long-term marriage

- The parties were married for 19 years and separated when the husband announced the marriage was over and he had found someone else
    - The parties had no children
- Prior to separation, the wife was earning $35,000/year and the husband was earning $111,700/year due to a promotion and relocation
- After the separation the wife became clinically depressed and required time off work
- The husband lived with the other woman, who chose to stay home, and her two boys
- The wife lived alone and was one credit away from her BA
- The trial judge found that the wife had suffered an economic disadvantage resulting directly from the husband's decision to exclude her from his enhanced career and the significant financial and personal benefits that directly flowed from his move to Toronto
- The trial judge ordered the husband to pay the wife $2,600/month for the remainder of the year ending December 2006; $1,800/month for the calendar year 2007; and $1,050/month for the calendar year 2008
- There was no award of support for 2009
- However, the order provided that, after January 1, 2009, either party could seek a review of entitlement and/or quantum without the need to establish a material change in circumstances
- The trial judge declined to make support retroactive, leaving the appellant with the $2,000 monthly interim support she was awarded for the period from October 1, 2004, until the end of trial
- The wife appealed the decision.

*Issues:* Is the support awarded correct?
*Held:* No
*Ratio:*

The Guidelines should be considered in context and applied in their entirety, including the specific consideration of any application variable and when necessary, restructuring.

- The Guidelines apply to initial orders and variations.
- A step-down order (with gradual decreases in amount over time) recognize the need for the recipient spouse to achieve self-sufficiency.
- Support orders must fall within the Guidelines range unless there is an applicable exception.
    - Any deviation from the Guidelines must have reasons given in order to provide consistency, predictability and certainty.
- An indefinite order for support is appropriate after a long marriage, depending on the spouse's age and ability to attain self-sufficiency.

*Reasons:* Justice Lang, writing for the court, first dealt with the entitlement of the wife to support:

1. Length of cohabitation (s. 15.2(4)(a))
    - 19-year marriage is right on the cusp of a long-term marriage (20 years).
        - Rule of 65: support will be indefinite if the marriage is 20 years or longer in duration OR if the marriage has last 5 years or longer, when years of marriage and the age of support recipient (at separation) added together total 65 or more
    - Due to the wife's employment position and youth, court agrees that an indefinite order would be out of place here
2. Functions performed during cohabitation (s. 15.2(4)(b))
    - There was no factual finding on this issue by the trial judge
    - Lang J finds that the wife had greater non-economic responsibilities during the marriage
3. Other circumstances (s. 15.2(4)(c)).
    - The husband's new family must be considered in context because this may decrease his ability to pay support
    - However, he voluntarily assumed significant responsibility for the second family when he knew (or should have known) of his pre-existing obligation to his first family
    - The new partner could work and she receives spousal support.

On balance, the wife is entitled to non-compensatory support

- Her support for him for the few years when he was getting his BEd at the beginning of the relationship was made up through 19 years of marriage.

Considering the spousal support objectives in s. 15.2(6):

- Economic advantages or disadvantages from the marriage or its breakdown
    - She was disadvantaged by the breakdown as she was not able to share in his increased salary and had to give up her middle-class lifestyle.
- Economic hardship
    - No hardship to the wife as she is able to provide for her basic needs.
- Self-sufficiency
    - The court looked at the parties' present and past incomes, the standard of living during marriage, likely steps which could be taken to increase a party's means, the parties' likely post separation circumstances, and the duration of cohabitation
    - Appellant cannot be self-sufficient in this context on her current income

On quantum and duration of support, the wife's dependency on the marital standard of living was not so entrenched in the manner as it would have been in a traditional marriage with a gradually increased standard of living; the husband's income only increased during the final years of the marriage

- On balance the court concludes that the wife is entitled to support for seven years beginning with the year of separation
- The court utilizes a step-down order to encourage self-sufficiency: she is awarded $3,000/month for a three-and-a-half-year period followed by a further three and a half years at $1,500/month.
    - This is restructured from the formula in the Guidelines due to the non-compensatory nature of the support.
- Under *Leskun*, review orders should only be used when there is "genuine and material uncertainty at the time of the original trial".
    - There was no real uncertainty here, so this was an error on the part of the trial judge.

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## October 22, 2020

### Taxation of support payments

- Child support payments and lump sum payments are tax neutral

- Periodic spousal support payments are taxable for the recipient and deductible for the payor

## Enforcement of Support Orders

- *Maintenance Enforcement Act* (p. 73)– apply to child and spousal support orders
- At a basic level what the *MEA* does is it creates a maintenance enforcement program (MEP) run by the provincial government which facilitates collection and payment of support so it collects the money from the payor and forwards the money to the recipient once that money has cleared through a trust account
- it also has the power to take enforcement actions to collect or enforce arrears or in back payments of support
- Section 1(1)
    - (a) Creditor – the recipient of child/spousal support
        - Means a person entitled under a maintenance order to receive money for maintenance on the person's own behalf or on behalf of another person
    - (b) Debtor – payor of child/spousal support
        - means a person required under a maintenance order to pay money for the maintenance
    - (d) Maintenance
        - means maintenance, support or alimony an includes
            - (i) an amount payable periodically, weather annually or otherwise an weather for an indefinite or limited period or until the happening of a specified event
            - (ii) a lump sum
            - (iii) expenses in respect for prenatal care and the birth of child
            - (iv) an amount payable under the Queen's bench protection order under the protection against family violence act
            - (v) a charge on property or otherwise as security for the payment of maintenance
            - (vi) interest or the payment of legal fees or other expenses arising in relation to maintenance
        - Note: The point to remember here is under this definition it doesn't matter if it's child support or spousal support, it doesn't matter if it's Section 7 expenses, it doesn't matter if Its periodic or lump sum, MEP has jurisdiction to enforce those types of payments
- Section 5
    - Gives the director of maintenance enforcement the ability to enforce maintenance orders that have been filed with the program
    - 5(1) If the director considers it practicable to do so call mother director shall enforce a maintenance order that is filed with the director in the manner the director considers appropriate and the director, for that purpose, may commence and conduct proceeding in the name of the director as if the director were a creditor under the maintenance order
    - 5(2) the director may refuse to enforce more than three years of arrears of maintenance payable under a maintenance order
    - the period of three years under subsection two begins three years before the date on which the director initiates the current proceedings to enforce the payment of maintenance under the maintenance order
- Section 6 order made before January 1, 1987
    - Before this date it is optional for the creditor to file with MEP
- Section 7
    - Says all orders made after December 31, 1986 must be filed with the MEP unless the creditor files to skip this step
    - The child/spousal support order does not get filed automatically even though it is made mandatory in Section 7 of the act.
        - What practically happens is that every child support or spousal support order that is granted by an Alberta court contains a mandatory clause in it that says that this order shall be filed with the maintenance enforcement program and then it is up to the creditor of support to actually take the steps to file with MEP
            - If they decide not to nothing is generally done but it is generally to their benefit to file with MEP as it takes the hassle off of them from having to collect and enforce support
            - If the creditor does not want to have the requirement, they can apply to have the clause removed from the order
- Section 8
    - Stipulates that if they choose to the debtor may file order with MEP
    - May happen in situations where the payor wants the support to be taken as a pay roll deduction from their employer paycheck
        - Will fill out forms to do so but note that the order must already be filed with MEP to do that

- Section 9: withdrawal of filing
    - A file may be withdrawn - A creditor may withdraw an order filed with MEP at any time so long as notice is made in writing (basically say the no longer wish to have the file enforced by MEP no longer)
    - Note: Sometimes you see in negotiated agreements there is an agreement that neither will file with the maintenance enforcement program but the order is already filed so then the creditor would have to take steps to a sort of deregister not order
- Enforcement actions in situations where payor is defaulting on payments
    - Far reaching power in terms of what they can do to enforce the support orders
        - File a writ against the payors personal property
        - Garnish funds owed by the federal gov to the payor (i.e cease income tax returns)
        - Register caveats against real property
        - Garnish wages from employer
        - Garnish funds from any accounts (i.e. bank or investment accounts or sources)
        - Enforce motor vehicle restrictions (i.e. decline vehicle registration renewal)
        - Suspend drivers license
        - Can suspend federal licences (i.e. revoke payors passport)

Variation of Support Orders: Divorce Act s.17

- Variation for child support requires a change in circumstances (material change)
- Variation for spousal support – section 17
    - Section 17(1)(a): A court of competent jurisdiction may make Unordered bearing Comer ascending or suspending prospectively or retroactively (a) a support order or any provision thereof on application by either or both former spouses
        - Court has jurisdiction vary any support order
    - Section 17(3): The court may include in a variation order any provision that under this act could have been included in the order in respect of which the variation order is sought
        - have the ability to include in a variation order any terms conditions or restrictions that they could have included on an original order;
            - so their jurisdiction is not fettered by the fact that it's a variation application – have discretion
    - Section 17(4.1): before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in <u>the conditions, means, needs or other circumstances</u> of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order and in making the variation order, the court shall take that change into consideration
        - Change in the conditions, means, needs or other circumstances of either spouse – interpreted by SCC as requiring a material change in the conditions, means, needs or other circumstances of either spouse since the permeant order was regimented
        - Material change is a change that was not contemplated by the court at the original time of the order and that if it had been contemplated by the court if it would have led to different terms
            - so in other words is the matter that is relied on as constituting a material change was known at the time that the original order was granted it cannot be relied on as the basis for variation
                - the change that the person is relying on as constituting a material change must be of a substantial unforeseen and continuing nature
                    - the court has said that things like the normal process of the spouses aging or getting older does not constitute a material change the maturation of the family unit
                        - i.e. the fact that the children are getting older and might be requiring additional or different types of financial support that does not suffice to prove a material change
                    - change needs to be something substantial unforeseen and continuing that was not contemplated at the time of you original order
            - So it may include not only the happening of something unexpected but also the non occurrence of an expected event
                - i.e. a big example of this is if the original order was premised on the assumption that the recipients spouse would achieve self-sufficiency by a certain date and that spouse has failed to achieve self-sufficiency, while that may constitute a material change because it was not something that was contemplated at the time of the original order but in fact it

was contemplated that it would occur – so the fact that it has not may constitute a material change
        - Onus is on the person applying the variation to prove a material change has occurred - threshold step for variation order in spousal support
    - **Section 17(6):** In making a variation order, the court shall not take into consideration any conduct that under this act could not have been considered in making the order in respect of which the variation order is sought
        - Spousal misconduct is irrelevant when assessing a variation order (same as when assessing original order)
    - **Bill c-78 change**
        - **Section 17(6.6)** – New provision that is coming into force with Bill C-78
            - Stipulates Child support takes priority over spousal support even on a variation application
    - **Section 17(7)**
        - A variation order varying a spousal support order
            - (a) Recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown
            - (b) Apportion between the former spouses Any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage
            - (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
            - (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time
        - requires court to consider the exact same objectives on a variation application as they must consider under an original application
    - **Section 17(10):** where is spousal support order provides for support for a definite period or until a specified event occurs comma a court may not comma on an application instituted after the occurrence of the event, make a variation order for the purpose of resuming that support unless the court is satisfied that

        (a) a variation order is necessary to relieve economic hardship arising from a change described in subsection (4.1) that is related to the marriage; and

        (b) the Changed circumstances, had they existed at the time of making the spousal support order or the last variation order made in respect for that order, as the case may be, would likely have resulted in a different order
        - puts limitations on reviving a definite order after it has expired
            - There are restrictions on what a court can do if the variation of that order is applied for after the termination event has occurred
            - Stringent test in subsection (a) and (b) for how the court and when the court can revive or resume a support order under a definite order that has terminated
                - Explicit requirement that the effect of the change must be causally connected to the marriage which imposes a significant limitation on the jurisdiction of the court once that order has terminated
                - the practical strategy here is that once you know that a material change has occurred the application to very should be brought about or the order expires so as to avoid having to get into this stringent task necessary under section 17(10)
- Summary: Court hearing an application for variation should treat the original order as correct at the time it was made and confine its role to examining whether subsequent changes justifies variation under section 17
    - It is not a fresh inquiry not an opportunity for the spouses to completely reargue the issue of spousal support – once a material change has been found, the court can only consider the spousal support objectives in relation to the material change – a limited scope of review – vary order only with reference to material change

*Miglin v Miglin* Case

- Addresses what happens when there is no pre-existing order for spousal support but the parties have a pre-existing agreement for spousal support
- Whether or not the court is justified in intervening to either overturn or adjust the terms of that pre-existing agreement
    - Can the court vary a pre-existing spousal support agreement in the same way they can vary a pre-existing spousal support order?

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RECOMMEND READINGS: VARIATION OF SUPPORT ORDERS – DIVORCE ACT S.17

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*Miglin v Miglin, 2003 SCC 24*

CASE SUMMARY

*Facts:* The parties were married for 14 years and had four children (at time of separation kids ranged between ages 2 and 7)

- Early on in marriage Mother went back to school to complete BA degree and there after ran a resort lodge as a couple
  - They operated a resort lodge in Algonquin Park in the summer and lived in Toronto in the winter
- Both parties worked in the business (shareholder); the husband handled the finance and the wife the day-to-day operation of the lodge
  - Characterized their involvement differently
    - Husband said their marriage was a modern marriage where they were equal participants of the business; as such the wife was employed for the duration of the marriage and was readily employable upon separation
    - Wife said their relationship was traditional marriage, Marriage primary role with caring for the children and she helped out with the business when she could
  - Both spouse took salary of $80,000 from the business
- Upon separation the parties each retained experienced family law counsel and spent over a year negotiating a separation agreement so it was a global separation agreement that addressed parenting property child support spousal support etc
  - After around fifteen months of negotiation, the parties signed an agreement, wherein:
    - The husband kept the lodge and his start-up business (income producing asset)
    - The wife kept the matrimonial home in Toronto (worth approximately the same as the lodge at $250,000)
    - The husband would pay $60,000/year in child support
    - A consulting agreement providing the wife with $15,000/year for five years, renewable on consent of both parties at end of 5 years; and
    - A full and final release of any future spousal support claims – both parties agreed to forever wave spousal support
- After the divorce judgment was issued in 1997, the wife's childcare obligations changed, and the consulting agreement was not renewed (by the husband)
  - Did not address corollary relief – so all relief was contained within the confines of the separation agreement
- After granted the relationship broke down and the consulting agreement was not renewed – wife lost her notional salary from the buisness
  - wife applied to the court for relief, including spousal support – original application under section 15(2) of Divorce Act for spousal suppor
- The trial judge referred to the husband as "manipulative" and "obsessive"
- The application was allowed, child support was brought in line with the Guidelines and the wife was awarded support of $4,400/month for five years
  - The Court of Appeal affirmed the judgment regarding spousal support, and the husband was given leave to appeal to the Supreme Court of Canada

*Issues:* When should a support agreement be upheld by the courts? Does the court have jurisdiction to order, making original order, for spousal support under section 15.2 when the spouse is already have a pre-existing and binding agreement relating to spousal support?

- CHECK: held the presents of the pre-existing agreement did not oust the courts jurisdiction to order for support
  - A retained as supervisory jurisdiction over this relationship to ensure that the objectives of the divorce act were being met
- Note: this is not a variation order but an original order for support

*Held:* Original order stands

*Ratio*: **Establishes the test for enforcement of support agreements**

- ***Miglin* applies only to final spousal support agreements**
  - A final agreement is one which limits the amount or duration of support or waives support entirely; it does not contemplate variation

*Reasons:* Arbour and Bastarache, writing for the majority, stress finality and certainty as key principles in support agreements, citing s 9 of the *Divorce Act*; **these are contracts and as long as they were entered into openly, the courts should enforce them**

- They state that when considering whether to uphold a support agreement, there is a two-stage analysis:

1. **The formation of the agreement: was the agreement "unimpeachably negotiated"?**
   - Factors to consider:
     - *Representation* by counsel: the degree of professional assistance received by the party is relevant, but a court should not presume an imbalance of power

        - *Circumstances*: was one or both parties vulnerable and if so, did presence of counsel rectify this vulnerability
        - *Duration of negotiations*: was the agreement negotiated over a reasonable amount of time?
    - Substance of the agreement: does the agreement remain in substantial compliance with the objectives of the Divorce Act?
        - The analysis should not be restricted to the spousal support component – look at the whole agreement; the agreement as a whole should substantially comply with the factors and objectives of the Act (including the principles of certainty, autonomy and finality).
        - An agreement can be modified to bring it in line with the principles in the Act.

If the agreement is unimpeachable (good), then:

2. Agreement's correspondence to the parties' original intentions: were the current circumstances anticipated when the agreement was drafted?
    - Foreseeability is interpreted broadly; circumstances do not have to have been explicitly considered/contemplated
    - Foreseeable circumstances include a change of job, assets going down in value, etc.
    - Generally, where negotiation of the agreement was correct and the agreement remains in substantial compliance with the Act, the court should defer to the wishes of the party and accord the agreement great weight.

*Application*

- Both parties had engaged the services of expert counsel and negotiations persisted over a lengthy period
- Although the husband may have been the dominant party, the wife had adequate counsel; there was no hint of any vulnerabilities that might not be compensated by counsel
- The quantum of child support established in the agreement intended to provide the wife with a minimum amount of income in contemplation of her not working
- While the wife argues that the business generates income, this was accounted for when the assets were valued and divided.
    - The consulting contract reflects the parties' intention to provide the wife with a source of employment income for a limited time
- The wife chose not to go back to the workforce and had substantial assets even without support; there was no hardship or long-term disadvantage.
- In the result, the original order should stand

*Dissent*: LeBel and Deschamps stress very different concepts: interdependence and unequal bargaining power. They propose a simpler test; is the agreement objectively unfair when considered now?

- The dissenters disagree with the majority in two key areas
    - One, the presence of counsel may not be enough to negate a power imbalance
    - Two, that very little deference should be given to agreements that deviate from the objectives in s. 15.2(6) of the Act; any fair agreement should reasonably realize the four stated objectives

## CLASS NOTES ON CASE

How should a court treat an application to vary the amount and duration of spousal support negotiated in a separation agreement?

- *Pelech* Triology:
    - Clean break model – only overturn separation agreement when unconscionable.
    - So how the trilogy relates to this case is that the trilogy there actually set a very very stringent test for when a court is justified in overriding a pre existing agreement between parties
        - the trilogy said that a court is permitted to override a final agreement on spousal support only where there has been a significant change in circumstances since the making of the agreement
        - the test establishes a threshold that is defined as a radical and unforeseen change that is causally connected to the marriage
            - quote from the Supreme Court at page 260 existing law pre-*miglin*: Suffice it to say that the *Pelech* trilogy has come to stand for the proposition that the court will not interfere with a pre existing agreement that attempts to fully and finally to settle the matter of spousal support as between the parties unless the applicant can establish that there has been a radical and unforeseen change in the circumstances that is casually connected to the marriage.
            - The trilogy test is designed to promote certainty and facilitate a clean break in the relationship of the parties It is an analysis focused on individual autonomy and respect for contracts
- since the release of the trilogy though the Supreme Court had released their decisions in *Moge* and *Bracklow* which demonstrated a huge huge shift in the standards underlying spousal support orders in Canada
    - the objectives underlying *Pelech* trilogy - so the objectives of finality, certainty and autonomy – were no longer paramount, *Miglin and Bracklow* directed family lawyers to also consider the factors and objectives listed in section

15.2 - so *Miglin* and *Bracklow* established really once and for all after their discussion of the trilogy and how it was change by the release of *Moge and Bracklow, Miglin* established for once and for all said the *Pelech* test is no longer applicable under the new support paradigm
    - so they're saying we need to figure out a new test in order to determine whether or not or should interfere with a pre existing agreement relating to spousal support – the *Pellech* test no longer applies
  - However The Supreme Court in *Miglin* did agree with the trilogy in principle that pre-existing agreements should be given considerable weight after all any pre-existing order agreement or arrangement relating to spousal support is an explicit factor to be considered under section 15.2(4)(c)
  - Often a pre existing agreement relating to spousal support will be part of a global settlement relating to all corollary relief issues surrounding the marriage – so disturbing the spousal support provisions might make the rest of the agreement unfair
    - For example: so you might sometimes be situation where I had been to my otherwise have been obligated to pay spousal support willing to make an unequal division of matrimonial property in order to obtain a waiver of support from his wife; so that's the case and then the court goes and overturns the spousal support waiver and awards also support to the way that may be unfair to the husband because it undermines some of the things he gave up in the agreement in order to obtain that waiver
      - so the court was very cognisant of the fact that the global settlements cannot be lightly disturbed
- further lawyers are required to canvas the possibility of settlement or negotiation with their client
  - It's one of the duties under the divorce act
  - it would undermine this duty and objective is pre-existing agreement were routinely overturned - so this encouragement to negotiate or settle would be completely undermined parties would have little incentive to negotiate if they were in a position where they felt they could not never rely on their agreements because courts are going to be routinely over returning them under section 15.2
- So ultimately after canvassing you competing objectives the court determined that there must be a balance between parliament objective oof equitable sharing of the consequences of marriage and it breakdown with the parties freedom to arrange their affairs as they see fit
  - thus courts should not routinely interfere with pre-existing agreements unless it is clear that the agreement does not substantially comply with the overall objectives of the divorce act
  - HOWEVER The Supreme Court was quick to point out that the spousal support objectives listed in section 15.2(6) are not the only relevant objectives to consider- lawyers parties courts must also look at the emphasis on negotiation and settlement that the divorce act sets out and the objectives of certainty, finality, autonomy that were espoused in the *Pelech* trilogy
    - In particular party should be able to structure their affairs as they see fit and the spousal support objectives listed in section 15.2(6) should not operate so as to preclude parties from bringing their own wishes and values to the negotiating
    - In other words, the court is saying more must be shown than mere deviation from what I trial judge would have awarded in accordance with section 15.2(6) before it is appropriate for the courts to disregard the parties pre-existing agreement
- At this point in the decision the court has told us what are not the tests and what we shouldn't be doing but they have yet to tell us what is required when the court is faced with an application under 15.2 and a pre-existing agreement
- What is known
  - first of all the court it's clear that there is no threshold matter like there is one variation application
    - so this is not a variation situation where we have a pre existing court order an after proven material change as a threshold issue
    - we have a pre-existing agreement that's true but there is no threshold issue, rather the question is whether at the time of the application the totality of the circumstances including any changes that may have occurred since the negotiation of the agreement render continued reliance on the pre existing agreement unacceptable
  - Second of all the court says that this type of application requires a full investigation into all of the circumstances surrounding the agreement both at the time of its formation at the time of the application
- As the result the court formulates a two step test that in their view balances the party interest in determining their own affairs with an appreciation of all of the objectives underlying the divorce - the test there's two stages; two stage test that balances the equitable sharing of the consequences of marriage breakdown with the parties freedom to arrange their affairs as they see fit
  - 1. Stage one (needs to be assessed as of the time of execution)
    - (a) so the first subtest under stage one is you have to look at the circumstances of execution and consider the vulnerabilities of each side and whether or not the process was fair

- So as an example did they each have access to counsel - that's something that you would consider under the circumstances of execution step of stage one
- so the court noted three important points here
    - 1. we're not looking for unconscionability in a strict contract sense
        - the court said that there may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context
            - so we're not talking about unconscionability in strict contract sense it can be something less than that
    - 2. there should be no presumptions made about vulnerability or power imbalances - there must be evidence to warrant the court's finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation
    - 3. finally the mirror presence of vulnerabilities will not in and of itself justify intervention – the court must look at whether the circumstances nevertheless compensated for these vulnerabilities
- So in other words if the bargaining process was fair then the court should not be quick to interfere with the pre existing agreement on the other hand if one party was taken advantage of the agreement should merit a little weight

- (b)under the second subtest under stage one you need to look at the substance of the agreement
    - And in particular did it meet the objectives of the divorce act
        - again we're looking at all of the objectives of the divorce act both as set out in section 15.2(6) as well as the objectives espoused underneath the pallet trilogy which include certainty finality anatomic
    - only a significant departure from the general objectives of the act will warrant the court intervention on the basis that there is not substantial
        - so if the circumstances of negotiation and execution were fair and the substance of the agreement generally complies with the objectives of the divorce act their agreement is probably going to be given considerable weight

- Note: if the agreement passes stage one it should be afforded great weight
- 2. Stage two (this stage is assessed at the time of the application )
    - Stage two allows the court to assess the extent to which any changes may have affected the initial assessment of the agreement
    - so under this stage we need to determine whether the agreement still reflects the intention of the parties and whether the agreement still meets the legislative objectives of the divorce act
        - the applicant must clearly show that in light of any new circumstances that have occured between negotiation and the time of the application the terms of the agreement no longer reflect the parties intentions that they had at the time of execution and they also no longer reflective objectives of the act
            - So in other words basically the applicant must demonstrate that the new circumstances were not reasonably anticipated by the parties and have led to a situation that cannot be condoned
        - however the court did stress that a certain degree of change is foreseeable most of the time
    - the question becomes what is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application

- That's the test that *Miglin* sets out for determining whether a pre existing spousal support agreement should be buried or overturned by the court
- HELD: After applying the test to the facts of the case in *Miglin* the Court held the agreement should be preserved and the wife was not entitled to spousal support order
    - the court said that there was nothing to indicate that the circumstances of execution were questionable, though the way it did indicate that she felt vulnerable during negotiations, the court noted that she had a high degree of professional assistance, she had a very experienced family Lola where she had retained accountants and financial advisors etc and that this high degree of professional help could could compensate for any vulnerabilities that she was feeling
    - the court also emphasized that there was nothing to indicate that the agreement did not meet the objectives of the divorce act

        - the property division reflected their wishes and a higher amount of child support was agreed to in order to compensate for the spousal support waiver
        - in any event the Supreme Court said that the salary that the wife was receiving under the consulting agreement could essentially we function as time limited support and she fully agreed to that based on the other provisions of the agreement
    - For these reasons the court said that the pre existing agreement should stand, the wife is not entitled to have her agreement overturned and they would not order spousal support
- Criticisms of *Miglin*
    - has actually been a very criticized decision - both because of the test that it sets out and because of the outcome that it dictated
        - so first of all with respect to the test many commentators are saying well this does not actually clear things up at all - it's a fairly complicated test and the majority reasons are confusing and vague when talking about the test and the reason the majority reasons are confusing and vague is because they were authored by two different judges … and then they were sort of merged into one set of reasons - actually are contradictory in some places and confusing that's one of the criticisms of the *Miglin* decision and in particular the *Miglin* test
        - another test is that they claim that they are over ruling *Pelech* and at the *Pelech* trilogy test of the radical an unforeseen change causually connected to the marriage, they're saying that test no longer applies;
            - But in reality having to go through these two stage stages and prove not only that the circumstances of execution or substantial compliance with the objectives of the act don't going through these two stages and in particular having to show that the unimpeachably negotiated agreement cannot be said to have been contemplated, they said that is a higher test then *Pellic* and saying that even if you are vulnerable and there Is the power imbalance if you're assisted by counsel that is going overcome those vulnerabilities
                - They said that basically mean that no person can ever argue that the circumstances of execution were suspect if they had a lawyer
                    - that basically is saying that having independent legal advice negate any sort of oppression or pressure or power imbalance in the negotiation
    - so there's a lot of criticism about the test in particular
    - there's also criticism about the outcome of the decision
        - the court is making inferences from these facts that you know it was the wifes choice not to work and yes she has care of for children and she got a high amounts of child support and they got equal amounts of matrimonial property and she worked all the way throughout the marriage so she readily employable and to go back to work now that they have divorced – that is what the court said!
            - and critics are saying well actually those are just an spin on the facts to fit your test and if you look more objectively she has to care of four children who are very very young at the time of separation so it is probably unlikely that she would be able to find employment that would earn her the same salary that she was earning as a shareholder of the large business
                - Yes the values of the matrimonial property that each party received were technically equal but she got the matrimonial home (non income producing) and he got the business and business is income producing
                    - So that is a large factor that you have to consider
        - and they also said the husband is characterizing the wife as readily employable because she worked at the lodge throughout the marriage - well that may be true working within a family business while you are primary caregiver for small children is very very different than having years of experience of the general work force
            - Won't Translate into getting her job comparable to the salary that she was received in through the lodge
        - so they're saying that in this case actually the way it was in a very unfair condition at the end of the negotiated agreement - she specifically testified that she was feeling vulnerable during the negotiation and the negotiations took over a year which the court characterized as saying they took their time negotiating every single detail of the agreement
            - critics say well perhaps but on the other hand maybe what happened is that the negotiations were dragging on so long that the wife just capitulated because she couldn't take it anymore
- Note: Summary of test - Page 255 – quick summary of judgment (half way down left hand column starting with "as we explain below we believe….."