Family Law Part 2

October 27, 2020

PART V: PARENTING ISSUES

- Parenting issues: this is commonly referred to as custody and access issues
  - This is the most difficult areas of family law – is when people are duking it out about what they are going to do about there kids
    - People are emotional and often very angry; there's an aspect of revenge involved; there's always the idea of I'm a better parent thus I have to prove I'm better parents
  - The more people fight the more the kids suffer – they are not as resilient as people think they are; and they end up knowing far more than the party think they do
- If you plan on bringing an application with respect to parenting time of children, clients have to take parenting after separation course – it is a requirement!
  - Cannot file your documents until you also file the certificate that says that your client has taken the parenting after separation course
  - It is a 6 hour course it is taking online and typically co-taught by a lawyer and a psychologist
  - Idea is to get parties at the beginning to try and stop matters from degenerating into a slug fest between them with kids in the middle
  - So you have to tell clients that they have to take the parenting after separation course and they have to do so right up right up front
  - is a few exceptions: you don't have to take it if all of the kids are over 16 years of age; you don't have to take it in if you want to go to court because there's been an abduction or some sort of kidnapping; there has been unilateral change of the parenting situation; or you don't have to take it in the first instance anyways if it is part of an ex parte application for a restraining order or EPO, something to do with domestic violence
- Both parties have to take it → both parties have to take it because you cannot get divorce judgment finalized until both parties have filed their certificates showing they have taken the parenting after separation course

Different types of order with respect to parenting

- Interim order – usually the first order; initial order; occurs before trial, before the matter is usually settled, usually a stop-gap measure
- Final order – usually refers to in the case of divorce a divorce judgment, or an order that comes out of a trial or out of a JDR
- Variation order – it is an order that varies an existing order; change in material circumstances since last order was granted

Two major pieces of leg that deal wih parenting issues: (1) divorce act and (2) family law act

- Divorce Act & Bill C-78
  - Bill C-78 is already passed and was supposed to come into effect in July but due to the pandemic is delayed and now coming into effect in March 2021
    - <u>WE ARE FOCUSED ON BILL-C78 - the "NEW DIVORCE ACT"</u>
- Bill C-78
  - Major change in this act
    - is the terminology of custody and access – no longer used but the new act rather use parenting time, parenting plans, contact order
      - The idea is that if you change terminology it will reduce the conflict between parties, rather than fighting about custody and access parents will be talking about parenting time
    - A definition of what constitutes the best interest of the children
      - Best interest of the child is supposed to be the only thing the court basis its decision on with respect to where a child lives, who makes decisions about a child, etc

Family Law Part 2

- In past we had a definition of best interest of child in family act but we did not have one in the divorce act… this is a big change with Bill C-78
    - Provides a very detailed definition – includes the factors that should be looked at when considering the best interest of the child
- SCC in *Young v Younge (1994)* defines the definition of best interest of a child as:
    - Positive right to the best possible arrangements in the circumstances and the child has a positive right to the best possible arrangements in the circumstances
- So when a court is making a decision about where kids are going to live, how much time they are going to spend with each party and who is going to make decisions for the child, the Court is going to look at this child in these circumstances and what it the best possible arrangements for the child

- Creation of duties – There are duties that the clients has to acknowledge & sign an acknowledgement that they know they have this duty to care for children and as lawyers there are duties that lawyers have to advisor their clients of and then file statement saying you have discussed the duties they have

Bill C-78 "New Divorce Act": Important provisions

Definitions

- Definition of decision-making responsibility:
    - Means the responsibility for making significant decisions about a child's well-being, including in respect of: (a) health; (b) education; (c) culture, language, religion and spirituality; (d) significant extracurricular activities
- Definition Family dispute resolution process:
    - means a process outside of the court that is used by the parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law
    - Anything but the court basically or dispute mechanism the court offers
- Definition of family violence:
    - Means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behavior or that causes that other family members to fear for their own safety or for that of another person - and in the case of a child, the director indirect exposure to such conduct - and includes
        - (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person
        - (b) sexual abuse
        - (c) threats to kill or cause bodily harm to another person
        - (d) harassment including stalking
        - (e) the failure to provide the necessaries of life
        - (f) psychological abuse
        - (g) financial abuse
        - (h) threats to kill or harm an animal or damage property
        - (i) the killing or harming of an animal or the damaging of property
- Definition of parenting order:
    - Means an order made under subsection 16.1(1)
- Definition of parenting time:
    - Means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during the entire time
    - Basically the time a child spends with you that you are responsible for said child – can include when in school, playing with times
        - When the child is your responsibility
- Definition of relocation:

- Means a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility - or who has a pending application for a parenting order - that is likely to have a significant impact on the child's relationship with
  - (a) a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or
  - (b) a person who has contact with the child under a contact order
- Note: Old act gave no direction with regards to how to deal with situations where one party wants to relocate the child out of the jurisdiction/province/country – the new act provides directions for dealing with such circumstances
- Relocation in existing case law is referred to as mobility

Provisions

Section 7: Duties

Duties of parties of proceeding

- 7.1 Best interest of chil
  - A person to whom parenting time or decision making responsibility has been allocated in respect of a child of the marriage or who has contact with that child under a contact order shall exercise that time, responsibility or contact in a manner that is consistent with the best interests of the child.
  - Exercise in a manner consistent with best interest of child
- 7.2 Protect the child from conflict arising from the proceeding
  - A party to a proceeding under this Act shall, to the best of their ability, protect any child of the marriage from conflict arising from the proceeding
- 7.3 Family dispute Resolution Process
  - To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.
- 7.4 Complete, accurate and up-to-date information
  - A party to a proceeding under this Act or a person who is subject to an order made under this Act shall provide complete, accurate and up-to-date information if required to do so under this Act.
- 7.5. Duty to comply with orders
  - For greater certainty, a person who is subject to an order made under this Act shall comply with the order until it is no longer in effect.
  - i.e cannot unilaterally change the order
- 7.6 Certification
  - Every document that formally commences a proceeding under this Act, or that responds to such a document, that is filed with a court by a party to a proceeding shall contain a statement by the party certifying that they are aware of their duties under sections 7.1 to 7.5.
  - When you file your SoC or SoD + counter claim the client must sign a certificate acknowledging duties

Legal Advisor – duty to advise

- 7.7(1) reconciliation
  - Unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, it is the duty of every legal adviser who undertakes to act on a spouse's behalf in a divorce proceeding
    - (a) to draw to the attention of the spouse the provisions of this Act that have as their object the reconciliation of spouses; and
    - (b) to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counselling or guidance facilities known to the legal adviser that might be able to assist the spouses to achieve a reconciliation.
  - Is same thing as current section in Divorce Act – basically say I understand this but there is no possibility of reconciliation
- 7.7(2) duty to discuss and inform

Family Law Part 2

- It is also the duty of every legal adviser who undertakes to act on a person's behalf in any proceeding under this Act
    - (a) to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so;
    - (b) to inform the person of the family justice services known to the legal adviser that might assist the person
        - (i) in resolving the matters that may be the subject of an order under this Act, and
        - (ii) in complying with any order or decision made under this Act; and
    - (c) too inform the person of the parties' duties under this Act

- 7.7(3) certification
    - Every document that formally commences a proceeding under this Act, or that responds to such a document, that is filed with a court by a legal adviser shall contain a statement by the legal adviser certifying that they have complied with this section.
    - Need a written verification that you have complied with section 7.7; you have met your responsibilities as a lawyer

Section 16: Best Interests of the Child

- 16(1) Best interest of child
    - The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.
    - Best interest of child in this circumstance is the only consideration
- 16(2) primary consideration
    - When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.
- 16(3) factors to be considered
    - In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including
        - (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
            - **Note**: i.e. younger child is the greater the need for stability – so parenting may not be long periods of time but rather shorter and more frequent visits with parents
        - (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
            - **Note**:How strong there relationship is with each of the parties and extended family
        - (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
            - **Note**:i.e. if you have one parent who can only bash the other parent is it in the child's best interest to provide that parent with primary custody or play a vital role in child's development
            - **Note**:a party's willingness to develop and maintain the child's relationship with the other parent is a factor that is considered when looking at Best interest of child
        - (d) the history of care of the child;
            - **Note**:I.e. who has been primary care giver in past

- (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
  - Note:* the basic rule the older child is, the more likely a court is to give respect to there wishes and usually courts do not start putting any significant weights on the child's wishes in less they are before the court by way of an experts report - until they are somewhere in the area 13 or 14 certainly by the time they are 15 or 16
    - No magic age → Typically don't start considering child wishes until they are teenagers
    - But they will not consider children wishes (i.e. a 6 year-olds wishes)
- (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) any plans for the child's care;
  - Note:Are they just arguing about parenting time but have no plan as to how they will care for the child
- (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j) any family violence and its impact on, among other things,
  - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
  - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
  - Note: So we look at family violence in terms of has there been family violence found and what would be the impact on the perpetrator of the family violence to meet the needs of the child and is it appropriate in these circumstances to be making an order that allows the perpetrator of violence time with the child or necessitates contact between the perpetrator and the victim
- (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child

- 16(4) what constitutes family violence
  - In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:
    - (a) the nature, seriousness and frequency of the family violence and when it occurred;
    - (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
    - (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
    - (d) the physical, emotional and psychological harm or risk of harm to the child;
    - (e) any compromise to the safety of the child or other family member;
    - (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
    - (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
    - (h) any other relevant factor.
  - Note: gives direction as to how the court is to deal with violence

Family Law Part 2

- 16(5) Past conduct
  - In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.
  - Note: Past conduct is only relevant so far as its affectual ability to exercise you parenting ability to care for the child → court shall not take into consideration of past conduct
- 16(6) Maximum parenting time
  - In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.
  - Note: used to be section 16(9) in divorce act but now its section 16(6);
  - Note: this provision has caused difficulty over the years as lots of judges have read this to say If we're going to maximize time that means all matters should start with the presumption of kids should spend equal time with each parent, there should be shared residency. This is not what this provision says… and if you look at some custody access litigation in the past 15 years you'll see this back and forth here in Alberta particularly where the QB says there's a presumption in favour of shared residency but CA is saying no there not
    - When they changed the DA they had the potential to specify that share residency should be the starting point (50/50 time) but they did not do that – they maintained what they said in the old act which stated you maximize the contact as is consistent with the best interest of the child
      - Look at your particular situation and maximize the contact as is consistent with the child's best interest
- 16(7) Parenting order and Contact order
  - In this section, a parenting order includes an interim parenting order and a variation order in respect of a parenting order, and a contact order includes an interim contact order and a variation order in respect of a contact order.
  - Note: includes any type of order (interim, final or variation)

Parenting Orders

- Section 16.1 through 16.5 discusses what a parenting order is
- 16.1(1) Parenting Order
  - A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by
    - (a) either or both spouses; or
    - (b) a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.
- 16.1(2) Interim Order
  - The court may, on application by a person described in subsection (1), make an interim parenting order in respect of the child, pending the determination of an application made under that subsection.
- 16.1(3) Application by person other than spouse (a person who is a parent of the child but not party to divorce – stand in the place of a parent – that you can make an application for a parenting order)
  - A person described in paragraph (1)(b) may make an application under subsection (1) or (2) only with leave of the court.
- 16.1(4) Contents of parenting order
  - The court may, in the order,
    - (a) allocate parenting time in accordance with section 16.2;
    - (b) allocate decision-making responsibility in accordance with section 16.3;
    - (c) include requirements with respect to any means of communication, that is to occur during the parenting time allocated to a person, between a child and another person to whom parenting time or decision-making responsibility is allocated; and
    - (d) provide for any other matter that the court considers appropriate

        - Note: Basically the court are going to say OK this is this is the schedule- this is the time there gonna spend the party A, this is the time there gonna spend with party B; it's also gonna set up who's going to be responsible for decision-making (is it one, the other, both?)
- 16.1(5) Terms and conditions
    - The court may make an order for a definite or indefinite period or until a specified event occurs, and may impose any terms, conditions and restrictions that it considers appropriate.
    - Note: May say I will give you this order until one of the parties is successful doing… or this schedule is in place for X amount of time and if Y happens then it will be revised or parenting time is conditional on not consuming alcohol
- 16.1(6) family dispute resolution process
    - Subject to provincial law, the order may direct the parties to attend a family dispute resolution process.
- 16.1(7) relocation
    - The order may authorize or prohibit the relocation of the child.
- 16.1(8) supervision
    - The order may require that parenting time or the transfer of the child from one person to another be supervised.
    - Note: Supervised means this: if I have parenting time supervision means I have to have a specified person or agency, or another adult has to be present when having parenting time
- 16.1(9) prohibition on removal of child
    - The order may prohibit the removal of a child from a specified geographic area without the written consent of any specified person or without a court order authorizing the removal
- 16.2(1) Parenting time
    - Parenting time may be allocated by way of a schedule.
- 16.2(2) Day-to-day decisions
    - Unless the court orders otherwise, a person to whom parenting time is allocated under paragraph 16.1(4)(a) has exclusive authority to make, during that time, day to-day decisions affecting the child.
- 16.3 Allocation of decision-making responsibility
    - Decision-making responsibility in respect of a child, or any aspect of that responsibility, may be allocated to either spouse, to both spouses, to a person described in paragraph 16.1(1)(b), or to any combination of those persons.
- 16.4 Entitlement to information
    - Unless the court orders otherwise, any person to whom parenting time or decision-making responsibility has been allocated is entitled to request from another person to whom parenting time or decision-making responsibility has been allocated information about the child's well-being, including in respect of their health and education, or from any other person who is likely to have such information, and to be given such information by those persons subject to any applicable laws.

Contact Orders

- Section 16.5
- Note: Contact order is an order that allows a person who is not a party to the litigation (i.e. somebody who has relationship with child - a person who stands in place of a parent (this could include step parent, grandparents, aunts and uncles = third parties with significant relationship with the child) – allows them to have contact with the child) to see the child; do not have decision making capabilities, nor do have parenting time but simply is allowed contact with the child
    - contact orders can have terms and conditions, they could be supervised, can be prohibition on removal child, and the contact order would set out the time and type of visits/communication
    - Allows for third parties to have contact to the children but does not allow power to have any say in how the child is raised
- Section 16.5(5) Contents of contact order:
    - The court may, in the contact order,

Family Law Part 2

        - (a) provide for contact between the applicant and the child in the form of visits or by any means of communication; and
        - (b) provide for any other matter that the court considers appropriate.
    - Important Section 16.5(9) to note:
        - If a parenting order in respect of the child has already been made, the court may make an order varying the parenting order to take into account a contact order it makes under this section, and subsections 17(3) and (11) apply as a consequence with any necessary modifications.
        - Note: If the parenting order will be varied the court needs to consider if the variation will impact the contact order; it is likely contact order won't have to much affect when varying an order

Parenting Plan

- Section 16.6(1)
    - The court shall include in a parenting order or a contact order, as the case may be, any parenting plan submitted by the parties unless, in the opinion of the court, it is not in the best interests of the child to do so, in which case the court may make any modifications to the plan that it considers appropriate and include it in the order.
    - Note: Basically there will be a parenting plan And then goes on to say the definition of a parenting plan means a document in or part of a document that contains the elements remaining to parenting time, decision making responsibility, or contact.
        - Per Lorie this says that what we're going to be required to do is to provide in our supporting documents for an application is to say this is the parenting plan my client is proposing and it will set out time (including holiday, activities, communication, decision making responsibilities)

Change in Place of Residence

- 16.7 Non-Application
    - Section 16.8 does not apply to a change in the place of residence that is a relocation
- 16.8 (1) Notice
    - a person who has parenting time or decision-making responsibility and respect of a child of the marriage Anne who intends to change their place of residence or that of the child shall notify another person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention
- 16.8 (2) Form and content of notice
    - the notice shall be given in writing and child set out (a) the date on which the change is expected to occur; and (b) the address of the new place of residence in contact information of the person or child, as the case may be

Relocation

- Section 16.9
    - Will return to

Variation order

- Section 17
    - Discusses variation - All orders with respect to kids are open for variation if there has been a change in material circumstances since granting of the last order
        - Time period the court will look at is from last granting to date of variation order
- 17(1) Variation order
    - A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively,
        - (a) a support order or any provision of one, on application by either or both former spouses;
        - (b) a parenting order or any provision of one, on application by
            - (i) either or both former spouses, or
            - (ii) a person, other than a former spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent; or

        - (c) a contact order or any provision of one, on application by a person to whom the order relates.
- 17(2.1) Variation of Parenting order
    - If the court makes a variation order in respect of a parenting order, it may make an order varying any contact order to take into account that variation order, and subsections (3) and (11) apply as a consequence with any necessary modifications.
- 17(2.2) Variation of contact order
    - If the court makes a variation order in respect of a parenting order, it may make an order varying any contact order to take into account that variation order, and subsection (3) and (11) apply as any consequence with any necessary modification
- 17(3) Conditions of order
    - 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, and the court has the same powers and obligations that it would have when making that order.
- 17(5) Factors for parenting order or contact order
    - Before the court makes a variation order in respect of a parenting order or contact order, the court shall satisfy itself that there has been a change in the circumstances of the child since the making of the order or the last variation order made in respect of the order, or of an order made under subsection 16.5(9).
    - Note: Basically saying What you need to know is that the court has to satisfy themselves that there has be a change the circumstances since the last order was granted and if it isn't a change in circumstances that's it you're done you're out;
        - have to convince the court here are the change in circumstances and here is the new order or plan I am suggesting

Family Law Act: important provisions

- The FLA is the other piece of legislation that governance parenting time and issues with children in in Alberta
- When to use the family, law acts
    - if you cannot use the divorce act, if you are not legally married, then you use the family law Act or if you are married but you haven't commenced an action for divorce but are separated and you are not sure you want to divorce or are not sure if you're going to reconcile it then you would use the family law act
- The important portion of the family law act is part 2 – discusses guardianship, parenting and contact orders and enforcement of time with a child
- Section 18(1):
    - In all proceedings under this Part except proceedings under section 20, the court shall take into consideration only the best interests of the child.
- Section 18(2)
    - In determining what is in the best interests of a child, the court shall
        - (a) ensure the greatest possible protection of the child's physical, psychological and emotional safety, and
        - (b) consider all the child's needs and circumstances, including
            - (i) the child's physical, psychological and emotional needs, including the child's need for stability, taking into consideration the child's age and stage of development,
            - (ii) the history of care for the child,
            - (iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,
            - (iv) the child's views and preferences, to the extent that it is appropriate to ascertain them,
            - (v) any plans proposed for the child's care and upbringing,
            - (vi) any family violence, including its impact on

        - (A) the safety of the child and other family and household members,
        - (B) the child's general well-being,
        - (C) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and
        - (D) the appropriateness of making an order that would require the guardians to co-operate on issues affecting the child,
    - (vii) the nature, strength and stability of the relationship
        - (A) between the child and each person residing in the child's household and any other significant person in the child's life, and
        - (B) between the child and each person in respect of whom an order under this Part would apply,
    - (viii) the ability and willingness of each person in respect of whom an order under this Part would apply
        - (A) to care for and meet the needs of the child, and
        - (B) to communicate and co-operate on issues affecting the child,
    - (ix) taking into consideration the views of the child's current guardians, the benefit to the child of developing and maintaining meaningful relationships with each guardian or proposed guardian,
    - (x) the ability and willingness of each guardian or proposed guardian to exercise the powers, responsibilities and entitlements of guardianship, and
    - (xi) any civil or criminal proceedings that are relevant to the safety or well-being of the child.
- **Note:** this almost identical to the new divorce act where it sets out the best interest of the children
    - Here where divorce act talks about parties the family law act talks about guardians – need to be a guardian of child to get parenting order
- How do you determine who is the Guardian of the child? – Section 20
    - section 20(2)
        - Subject to this section, a parent of a child is a guardian of the child if the parent (a) has acknowledged that he or she is a parent of the child, and (b) has demonstrated an intention to assume the responsibility of a guardian in respect of the child within one year from either becoming aware of the pregnancy or becoming aware of the birth of the child, whichever is earlier.
        - **Note**: used to be that the only automatic guardian of a child was a mother…fathers had to prove they were guardians of a child or they have to apply to court to be deemed a guardian. What this section says is that if you are a parent you are automatically a guardian if you have acknowledged you're a parent and demonstrated the intention to assume the role and responsibility of being a guardian
- How do you assume the responsibility of a guardian?
    - Section 20(3) – sets out list of ways to assume intention of guardianshiip
        - For the purposes of this section, a parent has demonstrated an intention to assume the responsibility of a guardian in respect of a child by
            - (a) being married to the other parent at the time of the birth of the child,
            - (b) being the adult interdependent partner of the other parent at the time of the birth of the child or becoming the adult interdependent partner of the other parent after the birth of the child,
            - (c) entering into an agreement that meets the requirements of the regulations with the other parent to be a guardian of the child,
            - (d) marrying the other parent after the birth of the child,
            - (e) cohabiting with the other parent for at least 12 consecutive months during which time the child was born,
            - (f) with respect to a female parent, carrying the pregnancy to term,

Family Law Part 2

- (g) with respect to a child born as a result of assisted reproduction, being a parent of the child under section 8.1,
- (h) being married to the other parent by a marriage that, within 300 days before the birth of the child, ended by
  - (i) death,
  - (ii) a decree of nullity, or
  - (iii) a judgment of divorce,
- (i) where the other parent is the birth mother of the child, voluntarily providing or offering to provide reasonable direct or indirect financial or other support, other than pursuant to a court order, for the birth mother during or after her pregnancy,
- (j) voluntarily providing or offering to provide reasonable direct or indirect financial or other support, other than pursuant to a court order, for the child, or
- (k) any other circumstance that a court, on application under subsection (6), finds demonstrates the parent's intention to assume the responsibility of a guardian in respect of the child.

- Section 22(1)
  - A guardian who is a parent of a child may appoint a person to be a guardian of the child after the death of that guardian by (a) a will, or (b) a written document that is signed and dated by the guardian and an attesting witness
  - **Note:** basically say you can will your guardianship of a child to a third party who will take over after you die
- Section 23: Making a guardianship order
  - Basically talks about that if you don't fall under section 20 – not a parent – if you are a third party and want to be declared a guardian – section 23 discuss how you go about doing that.
  - Section 23(1)
    - The court may, on application by a person who
      - (a) is an adult and has had the care and control of a child for a period of more than 6 months, or
      - (b) is a parent other than a guardian of a child, make an order appointing the person as a guardian of the child.
  - Section 23 basically allows a third party to be appointed guardians, not always instead of someone else, if the court thinks it is in the best interest of the child the court may appoint a new or third guardian and that guardian has the same status as a parent
- What does being a guardian involve?
  - Section 21 – discussed the powers and responsibilities and entitlement of guardianship
  - 21(1) A guardian shall exercise the powers, responsibilities and entitlements of guardianship in the best interests of the child.
  - 21(2) Where a child has more than one guardian, the guardians
    - (a) may each exercise the powers, responsibilities and entitlements of a guardian, unless the court orders otherwise,
    - (b) shall provide information to any other guardian relating to the exercise of powers, responsibilities and entitlements of guardianship, at the request of that other guardian,
    - (c) shall use their best efforts to co-operate with one another in exercising their powers, responsibilities and entitlements of guardianship, and
    - (d) may enter into an agreement with respect to the allocation of powers, responsibilities and entitlements of guardianship among themselves.
  - 21(3) A guardian who is neither a parent of the child nor a person standing in the place of a parent referred to in section 48 has no legal duty to support the child from the guardian's own financial resources.
  - 21(4) Except where otherwise limited by a parenting order, each guardian is entitled

        - (a) to be informed of and consulted about and to make all significant decisions affecting the child in the exercise of the powers and responsibilities of guardianship described in subsection (5), and
        - (b) to have sufficient contact with the child to carry out those powers and responsibilities.
    - 21(5) Except where otherwise limited by law, including a parenting order, each guardian has the following responsibilities in respect of the child:
        - (a) to nurture the child's physical, psychological and emotional development and to guide the child towards independent adulthood;
        - (b) to ensure the child has the necessaries of life, including medical care, food, clothing and shelter.
    - Section 21(6) (for our purposes this is the important section)
        - Note: This section delineates the powers a guardian has and these are the types of decisions a guardian can make
            - Under the documents you file to make an application under the FLA you will see this list is replicated in thee documents; it will say "do you want to make this decision on your own; do you want the other person to have to make it on their own; or do you want to make it together – this will give a good starting point for parenting plans that will have to be submitted
        - Bottom line: sets out the responsibilities of a guardian
        - Except where otherwise limited by law, including a parenting order, each guardian may exercise the following powers:
            - (a) to make day-to-day decisions affecting the child, including having the day-to-day care and control of the child and supervising the child's daily activities;
            - (b) to decide the child's place of residence and to change the child's place of residence;
            - (c) to make decisions about the child's education, including the nature, extent and place of education and any participation in extracurricular school activities;
            - (d) to make decisions regarding the child's cultural, linguistic, religious and spiritual upbringing and heritage;
            - (e) to decide with whom the child is to live and with whom the child is to associate;
            - (f) to decide whether the child should work and, if so, the nature and extent of the work, for whom the work is to be done and related matters;
            - (g) to consent to medical, dental and other health-related treatment for the child;
            - (h) to grant or refuse consent where consent of a parent or guardian is required by law in any application, approval, action, proceeding or other matter;
            - (i) to receive and respond to any notice that a parent or guardian is entitled or required by law to receive;
            - (j) subject to the Minors' Property Act and the Public Trustee Act, to commence, defend, compromise or settle any legal proceedings relating to the child and to compromise or settle any proceedings taken against the child;
            - (k) to appoint a person to act on behalf of the guardian in an emergency situation or where the guardian is temporarily absent because of illness or any other reason;
            - (l) to receive from third parties health, education or other information that may significantly affect the child;
            - (m) to exercise any other powers reasonably necessary to carry out the responsibilities of guardianship.
- Parenting orders: section 32, 33 and 34

Family Law Part 2

- Section 32(1) Allows court to make an order in situations where parties cannot come to an agreement
  - Where a child has more than one guardian and the guardians (a) are not able to agree with each other in exercising the powers, responsibilities and Chapter 1 29 entitlements of guardianship in respect of the child, and (b) in the case where the guardians are the parents of the child, are living separate and apart, the court may, on application by one or more of the guardians, make an order relating to the exercise of the powers, responsibilities and entitlements of guardianship in respect of the child.
- Section 32(2) discusses what goes into a parenting order
  - A parenting order may contain any or all of the following:
    - (a) an allocation, generally or specifically, of the powers, responsibilities and entitlements of guardianship among the guardians;
    - (b) an allocation of parenting time, which may be by way of a schedule, unless a schedule is unnecessary in the circumstances;
    - (c) a dispute resolution process for any or all future disputes regarding guardianship or parenting arrangements, if the process has been agreed to by the persons who are bound by that process;
    - (d) any other provisions that the court considers appropriate.
- Section 33(2)
  - Without limiting the generality of subsection (1), the court may include in a parenting order a term requiring a guardian who intends to change his or her place of residence or that of the child to notify the other guardian or guardians, at least 60 days before the change or within such other period before the change as the court may specify, of the change, the date on which the change will be made, and the new place of residence for the guardian or the child, as the case may be
  - Note: Idea is that if either party is thinking of relocating a child they need to give 30 days written notice so it will allow the other party time to bring an application to court to stop the move if need be
- Section 34 variation of parenting order
  - 34(1) In this section, "variation order" means an order made under subsection (2) or (5).
  - 34(2) The court may, on application by one or more of the guardians, make an order varying, suspending or terminating a parenting order or any part of that order.
  - 34(3) Before the court makes a variation order in respect of a parenting order, the court shall satisfy itself that a change in the needs or circumstances of the child has occurred since the making of the parenting order or the last variation order made in respect of that order, and in making the variation order, the court shall consider only the best interests of the child, as required by section 18 and as determined by reference to that change.
  - 34(4) The court may include in a variation order any provision that could have been included in the parenting order in respect of which the variation order is sought.
  - 34(5) The court may, on application by the child or a person who has the care and control of the child, make an order varying, suspending or terminating a parenting order referred to in section 22(6) or any part of that order.
- Section 35 and Section 35: Contact orders
  - Are very similar to the ones in divorce act

  Contact order
  - Section 35(1) The court may, on application by any person, including a guardian, make an order providing for contact between a child and a person who is not a guardian.
  - 35(2) Subject to subsection (3), a person other than
    - (a) a parent or a guardian of a child, or

- (b) a person standing in the place of a parent may not make an application under this section without the permission of the court on notice to the guardians.
- Note: That means say an aunt who wants contact, you would not make two applications you would make an application for leave to make the application at the same time you made the application; need to get the court to allow you to do so

- 35(3) A grandparent of a child does not require the permission of the court to make an application under this section if
  - (a) the guardians are the parents of the child and
    - (i) the guardians are living separate and apart, or
    - (ii) one of the guardians has died, and
  - (b) the grandparent's contact with the child has been interrupted by
    - (i) the separation of the guardians, or
    - (ii) the death of the guardian.
- Note: Court has to be convinced the contact is in the best interest of the child
  - Per Lori: It is difficult to get a contact order and usually in situation of grandparents or stepparents; usually when said individual(s) has had a significant impact on the child's life and stopping the relationship would harm them
  - Keep in mind: third parties would need leave of the court to bring application for contact if the kids parents are intact (i.e. if grandparent do not like how parents are raising children)
- 35(4) In determining whether to grant permission under subsection (2), the court shall consider the best interests of the child, including
  - (a) the significance of the relationship, if any, between the child and the person for whom contact with the child is proposed, and
  - (b) the necessity of making an order to facilitate contact between the child and the person for whom contact with the child is proposed.
- 35(5) Before the court makes a contact order, the court shall satisfy itself that contact between the child and the person for whom contact with the child is proposed is in the best interests of the child, including whether
  - (a) the child's physical, psychological or emotional health may be jeopardized if contact between the child and the person for whom contact with the child is proposed is denied, and
  - (b) the guardians' denial of contact between the child and the person for whom contact with the child is proposed is unreasonable.
- 35(6) The court may, in a contact order, provide for contact between the child and the person for whom contact with the child is proposed in the form of visits or in the form of oral or written communication or any other method of communication, and may provide for any related matter as the court considers appropriate.

Terms and Conditions

- 36 The court may make a contact order for a definite or indefinite period or until a specified event occurs and may impose terms, conditions and restrictions in connection with the order as the court considers appropriate

- FLA has provision re enforcement of orders
  - Section 40
    - Discussion re orders that allows parenting time or contact and it is being denied to me; other party not following the order
    - 40(1) Subject to subsection (5), the court, on application by a person with a right under a time with a child clause, if it is satisfied that there has been a denial of time within 12

months of the application being brought, may make any enforcement order that is appropriate in the circumstances.

- 40(2) An enforcement order under subsection (1) may contain any one or more of the following provisions:
    - (a) a provision requiring the respondent to give the applicant compensatory time;
    - (b) a provision requiring the respondent to give security, in the form and amount and under the conditions determined by the court, for the performance of the obligation in the time with a child clause;
        - **Note:** Security = money
    - (c) a provision requiring the respondent to reimburse the applicant for any necessary expenses actually incurred as a result of the denial of time;
    - (d) a provision imposing on the respondent a penalty in an amount not exceeding $100 for each day there has been or is a denial of time to a maximum of $5000 and in default of payment to imprisonment for a term not exceeding 90 days;
        - **Note:** Can add a police assistance/enforcement clause – says police are entitled to enforce it – can be traumatic on child
    - (e) a provision providing for the respondent to be imprisoned, continuously or intermittently, to a maximum of 90 days for a denial of time until time with the child is given;
    - (f) where the court is satisfied, based on the respondent's history of denial of time or based on other reasonable and probable grounds, that a denial of time will occur, a provision directing an enforcement officer to act in accordance with section 44;
    - (g) a provision directing the respondent or the applicant, or both, to do anything that the court considers appropriate in the circumstances that is intended to induce compliance with the time with a child clause.
- 40(3) A provision referred to in subsection (2)(d), (e) or (f) may be included in an enforcement order only if the court is satisfied that none of the other provisions provided for in subsection (2) would be effective.
- 40(4) If an enforcement order contains a provision referred to in subsection (2)(f), the court shall include sufficient particulars of time, days, dates or periods of time to be enforced.
- 40(5) If the court is of the opinion that the denial of time was excusable in the particular circumstances, the court may
    - (a) refuse to make an enforcement order, or
    - (b) make any enforcement order in accordance with subsection (6) that is appropriate in the circumstances.
- 40(6) An enforcement order referred to in subsection (5)(b) may contain any one or more of the following provisions:
    - (a) a provision requiring the respondent to give the applicant compensatory time;
    - (b) a provision requiring the respondent to reimburse the applicant for any necessary expenses actually incurred as a result of the denial of time;
    - (c) a provision directing the respondent or the applicant, or both, to do anything that the court considers appropriate in the circumstances that is intended to induce compliance with the time with a child clause.

- Section 41: Failure to exercise time
    - Where a person who has a right under a time with a child clause fails to exercise that right without reasonable notice to a guardian, the court may, on application by that guardian, make an order requiring the person to reimburse the guardian for any

necessary expenses actually incurred by that guardian as a result of the failure to exercise that right.
- **I.e.** For instance if someone has time every second weekend and you look after them primarily but you could be taking shifts and you don't but the parent fails to show the court can order your wages for that missed work or amount paid for child care
- **Idea:** to get the parent to follow the order

October 29, 2020

Exam: For the purposes of the exam assume new divorce act is in effect – Bill C78 (will be indicated on exam to use new act)

The Forms of Orders

- Three types of orders when dealing with parenting issues: interim (initial order), final (Comes out of Aviva voce hearing) and variation

Interim order

- it is usually the first to order after an action has started; always prior to trial and often before parenting assessment is done
- usually situation where parties cannot agree, there is no order in place, they need some structure so someone goes to court to get an interim order
    - Basically a stop gap measure – we have to put something in order here, we have to put some sort of schedule in place and this is what we're going to do between now and the time he goes to trial or some sort of viva voce hearing
- *R v R* (nature of interim orders)
    - Specifically addresses interim order
    - Situation where a mother was appealing a trial decision that gave the dad primary residence of 4.5 year old child
    - One of the big arguments the mom was using was that by way of an interim order she had held residency of the child for a couple of years
        - these parties had lived on the farm she moved with the child two Lethbridge and had the child in childcare;
        - dad was still farming - one of his arguments was he didn't need any third party care for the child he could spend more time with the child
        - Mom's argument of course was I have had primary residency of this child for two years. Also posed an argument about the farm was bad for the health and most importantly argued that basically little children's fall children need their mothers
            - This is an old doctrine called ***tenders years doctrine***
    - ***Tender years doctrine***: young kids need their mothers
        - No longer in existence or in force
    - An interesting comment by the trial justice was made even though there's a provision in the existing act, and a provision in the act that's coming in, that says <u>past conduct is only relevant as it affects your ability to care for the child</u>
        - In the trial justice makes a comment here where he says the following: that the mother was marginally more responsible for the breakdown of the relationship, as she was more sensitive to that conduct of the husband constituting cruelty than she might otherwise have been
        - So one of the grounds for appeal of course was the fact that the trial justice based used for past conduct against her contrary to the Divorce Act
            - ultimately the court says no this was just a commentary
            - Per Lori: to be honest I have no idea why it justice would make this kind of comment unless the court were saying there's something wrong with this woman's conduct but in any event it's just an interesting side

- What is important about the case is what it says about interim orders or about the status quo
  - the court makes a few pronouncements and they are as follows:
    - first of all the best interests of the child must prevail at all times an interim order is basically making for the kid the best of a bad situation
    - Secondly the court says it is at the time of an interim disposition (IE the when the 1st order comes around) that the court should not lightly disturb the de facto arrangements (IE the status quo)
      - so the court will definitely look at the status quo when they're making an interim order
    - thirdly the court says interim custody (IE parenting time) is makeshift and is designed to minimize conflict by setting out an arrangement
    - fourthly the court says interim orders are designed to cause the least amount of harm
    - Fifthly, the court says all other things being equal, the general rule is that it's not in the best interest of the child to substitute an uncertain situation for a certain one
  - Bottom Line: basically what they are saying is the status quo at the time of an interim disposition the status quo is vitally important factor

- *Richter v Richter*
  - Richter says this:
    - first of all shared parenting (i.e. some sort of equal sharing of time and responsibility) should not be ordered with a substantial conflict and especially not before a trial where there's significant disagreement on the evidence
    - Secondly the Court of Appeal says it's not in the best interest of the child to impose a regime which invites continued court applications
    - Thirdly the court says the de facto arrangements should not be disturbed lightly pending trial
  - What they're looking for his stability and certainty in the kids life
- *Shwaykosky v Pattison*
  - CA decision
  - Long protracted litigation - Parties had shared residency for 5 years and they had a case manager since 2010
    - Case manager/case management
      - 1 justice is appointed to hear all interim applications, so one justice will hear every application up to but not including the disposition order or the trial
      - Usually in situations where there is significant litigations and parties brought application after application
      - The idea is that the Justice will remember the facts
  - Went to chambers and there was conflicting affidavit evidence
    - Mom was asking for viva voce hearing with oral evidence
  - What happened was the case management Justice in chambers gave primary residence to the dad
  - So it goes to the CA – the issue before the CA was changing a parenting situation (a interim order) when there has been a long standing status quo and without a viva voce hearing
    - CA response: except in the case of urgency, and only when it is clearly in best interest of child, substantially changing a parenting regime in chambers without the benefit of viva voce evidence, is a practice that we do not endorse…This court has said on several occasions that in the absence of a serious compelling circumstance doing so is fraught with problems and often procedurally unfair and may lead to protracted litigation and moving the children unnecessarily
      - Fairly strong statement from CA saying unless an emergency or some sort of urgency, and it is in best interest of children, changing an interim order (or

changing status quo) doing that in chamber with only affidavit evidence and doing that without a vivo voce hearing is not a practices they endorse

- These cases reveal fairly strong statements about the nature of interim orders
    - **Bottom Line:** So what you can take from that is that when granting an interim order the de facto that the de facto arrangements or the status quo are extremely important - they are designed to minimize conflict, cause the least amount of harm to the child to avoid continued applications and to engender some sort of consistency or so certainty

Final Order

- Order that emerges out of a vivo voce hearing
- The status quo is but 1 factor - it is not determinative factor but it is just one of the factors the court takes into account
    - it's not determinative
    - when you are in trial and there has already been an interim order the court will recognize that an interim parenting regime is it's not presumed to be the best because of the nature of an interim order
        - the nature of an interim order is sort of a makeshift - let's put some structure in here
    - when you get to the final order the court will not assume that because there is an interim order in place that that is automatically in the best interest of the child
        - that's because of the nature of an interim order
- **Bottom line:** the court will look at all factors and the status quo is but one factor

Variation Order

- Situations where we've got an order in place whether it's an interim order or the final order and somebody brings an application or somebody wants to change the existing order
- two things to remember about variation order:
    - 1. there has to have been a material change in circumstances from the time the last order was granted and
    - 2. the period of time of court looks at is the time since the last order was granted to today's date (time of hearing)
- when you were bringing an application to vary an order you don't go back to the pre-existing order to the time before that - we don't get to be argued that - the idea is that such would have been argued - it would have been decided when the last order was granted, when it was imported, whether it was by consent or whether it was ordered
    - A variation you have to show here is the change in circumstances Since the last order was granted and you focus on that period of time - from the time the last order was granted until today
    - in order to get to get a new order you have to show that there's been a change in circumstances in that period of time

Parenting Regimes: The Forms of Parenting Orders

- under the existing divorce act, what has been, what you will see in the case law, is what types of parenting regimes we have - in the past it's basically been two types under the Divorce Act:
    - (1) sole custody or
    - (2) some sort of joint custody

Sole Custody

- Sole custody: one party haas all the decision-making authority over a child, the other party is entitled to specified time with the child, is entitled to information about the child, but has no say in the decision-making process
- Very rare now – almost impossible to get

Joint Custody

- there's two types of **joint custody**:
    - (1) Joint legal custody
        - That the child is primarily resident or primarily lives with one parent
        - the other parent has specified parenting time

        - the major decisions concerning concerning the child's health education and welfare are made jointly by the parties BUT all the other decisions are made by the primary residential parent
    - (2) Joint physical custody
        - commonly referred to as shared residency
        - so the child is spending basically equal time with each parent and the parties have equal decision-making capabilities

Under New Act

- now under the new Act, when you guys get out in your practice, people will use these terms for another three or four years every time is a change in legislation, people will continue to use the terms
- What you are looking at Iis some sort of parenting regime - some sort of parenting schedule you'll never be able to look perfect for something that talked about the provisions where you have to put in a parenting schedule
- Basically what you will be looking at, the two major types, are going to be analogous to joint custody in terms of time:
    - Option 1: (Major type)
        - in one party has primary residence (IE the Childs spends the majority of their time with that parent)
        - The other option is the parent has specified parenting time
        - Example: So one party may have primary residence the other party may have specified parenting time so they have them every second weekend from Friday night until Monday morning when they go to school
            - Primarily reside with one parent
        - Under the new Divorce Act you have to set out the decision-making responsibilities
            - so you know reality tells us that the day-to-day decisions in a situation like that where somebody has primary residence they would make the day-to-day decisions and the major decisions would be shared between the parties
    - Option 2: (Major type)
        - Shared parenting/shared residency
        - Basically where the child spends more than 40% of their time with each one of the parties
        - So that could be any sort of arrangement:
            - could be an arrangement where the child changes residences alternating (weekly week one with one parent week two with the other)
            - it could be as scheduled were one party has Monday and Tuesday each week ,one party has Wednesday and Thursday, and then the alternate the weekends which are defined as Friday Saturday Sunday
            - it may be a situation where the kids change residences every 4 days
            - it may be a situation where one of the parties is working shift work and has 4 days off in a row and they have them on all there days off
        - Need to set out the decision-making capabilities/responsibilities
            - Absent that the parties would have to make the decisions concerning the child together
            - Idea is that you can make some sorts of decisions together, its hardly healthy where a child is alternating between residencies and the rules are extremely different

Maximizing Contact & New Divorce Act

- Provision re maximizing contact - and that is section 16(6) in the new act
    - it was 16(10) in existing at that
- Section 16(6)says as follows: in allocating parenting time the court shall give effect to the principle that a child should have as much time with each spouse as his consistent with the best interest of the child

Family Law Part 2

- In the last 15 years (if not more) there has been huge discussion and disagreement about what this provision means
    - there's a school of thought and a school of justices that have thought that this means that provision meant that there is a presumption in favor of shared residency
        - presumption in favor of that is to be joint custody (IE sharing of decision making) and a presumption in favor of the shared residence
- Have some cases in your materials which show that progression:

McCurry v Hawkins

- here that was a situation where they had Twins that were born half years old; there was a sharing of the responsibility for the kids during the marriage
- at separation parties were OK with what they had worked out until a third party or the mom's new boyfriend became involved
    - then the fight begins about whether or not there should be shared parenting
- Justice Fites who was a big proponent of you know we should start from the presumption of shared parenting – Makes the following comments:
    - "parents having the legal status of joint custody should also have the real status of joint parenting except where such an arrangement is not in the best interest of the children"
        - so she basically says at the time any type of joint custody means there should be shared residency
            - it's a presumption in favor of shared residency and that's the starting point
                - and for a while there we had justices that would tell you that even though that's not what the Divorce Act says; will start with that presumption and then you have to rebut it
                - The CA would return saying that is not the state of the law

Richter v Richter

- CA says the general proposition is you shouldn't order shared parenting when the parents are in substantial conflict with each other in certainly not before a trial and especially when there is significant disagreement on the evidence
    - so they suggest here that you know it's not just an automatic to order shared parenting

Cavanaugh v Balkaron

- Here the kids were 13 and 17
- The chambers justice, Justice Fites (TJ) ordered shared residency (i.e. shared parenting) of the kids despite Spite the fact that at least the 13 year-old did not want it but the Justice took the position that there should be shared residency/parenting unless the mother could show it was not in the best interest of the children
- The CA said no – this is the wrong approach
    - It says there is no longer any presumptions or default positions that regulate decisions concerning custody and access concerning parenting - the sole determinant is the best interest of the child

Botticelli v. Botticelli

- Justice Fites (aware of the *Cavanaugh* decision) was the justice again
- The facts were, Mr botticelli was asking for interim shared parenting of a 22 month old child; the mother opposed the application on the grounds that the father had acknowledged that he cannot care for the child appropriately and that the child is comfortably settled in the mother's home
    - Despite that and the fact that the father didn't care for the child Justice Fites grants shared residency
- This is what justice Fites says:
    - as our Court of Appeal recently clarified there no presumptions in parenting disputes and only standard is the best interest of the child. Well this means that there's no rebuttable presumption in favor of shared parenting, it also means there is no presumption among other potential examples in favor of the primary caregiver or in favor of the status quo

and with respect to the status quo, it can no longer be said that on an interlocutory basis (that means interim basis) a change in the de facto parenting arrangement is a gamble and should not be undertaken. Moreover, the argument in favor of maintaining the status quo does not in circumstances here meet the underlying premises of the status quo conclusion, particularly that there is a trial …

- Basically she says is *Cavanaugh* says there's no presumptions so that throws out what was said in *Richter* in terms of not disturbing the status quo - that throws out any presumptions that are used in giving an interim order and we should be able to do whatever you want under the interim order
  - she's basically trying to say that they were just talking about a presumption in favor of shared residency, they were talking about all presumptions - so everything should be thrown out including what we know we knew today about interim orders

Rensonnet v. Utl

- Court of Appeal they deal with the issue in *Botticelli* and they confirm what was said in *Richter* – so they say this:
  - the case law is clear that shared parenting arrangements should not be ordered when the parties are in substantial conflict with each other nor should such orders be made before trial if there's a significant and disagreement on the evidence

- So you have *Rensonnet* decision in 2014, and then in 2015 you have this way *Shwaykosky v Pattison* decision saying that changing the status quo before trial, absent of some sort of urgency, is not a practice that the court approves of
  - So you have this back and forth but you will see it keeps going to the Court of Appeal and the Court of Appeal keeps saying not here's no presumption in favor of shared residency it's still the law that you should not lightly disturb the status quo or you're making an interim order you should not lightly disturb the interim order, absent of viva voce hearing unless there is some urgency that can be shown to be in the best interest of the children
- We have had this back and forth going on for quiet some time – the two CA decision make it clear there should not be a presumption in favour of shared parenting/residency
  - when you're in front of a lot of judges out there they are still thinking in the back of their minds that should be shared residence do you have to show me otherwise so don't be misled by that but the state of the law is that there are no presumption - there's no presumption that favors shared residency
  - Per Lori: And I think you can make a very strong argument that when the new divorce act came in, was being drafted, there were huge amounts of submissions on this very issue
    - the parliament had the opportunity and they certainly any solutions on it… they had the opportunity to change section 16(9) (what will become section 16(6) under the new act) too say that the starting point is shared residency unless you can show it's not in the best interest of the child - they had the opportunity to do what justice Fites it did in McCurry v Hawkins… they didn't do that
      - the wording has not changed - it is the same provision in the new divorce act as is in the existing divorce act
    - so, I would argue that you can take from that, that the parliament has rubber stamped what our court of appeal has said that there are no presumptions in favour of shared parenting/residency; the only thing we look at is best interest of the children
  - Be alive to this issue when you are practicing - you never know what will happen so you need to be alive to the possibility that you get ta justice who believes shared residency/parenting is the starting point – so you need to be prepared to argue against it

Exam note: Lori wants us to know the principals of the case – what the case stands for; memorizing the facts is a waste of time – no interest if we can recite the facts of the case

Family Law Part 2

Alternative Options in terms of parenting Schedules

- In addition to the two previously mentioned
- Option #3: Split custody/split parenting
    - that's in a situation where there's more than one child and one child may be primary residence with mom the other child is primarily resident with dad; or one child is primarily resident with dad and the other child is doing some further shared parenting… that's called split parenting
    - It's not all that common but sometimes parties will agree to it or sometime courts will order it
    - it's usually in in situations where, for example, let's say you have a 16 year old and then you have an "oops" that's five years old – the 16 year old may not want to do some form of shared parenting/residency but may want a primary residence, where as for the 5 year old it is in their best interest to have shared parenting
    - or there may be a reason you know what for one child to stay with one parent primarily and one to stay with the other one
- Option #4 Bird Nesting parenting
    - what bird nesting is, is this: instead of the kids going back and forth between houses of their parents, the kids have a residence and the parents move in and out of that;
    - Example: so let's say a couple splits up, the kids stay in the house, let's say it's mom mom lives with him in that house for most of the time and then when its dad time mom will move out and dad move in or shared residency mom would live for a week and dad live for a week
    - Bird Nesting is not Something that a court is ever going to the order - the reason for that is that when you're doing a bird nesting situation what it requires is that each of the parties has someplace else to stay on their off weeks - so court is not going to order that bird nesting situation if it means that each of the parties also has two in addition to maintaining the residence where the kids live, each of them has to even get another apartment or you have to buy another house or what have you
    - bird nesting situations are almost entirely situations where it's done on a voluntary basis
    - normally they don't last that long because the child or the kids if they are staying in the family home at some point there's going to be a division of property; so at some point that home is either going to be transferred to one of the parties or it's going to be sold and the parties will split the profits
    - Where parties can get along really well and afford it then it will be used and, in some cases, where parties get along REALLY well the parents will share an apartment for there off days
    - Court wont order because it has expenses most party's cannot afford but it is a possible arrangement / parenting schedule
- Option #5 Parallel Parenting
    - Is a concept that came out of the states in the late 1990s and basically what it was, was a response to situations where parties couldn't get along at all - they absolutely couldn't get along they couldn't agree on things they couldn't agree on what to do with kids or what have you
    - So what do you do in that situation? The concept of parallel parenting came up - and you have an example of parallel parenting being ordered in your materials and that is in the *B(JE) v B(C)* case

B(JE) v B(C)

- This was a case where there was absolutely no agreement between the parties - they absolutely could not agree - and the husband was particularly difficult to get along with (multiple counsels went through)
- this is what the justice the trial justice says:
    - it would also so pure that Mr has been overly aggressive towards Mrs in his dealings with her, he has also been obstinate and unwilling to make any compromises, his behavior is such that coparenting between the parties is impossible, in fact the level of his animosity is so high that the party should have as little contact as possible
- She goes on then to order a parallel parenting type of regime - and she gives us a summary of what parallel parenting is (there is a seven point list):

        - 1. A parent assumes responsibility for the children during the time that the kids are with their parents
        - 2. a parent has no say or influence over the actions of the other parent while the children are in the other parents care
        - 3. here is no expectation of flexibility or negotiation
        - 4. A parent does not plan activities for the children during the other parents time
        - 5. Contacts between the parents is minimized
        - 6. children are not asked to deliver verbal messages
        - 7. information about health school, medical, vacations is shared in writing
            - she says usually in the form of an access book and keep in mind the case is 20 years old so it will be by way of some sort of electronic contact
    - Per Lori: So imagine how much fun it is for the kids in this type of situation
        - time with dad is a set of rules the other parent has nothing at all to say about it and then it completely changes the following week with mom
        - the big one here there's no expectation of flexibility or negotiation basically one piece is in my opinion is cow-tying to a parental rights argument
            - parents are entitled to have a say in the kids' lives or to be equally involved in their kids' lives, that is not the standard the standard is what is in the best interest of these children
            - in this situation I cannot see in a situation where parties have to minimize contact because there's so much antipathy between them how it's good for the children to be basically stuck right in the middle of this, they are the ones living in the middle of different rules
        - Now it is not something that is ordered regularly by courts – when you see this type of parenting it is more likely that it is something to which the parties have agreed to
        - There are still situations and cases where the court will say they think its in the best interest of the child/children for them to have some sort of equal time with each parent and they order some sort of parallel parenting regime
            - THIS IS UNCOMMOMN BUT IT STILL EXISTS
        - Used in more likely in final order than in interim order, unless it was status quo in the interim order

Note: Different types of regimes but the vast majority are options 1 and 2 and the argument there is that what is in the best interest of the children – to determine where primary or shared parenting we will look to factors that are set out in the new divorce act (will discuss next class)

Assesment: Issue of Assessments

- Now in the rules of Court there are a set of family law practice notes - you will see that there is a practice note 7 and a practice note 8

    Note 7 – 1. Interventions are appropriate in the context of family law case management for a small minority of separated and divorcing families where decisions concerning children are before the Court and where: i. the families are experiencing a state of high conflict; ii. the intervention of the Court is required; and iii. the Court requires assistance from Parenting Experts. 2. It is in the best interests of children who are members of conflicted families that there be early, quick and effective intervention by the Courts and Parenting Experts.

    Note 8 – 1. This Practice Note is for use in a small minority of separated and divorcing families where: a) the families are experiencing an impasse, b) an assessment for the Court is required; and c) the Court requires assistance from Parenting Experts. 2. This Practice Note may be used to provide a Parenting Time/Parenting Responsibilities Assessment (or "Assessment") where resolution is not possible, or an Intervention under Practice Note 7 will be ineffective. The Assessment will provide an objective assessment of the family by a Parenting Expert as a litigation

aid to assist the Court in addressing the best interests of the children. 3. This Practice Note takes into account the limitations imposed on Parenting Experts by the professional bodies that govern them, and was prepared in consultation with the College of Alberta Psychologists and the Alberta College of Social Workers.

- what these practice notes deal with are interventions or assessments that are done in parenting situations
- Practice note 7 it's quite long and involved
    - it talks about getting parenting experts involved to assist the parties in coming up with the schedule early to try and avoid further conflict between the parties that's one sort of intervention
    - there's interventions that a court can order where the parties are going to counseling and the children are going to counseling and the counselor can report back to the core
    - there are interventions that It can be ordered before the unification therapy where the parties are these are strange that sort of thing
    - there's a number of different interventions that occurred in order
    - So if you have a situation where parties are going off the rails quickly you can ask a court for practice note 7 intervention and and then you fill in the blank whichever one it is that you want
- Practice note 8
    - if ultimately the parties cannot come to the decision and you're going to be going to trial and they can't agree, the evidence is conflicting and you think you need for the court for some extra evidence for what's in the best interest of children this is set out in practice note 8
    - And that's what's commonly referred to as parenting assessment / custody access assessment
    - What an assessment involves this:
        - it's a assessor (which is almost always a psychologist from the list of psychologists who specialize in this), a psychologist is appointed to do an assessment and to make a report to the court, so the psychologist will then do a history of each of the parties , they will do psychological testing on each of the parties, they will talk to the children separately, where its age appropriate they can do child psychological testing, they will each parent bring in the children to assessors office on one occasion, most of them will do home visits to see the parents in there home environments with the kids, they will talk to other professionals involved with the family, look at police report or child service report, and can talk to collateral references that the parties provide
            - What they then do is a lengthy report that sets out all the above – highlight issues and they go into the results
            - Lastly the report will set out recommendations
                - To the court it is my recommendation that these children should be primarily resident with party A or it is my recommendation despite party B not wanting it that there should be some sort of shared residency
                - Some will go into detailed schedules others, will stay between the parties to determine
                - Some will say there needs counselling
                - May say a strict order is required
    - Normally, the court does not rubberstamp these but the court will put a lot of weight on a practice 8 assessment report
    - What you do need to know is that:
        - They are really Really intrusive
            - if your client is going to go through the through this don't just tell them OK you got an appointment on such and such a day, sit them down and tell him that they need to know these people are going to be looking into every aspect of their life
            - they need to know to answer the questions honestly on the psychological testing amazed at how many of these come back and say can get a valid profile

because the person was answering in a way that was trying to make themselves look themselves in the overly positive light
        - The other thing you should know is their hugely expensive
            - I haven't seen one that cost less than $25,000 in the last five or six years
            - some of them are around $40,000
- Better to try and get an intervention under practice note 7 rather than 8 to bring the parties to some sort of agreement before having to get an assessment under practice note 8
    - Done via an agreement or an application
        - The court will set out who the assessor will be and who will pay for it
- What if a party refuses: If someone refuses then the intervention professional would do a report noting the refusal and then likely the other side will say that party is not interested in participating and accordingly you should make my client what they want
    - Assessor can make notice to the court
- What if party cant afford it and thus had to refuse, then what?
    - that would be something that would be addressed at the time you need the application
    - For example, if its my client and you say my client doesn't have any difficulty participating in this but they simply do not have the funds to do this or they don't have any health care coverage that will do it, so you know that's something that we would ask the justice to saying find know participate but they have no funds in this case can the other side either front it's pay it all up front and it can be dealt with you know down the road when we divide the property or when they alternately make the decision you know it may be something that's offset against child support but at this point in time you wouldn't you would want to address that at the time that the order was being made

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REQUIRED READING: JOINT CUSTODY

BOTTICELLI V BOOTTICELLI 2009 ABQB 556

Facts: Husband asks for an interim shared parenting of the parties' 22-month-old child
- The mother opposes the application on the grounds that the father has acknowledged that he cannot care for the child appropriately and that the child is comfortably settled in the mother's home
- Upon separation, the child stayed with the mother; the father couldn't even manage one night alone with the child
- When the wife explained that shared parenting meant really caring for the child, the husband said "don't ask me to do something that I am not capable of doing"

Issues: Whether the interim application should be granted
Held: Yes – on the evidence, maximum contact with each parent does not conflict with the best interests of the child
Reasons: There are no longer any presumptions or default positions that regulate decisions as to custody and access
- The only standard is what is in the best interest of the child
- There is no rebuttable presumption in favor of shared parenting, nor is there a presumption in favor of the primary caregiver or in favor of the status quo
    - There are no presumptions of default positions in parenting disputes
- The broad statement that there are no presumptions includes presumptions that the status quo is in the child's best interest at least on an interlocutory basis
- Cropper → in most cases, where a trial is close at hand, and where the child is being well taken care of, it is preferable not to disturb the de facto custody
    - "It is preferable that one must seek to avoid the shunting of child from parent to parent because of the unsettling effect which such changes may have on the infant"
    - It may be taken as a working rule that evidence to warrant an order for interim custody must more cogently support disturbance of the de facto situation than evidence to support an order for custody after trial on the merits

    - BUT as in custody after trial so in respect of interim custody, the welfare of the children is the paramount consideration
- Although there is no presumption in favor of the status quo, it is obvious that, where a trial is close at hand, a court might well conclude that it is not in a child's best interest to disturb safe existing arrangements
- Cavanaugh makes it clear that there is no rebuttable presumption in favor of shared parenting
    - Still have to find a way to insert the maximum contact principle into the parenting analysis
        - This is the idea that a child of the marriage should have as much contact with each spouse as is consistent with the best interest of the child
        - This is significant as it stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider

Application: there is not enough evidence to prove that the father is incapable of caring for the child and there is no reason to restrict Parliament's goal of maximum contact

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RECQUIRED READING: JOINT CUSTODY

RENSONNET V UTTL 2014 ABCA 304

Facts: The unmarried parties cohabited for approximately 4.5 years before separating in 2013

- They had two young boys; immediately following the separation, the parties went on a pre-planned trip to Europe and each parent had the children in their care for a portion of the trip
- Days before returning home, the mother applied for an interim parenting order without notice to the father based on alleged concerns about the father's behavior following the separation
- The ex parte order was granted, giving day to day care and control of the children to the mother and allowing the father alternating weekend access
    - Review of this order was consistently postponed
- There was a special chambers application and by that point, credibility was at issue and the parties had lost sight of the primary concern: the children
- The Chambers judge held that the matter could only be resolved at trial

Issues: Whether the matter should proceed to trial

Held: No – the matter should go to trial

Reasons: Note: due to their fact-based and discretionary nature, interim parenting orders warrant a very deferential standard of review

- The case law is clear that shared parenting arrangements should not be ordered where the parties are in substantial conflict with each other, nor should such order be made before trial if there is significant disagreement on the evidence
- It is well established that when conflicting evidence is presented in affidavits and the credibility of the parties is in issue, the matter must be referred to trial
- Given the deference owed on interim parenting matters, this court concludes that the special chambers justice did not err in maintaining his earlier order pending resolution of this high conflict issue by trial
- Note: The CA will not overturn and replace an interim order for sole custody and access where parents are in high conflict leading up to the trial

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RECQUIRED READING: SHARED PARENTING

CAVANAUGH V BALKARON 2009 AABCAA 423

Facts: The TJ ordered that the parents should have shared residency despite the fact that the child had made clear that she did not want shared residency

- The trial judge awarded it on the basis that residency should be presumed unless there is evidence that it is not in the best interest of the child

Issue: should shared parenting be ordered?

Decision: Yes
Reasons: The CA affirmed that there are no presumptions or default of the children in custody disputes

- The sole consideration is the best interest of the child and can be awarded even when the kid does not want it
- NOTE: In 2014, the issue was again revisited. In the Rensonnet v Uttl decision, the Court of Appeal takes the opportunity to clarify that shared parenting arrangements should not be awarded if there is a significant disagreement of evidence or there is a lot of conflict between the parents. This reaffirmed Richter. There was no comment on the status quo.

REQUIRED READING: SHARED PARENTING

MCCURREY V HAWKINS, 204 ABQB 827

Facts

- 3 kids, shared custody
- Everything seems to be going fine until mom gets a new boyfriend, then things go wonky
- Ms. McCurry requests primary residence with Hawkins having reasonable access

Issue: should Ms. McCurry gget primary residence
Held: No
Analysis: presumption of JC and shared custody, JC should be the norm unless it is harmful

Note:

1. A parent assumes responsibility for the children during the time they are with that parent
2. A parent has no say or influence over the actions of the other parent while the children are in the other parent's care
3. There is no expectation of flexibility or negotiation
4. A parent does not plan activities for the children during the other parent's time
5. Contact between the parents is minimized
6. Children are not asked to deliver messages
7. Information about health, school vacations etc. is shared in writing usually in the form or an access book OR Our Family Wizard type APP.

Note: Judge's hope is cooperation will resume, change with time

REQUIRED READING: PARALLEL PARENTTING

B(JE) V B(C), 1998 ABQB 774

Facts: Each parent wants primary care of the children

- The father seems to have some anger and other issues
- He made unfounded and rude allegations relating to the mother's unfitness
- Co-parenting is impossible as he has been aggressive and unwilling to compromise

Issues: What is the appropriate form of custody
Held: Parallel parenting
Reasons: The Court imposed a parallel parenting regime in an attempt to keep these parties apart

- The Court says that the parent assumes responsibility for the child during the time the parent has access to the child
- A parent has no say or influence over the actions of the other parent while the children are in the other parent's care
- There is no expectation of flexibility or negotiation
- A parent does not plan activities for the children during the other parent's time
- Contact between the parents is minimized

- Children are not asked to deliver verbal messages
- Information about health, school, and vacations is shared in writing usually in the form of an access book

NOTE: One must consider whether parallel parenting is more related to the parent's rights than the best interests of the child

November 3, 2020

Factors Overmining the award of custody

Factors a court need to consider when considering best interest of the child

- What some of the factors that are set out in the new act about what constitutes the best interest of the child what things is a court actually supposed to look at
- Section 16(3) of New Divorce Act sets out the factors for determining the best interest of the child

FACTORS

Factor: History

→Section 16(3)(d): History of care of the child

- Talked about the history of care of the trial or the status quo as it as it has to do with interim orders - it's really important to try not to disturb it at the interim order stage
- The final analysis stage it can also be one factor that can sometimes be an incredibly important factor
    - And you will hear the term primary caregiver - I was the primary caregiver to the child throughout the relationship or I have been the primary caregiver to the child since the separation… It's an important factor
- Basically it is sort of a two pronged idea:1) this is what the child is used to 2) because of the history of care of this particular child I am better positioned to care for the child
    - So that's basically the argument that you would be making if you wanted primary residence of the child rather than some sort of shared residence here shared parenting time

K v K Case

- Court of Appeal case sets out pretty much exactly what primary caregiving mean
- this was a case that made it to the Court of Appeal that was appealed by the mother from a decision of the trial justice that awarded primary residence to dad - the terminology they use his custody were going to say awarded primary residence
- at the time of the trial with kids were seven and three years old
- the parties had separated about a month after the youngest one was born
- the separation was hardly what we'd call amicable - was hotly contested and ended up in a 5 day trial
- so the trial justice says it's a difficult decision going to give primary residence dad and I'm going to give generous instruction access or parenting time to mom
- it then goes to the court of appeal
    - the CA first of all overturned the judges decision
        - Note: it's incredibly rare for the Court of Appeal to overturn a parenting decision from a trial justice ..there's a lot of deference that goes towards a trial justice when we're talking about issues concerning parenting
    - they also instead of sending it back and ordering a new trial (which they had the ability to do), they simply substituted their judgments for the trial justices judgment and they looked at the test could be fairly evaluate the testimony in the transcript or does fairness to the parties they have to have agreed, Court of appeal said no …we can fairly evaluate the testimony and we talked about the uncertainty in the trauma and the anxiety that would be caused to the kids and the parties if another trial was ordered
    - So what the Court of Appeal does in the end is changes the residency to mom and does not order a new trial

Facts

Family Law Part 2

- the brief history is after the first child was born, the father was he teaching in the faculty of dentistry at one was at home with the child
- when the oldest child is about four years of age she starts working again for dental office
- then they have the youngest child and then in a month later they separate
- the kids stayed with mum and they stayed in the family home for a period of two years and then they all moved out and then Dad moved back into the family home but the kids stayed with mom
- so she starts an action and this is what she asked for:
    - that the father has no access, no contact at all with the children
    - she asked for what's referred to in the case is a non molestation
        - that's basically restraining order
    - she goes to Court and on an ex parte basis - meaning no notice to him – and asks for exclusive possession of the matrimonial home and a restraining order keeping him from the home and from the school that the oldest ones is attending
- Ultimately in this case anumus Curie is appointed – "a friend of the court" - basically someonee to speak for the children at the time (Note: we no longer have that)
- five months after this starts then mom files a civil lawsuit against the father and claims that he assaulted her that, he is sexually assaulted under the kids, he is actually criminally charged with sexual assault (that the criminal proceedings go to trial and after one day of trial the charges are stayed)
- ultimately she drops for civil suit and ultimately dad gets supervised parenting – also referred to as supervised access
- here there was both a psychologist and the social worker who specializes in dealing with sexually abused kids - they both did reports for the court family situations and recommendations concerning the parents
    - both of those reports came out one year but next year the two of them did a joint assessment
    - the first year in 1988 they started the trial and they did the property stuff… it's not until December of the next year that the parenting stuff goes back to trial
        - So we are now a year later from the joint assessment and two years old from the individual assessments of the psychologist in the social worker
    - there's a long time between filing the reports and when the experts actually gave testimony and what happened here is that the experts revised their opinions in that time - in the time between when they issued their reports and when they got on the stand to do their testimony - they changed their testimony with respect to some of their findings
        - basically what they had said was that mom was much better now at the time that they gave the testimony then she was even when they did the assessment
        - but ultimately the judge allowed the testimony because it didn't change their recommendations or that of the amicus curae
    - all of the experts involved here said that the care of the children with primary care of the children should be with a mom
- First the court talks about and the best interest of the child - how it's determined and who is best situated to determine that –
    - so the court says how is it that the best interest is to be determined… again our courts have been unanimous that the most authoritative pronouncement thereon is by a trial court judge who hears the evidence and assesses it
    - then they go on to cite with approval the following quote: further it was not and could not be disputed that the question of custody of an infant is a matter which peculiarity lies within the discretion of the judge who hears the case, as the opportunity generally denied to in the appelletee tribunal to see the parties and investigating the infant circumstances and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence
        - so there is a great deal of deference to trial justices when we are dealing with parenting issues – there is absolutely no question about it; they are the ones who see the witnesses, they can grasp their veracity , that sort of thing

Family Law Part 2

- Then the court moves on to the father's next arguments and what that was arguing was you know look how mom, look how she behaved here, you will try to accuse me of sexual assault right to accuse me of all these different things …what kind of role model is she
    - there isn't there was a huge amount of time steps on the issue of role modeling
        - who's the better role model for the kids, who should they be with more
    - the Court of Appeal addresses this issue of role modeling and they say the following:
        - they said they're not going to comment on the importance of role modeling
        - generally is a factor for consideration in assessing the persons parenting skills other than to conceive that certainly it is it is accepted that parents normally instill in their children a value system that may well affect them for the rest of their lives …
        - the court goes on to say that on the present facts he's an excellent role model but the fact that he's an excellent role model should have minimal impact, if any, on the ultimate decision about where the kids live .. the reasons for that:
            - Firstly if you haven't regime of liberal access or liberal parenting time - as that's what the mom was suggesting, here the kids primarily with her but lots of time with the father - the ability of the parents to establish a role model would not be lost
                - IE you can be a really good role model if you have your kids for specified parenting time as well as if you have the most of the time; you don't have to have them most of the time to impact
            - Secondly it's difficult to imagine in as that in a case such as this will both parents are found to be good parents the ability to provide a role model should carry much weight
                - so they're both really good role models doesn't carry much weight
            - Thirdly even if the role modeling concept where to be considered here is significant on the facts of this case, she appears to be at least equally able she provides the kind of role modeling that the kids need
            - so it's not that important factor - you can be a good role model for your kids and still not have them primarily living with you, you have the opportunity to affect them
        - so they kind of put the kibosh on that argument re: role modeling
    - there was arguments about the psychological health particularly of the mother - all the experts however had indicated that her health had improved and recommended that the kids benefited living with her
    - Finally they address the issue of the primary caregiver and they make a number of statements here and they say the following:
        - one must always considered such tangible factors as the residence which a parent proposes for the child and the ability of a parent to provide for a child's material wellbeing, such considerations must take a secondary position to the child's emotional psychological and intellectual needs
            - those are way more important than where a kid lives, the size of a house, the neighbourhood, that sort of thing
        - back to the case it says in large part provision maybe made for a child's material wellbeing by ordering appropriate regime of maintenance payments, the same cannot be said of more intangible types of support mentioned
        - neither can it be said in regard to the direct hands-on parenting skills which are necessary to child rearing the child had
            - TJ held that the mother had good parenting skills. Further the court going to say these are proven parenting skills, while their husbands caregiving skills are untested on the continuous day-to-day basis
                - IE she has demonstrated she can't care for them on a day to day basis and he hasn't demonstrated that 'cause he doesn't have the kids

- the mom has always been the children's primary caregiver, she's been the one who's wipe their noses, maintained their health, driven them to school, tutor the older one, taking him to church and arrange for the daycare
  - he's had a role in these matters but he's been much more limited in nature
  - she's not only proven that she can cope with the daily pressures of child rearing but she has exhibited an active an extended concern for the child's conditions means and needs
    - indeed, in all primary aspects it was her who was charged with child rearing before the marriage broke down and this judge says: I see no reason why that role should be changed now that the marriage has dissolved
- Continue to say that the children are more psychologically bonded to the mother and the youngest one who's three years of age has actually never lived with the father and she has been their sole residential parent for the three years since the separation
- Go on to say the following: in determining the best interest of the children, it is in my view is essential to examine the circumstances, is what is often called primary care of the children … indeed she was the one who had primary care

- Note: now the issue if this were being decided today it would be decided differently…so if some of the behavior of mom - you know asking for no contact, no access at all and then putting him through the ringer with all these allegations and then getting the supervised access and that sort of thing - the argument that you had them for the past three years when you have been actively working against the other person having them wouldn't fly today
- the primary care of the children, the history of care of the children, is important
  - both parties demonstrate in at least a willingness to care for them; do they have the ability to care for them; is there something about one or the other of parent that causes them not to be able to care for them; are the kids so bonded with one parent that it becomes a determinative factor
  - the history of care is important - it's always argued it's not determinative, but it is an important factor to keep in mind
    - so when you're talking to you know you get them to do a history of their marriage and one of the things you ask them to do is you get them to do a history of the roles - who did what with the kids;
- in terms of history of care of the child it's not determinative; none of these factors that are set at 16(3) are determinative in and of themselves; they may be determined in certain situations but they are all important factors which will carry even more less weight depending on the circumstances of the case that is before judge or the case that you and counsel would be negotiating

Factor: Family violence

→Section 16(3)(j): any family violence and its impact on, among other things, (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child and (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child

- one of the factors to take into account is any family violence and its impacts on, among other things (not an exhaustive list), the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the kid
- Firstly, Does the perpetrator of family violence have ability to care for the child;
- Secondly the appropriateness of making an order that would require persons in respect to anyone it would apply to cooperate on issues affecting the child
  - is it realistic when there has been family violence to grant an order that has the parties meeting on a regular basis or having to cooperate with respect to making decisions about the child

    - sometimes that is virtually impossible if you got one party who has perpetrated significant violence on the kids or the other party, it's virtually impossible to say those parties should make decisions together
- Factors court considers/looks at → section 16(4) which talks about the factors related to developing violence = so when violence is an issue the court shall take the following into account:
    - (a) the nature seriousness infrequency of the family violence and when it occurred
    - (b) is there a pattern of coercive controlling behavior in relation to the family member
    - (c)whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence
    - (d) the physical, emotional and psychological harm or risk of harm to the child
    - (e) any compromise to the safety of the child or other family members
    - (f) whether the family violence causes the child or other family members to fear for their own safety or for that of another person
    - (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child
    - (h) any other relevant factor
- Note: this is a huge change saying the courts shall take this into account; this is a recognition, which is probably 30 years too late, of the nature of family violence – huge move forward
    - So it not only gives us a definition, it gives us the factors that we should take into account when they are dealing with violence in the family
    - It is an acknowledgment of the impact of violence which is a welcome change
- Note: if you suspect or your client tells you (you know it's believable) this is an issue you need to deal with sooner rather than later…And there are certain practices that can be used when there's an issue of violence as well but if you think that this is an issue and you can't come to an agreement relatively quickly need to get into court, you need to make sure you these allegations are legitimate and you know something to back it up (there's nothing that upsets a justice more than somebody who makes allegations try and get a leg up in the a child custody file) and get an order and deal with it
- Question: Does this definition exclude violence against property? You know is that something that court could take into account? Not on the list but it could be

Factor: Conduct/ Lifestyle

→ Section 16(3)(c) Each spouse is willingness to support the development and maintenance of the child's relationship with the other spouse

→ Section 16(3)(h) The ability and willingness of each person respective whom the order would apply to care for and meet the needs of the child

→ Section 16(3)(i) The ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child

→ Section 16(3)(k) Any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child

- There are issues that is basically saying that because of someone's conduct or because of their lifestyle it impairs their ability to care for the child
    - Old example: one of the issues was that if one of the parties to a divorce action was involved in the same sex relationship that there were orders that said that the party involved in the relationship would have parenting times with the kids but the same sex partner could not be present
- One of the big ones that comes under this category is alcohol and drug use
    - Be vigilant in looking at these issues – these kind of things are only relevant to the extent that they affect the ability to care for the child
    - Ask clients if this is a new issue or an old issue that occurred throughout the relationship – ask them was this a problem before or is it new; did it have an impact on the breakdown of the relationship
    - you cannot just make the allegation – need to back it up

- If the court believes there are alcohol problems (same type of thing for drug problems - prescription drugs to illegal drugs) some of the things that occurred can do is place conditions on parenting time (i.e. parenting time but should not be alcohol consumption 24 hrs in advance or during time)
  - Issue is how do you prove someone breached the condition
  - Some clients want an order that says must not to consume alcohol and must pass a blood test or urine test good luck with that – unless there is a history of extreme drug or alcohol abuse the court wont impose that on someone in a parenting situation
  - Court can say that one of the parties will have supervised parenting until successfully completing a treatment program
  - Court can say that if the problem is a parent is living with somebody who's has a substance issue that parent must not have parenting time around said issue person
- Issue of smoking in front of the children:
  - Lifestyle issue that people would say the party doesn't care enough for the child to smoke not around them → parenting time should be limited or conditional that nobody should be allow to smoke in front of the kids
- Issue of anger
  - Anger issues can be a issue; court can get involved and they can say will be no unsupervised parenting time until somebody has successfully completed anger management program
  - If you can show there is anger issues it may not reach the level of violence as defined in the Act but there are issues there
- Issue of Obesity
  - Example: I feed them healthy but when with my ex he feeds them ravioli in a can
  - can become an issue particularly when child has some sort of condition that requires a specific diet
    - Example: one parent follows celiac diet and the other parent refuses to accept their child is celiac
      - If the one party is not following the court can use their refusal to follow medical advice to limit parenting time or structured to never go over a meal time or an order saying not to feed them
  - Parties are not agreeing so court makes a decision on it – court would step in and typically you would need some sort of document from doctor that shows it is a condition is present
- Issue of screen time
  - What kind of evidence would you use re: screen time issue
    - Would want an expert who supports you and can say it is harming your specific child (ie. Eye doctor)
    - Expert who can provide expert testimony that harm can be done due to screen time – can talk about the general impact of it
    - If on an interlocutory basis likely what you would want would you would want to find reputable studies that backs your position

- Because of lifestyle or conduct it is hindering a parent's ability to care for the child or actively harming the child such that parenting should be limited: time, ability to make decisions, should be supervised time
  - That is why you always have to show talking to a justice

Factor: Health Issues

→ Section 16(3)(a) The child's needs given the child's age and stage of development, such as the childs need for stability

→ Section 16(3)(h) The ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child

- health issues of the parties and health issues of the kids

Family Law Part 2

- So is there something specific to this child or these children or to both of these parents, something about their health, physical health or their emotional health, that is relevant to the type of parenting schedule you're going to set up here
- Note: Be a very very very careful do not want to be the person who is taking the position or being in court arguing because somebody over only has three more months to live for instance that they should be able to see their kids … use some common sense here and some compassion
    - You want to acknowledge the health issue and the tragedy of the situation, but the current parenting regime is not working so you need to accommodate
- In terms of the health of a parent Is this a new health issue or was it prior – i.e. suddenly divorced and now all of a sudden I think the person is the psychopath
- In terms of the health of the child you look at things like who has demonstrated or who has the willingness to meet the needs of his child or to adapt their life to continue to meet the needs of the child
- Be aware of in section 17(5.1)
    - Note: Section 17 discusses varying a parenting order
    - Section 17(5.1) states: For the purposes of subsection 5 which is very for the purposes of derringer over a former spouses terminal illness or critical condition shall be considered a change of circumstances of the child and the court shall make variation order and respective appearance in order with regard to the allocation parenting time
    - So if it's a situation where is a terminal illness or critical condition (IE vegetative coma or catastrophic injuries that sort of thing) that is automatically changing circumstances

Factor: Maintain good relationship
→ Section 16(3)(c) Each spouse is willingness to support the development and maintenance of the child's relationship with the other spells
→ Section 16(3)(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child

- there is a responsibility within the parameters of your particular case for parents to encourage a relationship with other, and parenting together
- there are some situations where there is so much interference with the parent child relationship that it becomes toxic
    - you will hear the term parent alienation syndrome
        - This can be one parent is on a mission to destroy the other parent – they tell kids Is that why the relationship broke up, this is why the other parties are to blame, tell the kids all other bad things, making yourself out to be the victim, making the kids feel guilty if they want to spend time with the other parent, it is when the other parent has specified parenting time but I'm going to plan to go to Disneyland during that time and telling the kids it is so sad you have to go spend time with the other parent while you know we're going to be having lots of fun
        - It can be used innocuous is somebody you know when you have your telephone parenting time when the kids are with the other parents and you are saying I miss you so much , I was so sad when you left
        - Could be talking money/support to the child, parent took money from them
        - Sit down and tell him everything that goes on in court, not facilitating parenting time
        - Making new spouses seem evil
        - Etc any behaviour that tries to interfere with child parent relationship; Behavior so aggreges that destroys the relationship between the child and parent
- Can be dangerous if not recognized right away – if your client comes into your office or it is the other side, and the parties can't come up with an agreement that there should be no discussion things regarding court, etc, then practice note 7 is there to be used to get an intervention and get it done quickly
    - It is difficult when it is not dealt with right away because then it becomes what is the court supposed to do … chances are if alienation has occurred it will be really difficult to resolve … what will it do to the kids

- It is a form of child abuse to the child
- Practice note 7 is key to remedying such circumstances – and immediate intervention is key

Factor: cultural, linguistic, religion
→ Section 16(3)(f) The child's cultural, linguistic, religious and spiritual upbringing heritage, including indigenous upbringing and heritage

- this is recognition, also welcoming long overdue, that these issues cultural linguistic religious and spiritual and become an issue
- it really becomes an issue if you've got situations where there was religious differences; got situations were there is differences in heritage or race
- it can become a factor in deciding the ultimate outcome
- When dealing with said issues lawyers must have sensitivity; the more respectful you are and just focusing on the child then the more successful the outcome will be

Bachor v Lehman-Bachor

- There was an appeal from chambers application
- the applicant, in this case it was the father, he wanted to change sole custody to joint (i.e. he wanted to have say in decision making, change the amount of parenting time/access, wanted to actually share, he wanted the court to direct that the was allowed to hold a 'child dedication ceremony' at the church of god
- Court says there's not a sufficient changes circumstances to justify making a joint custody; but there is a change the circumstances to justify changing the parenting style… the kid was going to school
- The issue of our concern was the issue of religion
  - justice dismissed the application to have this child's dedication ceremony and it said because mom had sole decision making, the father should not involve this child in any religious celebrations without the consent of the mother
- Goes to CA
  - And the Court of Appeal says yes she had sole custody, she had sold decision making, she's responsible for the pivotal decisions concerning this child
    - so yes they were fine with saying no child dedication ceremony without her consent but what they had difficulty with was that the judge went too far when they said that the father was not to involve this child in any religious celebrations at all (not just this dedication ceremony) …
  - CA says an access parent is ought to be able to share his or her own religious beliefs with the child not withstanding that both views might differ from those of the custodial parent…to the extent however that But the chambers judge appeared to have gone beyond the granting of just the child dedication ceremony and orders the child not be involved in any religious celebrations without their consent of the mom, we are of the view the order goes to far
  - so basically they changed the order to say his application to have the child participate in the dedication ceremony is denied but they removed the provision that said he can't have involved a child in any religious celebrations without the most consent
- basically what they are saying is that it is harmful or is so different from the custodial parent that it causes the child confusion or harm, then you should be able to expose the child to your religious beliefs

Young v Young

- It's kind of the same thing that the years ago they disappeared in young and young about the issue of the father exposing the children to his religion and basically the court says he is able tot do so unless the kids don't want it and/or its harmful to them

Vand de Perre v Edwards

- And this is a case from the Supreme Court of Canada
- deals with the issue of race and racial identity

Family Law Part 2

- The mom, who is a Caucasian, lived in Vancouver and Dad who is African American, live in Vancouver when he was playing basketball for the national team
- He was married and he had a wife and Twins in North Carolina
- so he has relationship with mom and out of this relationship a child was born
- Mom originally applies (kid 3mo) and seeks primary residence and child support and dad originally wants time with child, joint decision making but before the trial he remits his pleadings and now wants primary residence of child and sole decision making
- Go to trial – 26 days
    - Ultimately the court grants sole custody/decision making to mom and gives dad 4 weeks access, time at holiday/birthday and 48 hours further access on short notice
    - Dad appeals
- CA on its own motion pulls in dads wife and makes her a party to the action
    - Ultimately the CA decides now that the wife is a party that the two of them will have primary residence and mom will have generous access
- One of the issues that was before the court was the issue of race
    - Basically what was argued was that this child is half black and needs to be with the black parents to make them aware of their racial/cultural heritage; it was necessary for the child to live with dad primarily because of race
- SCC responds to the issue of race:
    - numerous intravenous saying that this was analogous to taking in an aboriginal child and adopting them out to a Caucasian family; the court says that's not the same thing at all here because this trial is of two races and both parents are of one of those races so its not analogous
    - Court says the interviewer submit though some studies show that black parents are more likely to be aware of the need to prepare their children to cope with racism, the main issue is which parent will facilitate contact and development of racial identity in aa manner that avoids conflict, discord and disharmony…racial identity is but one factor that may be considered in determining personal identity and the relevancy of this factor depends on the contexts other factors are more related to primary needs and must be considered in priority… the result here is that the child will have exposure to both sides of his cultural heritage , there was no evidence introduced to show greater exposure to one racial background through custody as opposed to access is in the better interest of the child in every case, consequently cultural concerns are not the same as those involved in perspective adoptive parents … see quote in CB
    - Basically what they say is that exposure to ones race is important but you can expose your child through specified parenting time as you can through primary residence; it is not a determinative factor – it is one factor and what a court should look at which parent will facilitate contact and the development oof racial identity in a manner that avoids conflict, discord and disharmony
    - Have to look in the context of this specific case

Factor: Childs wishes

→ Section 16(3)(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained

- The older the child the more likely according to give effect to their wishes – typically 14 up put weight on child wishes
- How do you get a child's wishes before the court?
    - Majority of the time gets to court through an expert report sort of practice note 7 intervention or it's a practice 8 full blown parenting assessment
        - Those experts will say the child expressed said desires
    - Another way is by appoint a lawyer to a child – section 95(3) of the family law act allows for the court to appoint council for children and apportion costs – child youth and enhancement act/ child welfare act
        - Per Lorie opinion: trying to get a childs wishes before a court, she thinks we make a mistake appointing council to child… #1 the specialized training for child is large and

lawyers do not have the skills to determine what the child is actually saying #2 it can cause problems down the road

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REQUIRED READING:

K(MM) v K (U), 1990 ABCA

Facts: The wife raised the kids while the husband worked
- The spouses split and the kids stayed with the mom
- The TJ granted the father custody based on a report which questioned the stability of the mother's personality even though the end recommendation was for the mother to keep custody
    - The report was also written over a year prior to trial
- The report writer testified that the wife had successfully dealt with many of the concerns raised while the husband handled himself poorly in regards of the children

Issues: Did the TJ err in deciding the parent with the most attractive personality characteristics should get custody?
Held: Yes – the CA overturned the TJ's decision and awarded custody to the mother
- This was instead of ordering a new, costly and delayed trial

Reasons: An "answer" to the concerns of the report was given at the trial but was apparently ignored by the judge
- We must look at a lot of factors including role model, etc
- But the main issue was who has been the primary caregiver
- In this case, the wife is the parent that will best serve the interests of the children
    - They have lived with her and she has taken an active role in their life
- While the husband may be financially able to offer the kids their own room, she can offer more time to them, her mother can assit with child care and their apartment has many amenities to afford them
    - Chid support is also meant to even this out

Note: s 18(2) of the Family Law Act says that one of the factors is who was the primary caregiver of the child before the separation

Class Notes on Case

If a parent's abuse allegations against the other parent are not proven, or dropped, can a judge order reversal of custody/access regime in place?
- BIOC → "primary care" or "status quo" presumption – better children remain with parent who has demonstrated commitment and capacity than have custody and access reversed and be placed with "untested" parent
- Note: This is a rare case where CA finds palpable and over-riding error in trial judge's findings of facts – findings OPPOSITE Of expert evidence, rules AGAINST joint experts recommendations.

REQUIRED READING:

Bachor v Lehmann-Bachor, 2001 ABCA

Facts: The father makes an application to allow him to hold what is called a "Child Dedication Ceremony" for the child at the Church of God
- The TJ said that the father cannot engage the child in any religious ceremonies without the mother's consent since she is the custodial parent

Issues: Can the father hold this ceremony for the child?
Held: Not without the mother's consent
- However, the TJ's conclusion that permission must be given for all religious ceremonies is too broad. Each religious ceremony should be considered on its own facts

Reasons: The custodial parent has the sole and primary responsibility for the day to day care and major decisions with respect to education, religion, health and well being

- While there is some caselaw that both parents should be able to expose the child to their religious beliefs, notwithstanding that they might be different, the ceremony is a public declaration to raise the kid a certain way, which is essentially appearing to choose a religion for the kid
- You can expose to religion so long as not inconsistent to best interests of kid, but primary decision making is up to custodial parent
- The Court of Appeal also said that re-marriage by the custodial parent does not in and of itself constitute a material change in circumstances
    - There has to be a material change to affect kid or ability to parent

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REQUIRED READING:

Van de Perre v Edwards, 2001 SCC

Facts: A son was born to a single Caucasian Canadian citizen living in Vancouver following an 18-month sexual affair with an African-American professional basketball player

Issues: How important is cultural and race factors in deciding custody disputes?

Held: It is but one factor and the weight you give it depends on the circumstances

Reasons: - the son would have exposure to both sides of his racial and cultural heritage since one biological parent would have custody and the other access

- No evidence was introduced to suggest that greater exposure to one's racial background through custody as opposed to access was in the better interest of the child in every case
- Cultural concerns were not the same as those involving prospective adoptive parents who do not share the same race and culture as the child
- The limited findings of the trial judge on the issue of race reflected the minimal weight the parties themselves placed on the issue at trial
- The trial judge clearly viewed the possible benefits provided by the father with regard to fostering a positive racial identity as not outweighing the negative findings relating to the father
- By intervening in the consideration of race by the trial judge the Court of Appeal failed to apply the correct standard of review and gave the issue disproportionate emphasis
    - The decision is only reviewable if there is (1) material error, (2) serious misapprehension of facts or (3) error in law

Class Notes on Case

- This case highlights the importance of race in the custody determination of a child of mixed racial heritage
    - Intervenors submit that race is a critical factor in custody and access cases
        - Court → In my view, the importance of this factor will depend greatly on many factual considerations. The interveners state that there are key tools a Canadian biracial child will need in order to foster racial identity and pride:
            - The need to develop a means to deal with racism and
            - the need to develop a positive racial identity.
        - The corollary to these needs is the parental ability to meet them
- "In fact, in this Court, counsel for the respondents stated that "neither of the parties wanted to touch it, because it's so politically incorrect to say that race has any bearing". This is an unacceptable reason for counsel to fail to raise evidence on a factor that he or she believes may impact the best interests of the child. Without evidence, it is not possible for any court, and certainly not the Court of Appeal, to make a decision based on the importance of race"
- This case is somewhat about the question of how to raise issues of race in a court of law
    - As it is an error of law not to raise it
- Take away → race will always be a factor in the BIOC
    - It is always relevant, and lawyers should not worry about bringing evidence. It will always be accepted

- With that being said, race is but one factor in determining personal identity; the relevancy of this factor depends on the context
- Race is not a determinative factor and its importance depends greatly on the facts

November 5, 2020

Factors for best interest of children continues

- One of the factors we previously discussed was physical violence – that also covers sexual abuse -or using allegations of sexual abuse to deny access
  - because of the nature of the allegations we have a specialized practice to deal with this: **practice note 5**
    - deals with a process that is used when there are allegations of sexual assault against the child or the children
  - Procedure
    - If there is an allegation made there are specialized forms that have to be filled out along with the affidavit (written evidence that they have) and filed with the court (under seal); it also must be served, not only to the other side, but to whatever the closest local or closest family services office is (child welfare services)
      - Note: this affidavit is under seal
    - What happens then is child and family services appoints an investigator (In Edmonton = zebra center) and what they are looking for grounds for further investigation
      - If they find the documentation does not warrant further investigation they then will fill out a form and send it to court (filed under seal) and then that's the end oof the matter
      - if there is sufficient evidence or enough reason for further investigation, they will do so and then they can (the investigating agency) can talk to police and use them if necessary, they can carry out a full-blown investigation. What they do then, they will do a full-blown report and then it will be forwarded to the case manager that has been assigned
        - Case manger gets all the documentation and hears all the evidence and application with respect to this
        - Re: the report – each side gets a copy, and your client can come read it but cannot take photos of it

      Once everyone has had a chance to look at the report then it goes inform of the case management justice and the justice can make an interim order and they can set it for an early trial date – a viva voce trial evidence trial of that particular issue (note: case manager wont hear that that trial because they are only a case management justice but can give an early trial date)
  - **Note**: make sure if you are bringing an action under practice note 5 that these are not spurious allegations and put everything you have with respect to the evidence (make sure there is support to the allegation) in your originating documents;

TS v AVT

- this was a case that was where one child (who was four years old) and the parties were not actually together we are not child was born
- The allegations were brought under the specialized process and the Justice was appointed as case manager
- Dad was declared a guardian and a couple years later was granted joint custody and joint decision making and then there was a ton of applications
  - dad made 14 separate applications to get parenting time with child and mom was consistently thwarting the orders and denyed parenting time to dad

    - Dad eventually made an application for sole custody/sole decision making and primary residence of the child
        - Resulted in viva voce hearing trial of the issue
- Mom made a number of allegations (only lived together for 4 or 5 months), mom had a child who was 2 years older (diff relationship)
- Mom used any excuse to deny parenting time: the kid was sick, breastfeeding, extracurricular like activities, anything to try to ruin the relationship with dad, could not refer to dad as dad
- The history of litigation:
    - the first time in court, after mom unsuccessful application, mom made allegations of physical abuse to her and the kids;
        - same day that allegation went before QB and was dismissed, mom applies for an EPO
    - the next allegation was that dad sexually assaulted the mom, she made allegations he was suicidal, he was trying to mutilate himself, that he used alcohol and as a result there was a parenting time assessment done to see if dad should have parenting time with the child
        - mom refused to comply and participate
        - Report comes out with nothing and parenting time was orders
    - Then mom made allegations that dad sexually assaulted both children and thus an intervention was done by CFS investigation process which concluded there was nothing to the allegation
- Issue before justice:
    - Issue #1 could the court change the parenting situation so that child would live with dad instead of mom and he would have sole decision making
        - Answer is yes – this is not a variation of a final order, you don't need a change in material circumstances, but even if you did need a change moms behaviour was so bad it could be considered a change in circumstances
    - Issue #2 what is in the best interest of this children in this circumstance
        - Justice says: continued exposure of a child to a parent's hostility to the other parent and controlling behavior can have long term consequences on the child
            - Per Lori: Justices will do a blurb at outset about if kids are exposed to conflict and hostility of parents it is detrimental to kids

        In order to protect child emotional and psychological health and overall best interest of child, the kid needs to be placed (primary care) with the parent who had demonstrated that he or she had taken steps to put the best interests of the child ahead of his or her own interest, by furthering the childs relationship with both parents and both parents families. Primary care ought to be with parent who fosters relationship with other parent and both parents family.
            - the record discloses the ongoing effort of the mother to interfere with the child's relationship with the father, her alienating behaviour (i.e. not allowing the child to refer to dad as dad, moving away to get the child away from the father, the continued too thwart the dads access) in doing so the mother continued to fail to comply with court orders. Finally the mother made serious allegations against the father and fathers family without providing evidence in support
- Note: In the years following this case Judges have made it very clear that exposing a child to conflict, making allegations, letting them do things like showing kids affidavits, talking about what's going on … is not in the best interest of child and is something courts look down on that behavior
    - Courts have the ability to limit parents parenting time because of said behavior
- Per Lori: The case Gives you an idea of the behavior to avoid and to be alert to when dealing with parenting issues and how to use the specialized practice note, practice note 5, when you are dealing with allegation of sexual abuse against the child

Mobility Cases

- Big change to new divorce act is this issue; Last divorce act does not have anything re: mobility cases

    - what happens in situations where there is an order in place and one party wants to move with the child
- Previously the starting point was a case called *Gordon Case* 1997 but now the new divorce act codifies this issue
- Section 16.7 -16.8 discuss change in the place of residence
    - Section 16.7: Section 16.8 does not apply to change in the place of residence that is a relocation
        - NOT TALKING ABOUTT RELOCATION
            - Relocation is change in place of residence of child or person who as decision making responsibility or parenting time – it is a change in residence of child or parent which is likely to have a significant impact on the childs relationship with the other person who has parenting time or decision making responsibility/capability or a person who has contact under a contact order
        - Per Lori: may be a situation where parties are doing share residency such that they are alternating weeks – change in place of residence is basically if the minor moves from one part of city to the other side – not a move that is going to affect the relationship with the other party or the parenting schedule (minor move)
    - Section 16.8:
        - 16.8(1) Notice
            - A person who has parenting time or decision making responsibility in respect of a child of the marriage and who intends to change their place of residence or that of a child shall notify any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention
            - Per Lori: this includes situations where say I have primary residency of the child and the other party has parenting time every second weekend, if they are going to move they are going to need to give notice
        - 16.8(2) Form and Content of notice
            - the notice shall be given in writing and shall set out
                - (a) the date on which the change is expected to occur; and
                - (b) the address of the new place of residence an contact information of the person or child, as the case may be
        - 16.8(3) Exception
            - despite subsection one and two, the court may on application provide that the requirements in those subsections do not apply or may modify them, including where there is a risk of family violence
        - 16.8(4) Application without notice
            - an application referred to in subsection three may be made without notice to any other party
- Per Lori: it is interesting that the requirement that the person changing a place of residency gives notice suggest the possibility that a party could oppose said relocation despite nothing being included in the provision saying they could oppose it … it is unclear if one can or cannot oppose it but tin any event you should give notice to the other side on a minor move which is a change in the place of resident

Relocation

- Section 16.9 - 16.96 deal with relocation
    - Those moves will have a significant impact on the children
- Section 16.9
    - 16.9(1) Notice
        - Any person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify, at least 60 days before expected day of proposed relocation and in the form prescribed by the regulation,

any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention
- **Note:** have to give notice (at least 60 days – gives enough time for other side to get into court)
  - 6o days does not include date of service

- 16.9(2) content of notice
  - The notice must set out:
    - (a) the expected date of the relocation
    - (b) the address of the new place of the residence and contact information of the person or child, as the case may be
    - (c) a proposal as to how parenting time, decision-making responsibility or contact, as the case may be, could be exercised
    - (d) any other information prescribed by the regulations
  - **Note:** Basically say this is when I plan on moving, this is where I am moving to and this is the information; then you need to say this is what I am proposing to ensure relationships are maintained
    - Cannot continue normal schedule and suggests a plan to ensure relationships are continued/maintained..ie they get all of spring break, 6 weeks in summer, etc
- 16.9(3) Exception
  - despite subsection one and two, the court may, on application, provide the requirements in those subsections, or in the regulations made for the purpose of those subsections, do not apply or may modify them, including where the there is a risk of family violence
- 16.9(4) Application without notice
  - an application referred to in subsection three may be made without notice to any other party

- Section 16.91
  - Section 16.91(1): Relocation authorized
    - A person who has given notice under section 16.9 and who intends to relocate a child may do so as of the date referred to in the notice if:
      - (a) the relocation is authorized by a court; or
      - (b) the following conditions are satisfied:
        - (i) the person with parenting time or decisionmaking responsibility in respect of the child who has received a notice under subsection 16.9(1) does not object to the relocation within 30 days after the day on which the notice is received, by setting out their objection in
          - (A) a form prescribed by the regulations, or
          - (B) an application made under subsection 16.1(1) or paragraph 17(1)(b), and
        - (ii) there is no order prohibiting the relocation.
    - **Note:** So if your original order does not say there no prohibition on either parties relocation, you give the notice 60 days in advance, and if the other party has not responded in 30 days in the form prescribed by the regulation, there is no objection
  - Section 16.91(2): Content of form
    - The form must set out
      - (a) a statement that the person objects to the proposed relocation;
      - (b) the reasons for the objection;
      - (c) the person's views on the proposal for the exercise of parenting time, decision-making responsibility or contact, as the case may be, that is set out in the notice referred to in subsection 16.9(1); and
      - (d) any other information prescribed by the regulations.

- **Note:** you cannot just say I oppose the move and that is it; you have to say I object, here is the reason I object and what I have to say about their proposal to maintain a relationship
    - If they do that you are looking at an application to the court who will decide whether to allow the relocation

- Section 16.92
    - 16.92(1) Best Interests of child – additional factors to be considered
        - In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,
            - (a) the reasons for the relocation;
                - **Note**: in AB the reasons for relocation limited it to say the reason for the move is only relevant if it actually relates to the child or impairs the best interest of child - this now has changed with new divorce act
            - (b) the impact of the relocation on the child;
            - (c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
                - **Note:** how much time do they spend together – is it a situation where parents see them once every 3 months or is it shared residency; what is level of involvement of non-moving party
            - (d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
            - (e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
                - **Note:** is there an agreement between the parties that made it in the order that specify parents must remain in a specific geographic area
            - (f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
                - **Note:** how reasonable is there proposal
                    - **Example:** is it reasonable because they want to move YEG to Calgary or YEG to singaphore
                - **Note**: travel expenses – if your making your proposal access costs need to be considered; need to say for example you are willing to take less child support because other parent have access costs
            - (g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.
                - **Note:** is this someone who wants to move who has been ignoring court orders; have they complied
        - **Note:** additional factors of best interest of child when considering relocation - Court is mandated to look at in addition to section 16(3)
        - **Note:** Very similar to the factors of SCC case *Gordon* Case; all relocation cases have looked at the factors similar
        - **Note**: What is different for us in AB is that some of these factors in our subsequent case law was limited significantly and they weren't in other province; it's now that this is actually codified in the divorce act - I'm going to caution you to be aware once you get

out and you're dealing with relocation in practice, you must be very careful about looking at past case law in Alberta
        - **Per Lori:** factors 16.92 (b) and (c) are very important
    - 16.92(2) factors not to be consider
        - In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate. Burden of proof — person who intends to relocate child
        - **Note:** Saying the court cannot look at, and you should not put in your materials, that I am the person who wants to relocate but if the court doesn't allow me too relocate I will stay here or if the court doesn't allow me to relocate I have to relocate anyways as I have been transferred
            - Those two situations a could should not look at
            - Bottom line: whether or not the parent will still move if not allowed court cannot look at this
- Section 16.93 - burden of proof
    - 16.93(1) Burden of proof – person who intends to relocate with child
        - If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.
        - **Note:** Basically saying if you are doing substantially equal time, some sort of shared residency/parenting, the party to intends too relocate the child has the burden of proving that the relocation would be in the best interest of the child
            - **Shared residency = onus on the person who wants tto move to show best interest oof child**
    - 16.93(2) Burden of proof - person who objects relocation
        - If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.
        - **Note:** If a child spends the vast majority of there time in the care of the party who tends to relocate, then the party opposing the relocation has the burden fo proving that the relocation would not be in the best interest of the child
            - **If it is the primary residential parent who wants to move the burden is on the other opposer to show its not in best interest of child**
    - 16.93(3) burden of proof – other cases
        - In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child
- Section 16.94: Power of court — interim order
    - A court may decide not to apply subsections 16.93(1) and (2) if the order referred to in those subsections is an interim order.
    - **Note:** If someone comes to court, no order in place, and they want to relocate, the court can say there the burden is not on each side – they can ignore the provision if it is a interim order
- Section 16.95: Costs relating to exercise of parenting time
    - If a court authorizes the relocation of a child of the marriage, it may provide for the apportionment of costs relating to the exercise of parenting time by a person who is not relocating between that person and the person who is relocating the child.
    - **Note:** if there is costs incurred in order to exercise parenting time the court can put in the order that any costs (flights, travel, rental cars etc) shall be such that the relocating person pays a certain portion or court may say they will allow the move but reconsider child support because

there is a reason to deviate from the usual section 3 & section 7 amounts because you are going from shared residence to primary residence (child support is going to have to change) or the court could just determine what will happen

- Per Lori: This section offers new provisions and is a new section in divorce act; it is an attempt to put some uniformity in the process – the best interest of child remains key
- Section 16.96: Discusses people who have contact with the child (no decision-making abilities or specified parenting time; i.e. grandparent, aunt, etc)
    - 16.96(1) notice – person with contact
        - A person who has contact with a child of the marriage under a contact order shall notify, in writing, any person with parenting time or decision-making responsibility in respect of that child of their intention to change their place of residence, the date on which the change is expected to occur, the address of their new place of residence and their contact information
        - Note: if you have contact you have to give notice to other parties that you intend to change your place of residence, date of change and address/contact information
            - if you are simply changing residence/relocation must notify parents
    - 16.96(2) notice – significant impact
        - If the change is likely to have a significant impact on the child's relationship with the person, the notice shall be given at least 60 days before the change in place of residence, in the form prescribed by the regulations, and shall set out, in addition to the information required in subsection (1), a proposal as to how contact could be exercised in light of the change and any other information prescribed by the regulations
        - Note: what its saying, for example, is that you see your grandchild every 6 weeks and grandma is planning to relocate and it's going to have an impact on the child; in that case you notify in writing but also have to say here I propose to have continued contact/maintain a relationship with child
    - 16.96(3) Exceptions
        - Despite subsections (1) and (2), the court may, on application, order that the requirements in those subsections, or in the regulations made for the purposes of those subsections, do not apply or modify them, if the court is of the opinion that it is appropriate to do so, including where there is a risk of family violence
    - 16.96(4) Application without notice
        - An application referred to in subsection (3) may be made without notice to any other party.

Variations

- Section 17 – variation
    - Basically, need to remember if a court is hearing an application of relocation, if it is going to have an impact on the relationship of the child with the other parent or other party, it is likely also going to have an impact on a contact order
        - So if the court is going to vary existing order for relocation, it is likely the court will need to vary the contact order
        - Keep in mind: if you are bringing an application for relocation changing one might change the other, thus should give notice also to the contact order parties
- Section 17(5.2) relocation – change in circumstances
    - The relocation of a child is deemed to constitute a change in the circumstances of the child for the purposes of subsection (5)
    - Note: in relocation of child that is automatically a change in circumstances
- Section 17(5.3) relocation prohibited – no change in circumstances
    - a relocation of a child that has been prohibited by a court under paragraph (1)(b) or section 16.1 does not, in itself, constitute a change in the circumstances of the child for the purpose of subsection (5)

- Note: in the current situation you go to court seeking an order to allow the client to move the child to a new location; the first thing the court will say is what is the change in circumstances since the last order – because we have conflicting decisions of if the move in and of itself constitute enough … what this is saying is that unless there is an order prohibiting a relocation and you still make an application to relocate that is not necessarily a change in circumstances you may have to deal with what are the differences since the last order

Provincial Acts

→ Should be aware that we have provincial acts

- *Extra-provincial enforcement of custody act*
  - Enforcement - section 2
    - 2(1) A court, on application, shall enforce, and may make any orders it considers necessary to give effect to, a custody order as if the custody order had been made by the court unless it is satisfied on evidence adduced that the child affected by that custody order did not, at the time the custody order was made, have a real and substantial connection with the province, territory, state or country in which the custody order was made.
      - Note: The court will enforce orders of other jurisdictions or make any orders deemed necessary to enforce that (eliminate people from skipping out of existing orders of other jursidictions); the court here will enforce unless the court is convinced that at the time the order was made the child did not have a real and substantial connection with the issuing jurisdiction
    - 2(2) The court, on application ex parte, may make an interim order under subsection (1) and may direct that the interim order be served on any persons and in any manner that the court specifies in the interim order.
  - Variation of custody orders - section 3
    - 3(1)A court may at any time by order vary a custody order as if the custody order had been made by the court if it is satisfied
      - (a) that the child affected by the custody order does not, at the time the application for variation is made, have a real and substantial connection with the province, territory, state or country in which the custody order was made or was last enforced, and
      - (b) that the child has a real and substantial connection with Alberta or all the parties affected by the custody order are resident in Alberta.
      - Note: the AB court can vary the vary an order of another jurisdiction if the court is satisfied that the (a) and (b) are satisfied
    - 3(2) A person is not resident in Alberta for the purposes of subsection (1)(b) when that person is within Alberta solely for the purpose of making or opposing an application under this Act.
    - 3(3) In varying a custody order under this section, the court shall (a) give first consideration to the welfare of the child regardless of the wishes or interests of any person seeking or opposing the variation, and (b) treat the question of custody as of paramount importance and the question of access or visitation as of secondary importance.
  - Extraordinary power of court - section 4
    - Notwithstanding anything in this Act, when a court is satisfied that a child would suffer serious harm if the child remained in or was restored to the custody of the person named in a custody order, the court may at any time vary the custody order or make any other order for the custody of the child that it considers necessary.
      - Note: basically court can use there jurisdiction to look after those who cannot look after themselves and if the court satisfied that enforcing another jurisdictions order would harm the child they can make their own order

Family Law Part 2

    - Note: Usually where a child lives determines the jurisdiction – where child is connected
- *International child abduction act*
    - Provincial act that adopts the UN convention protections of rights of children
    - Specialized process if someone brings a 'hague' application – someone has wrongfully removed a child from the state
    - Note: we are not required to know this in detail just be aware that it exists for practice – in practice you will just need to go to the divorce Act and familiarize yourself
    - Beware that this is the act the adopts in AB - Article 3:
        - The removal or the retention of a child is to be considered wrongful where -

            (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention;

            - Note: basically it was contrary to what the law was from the state which the child was removed

            (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention

            The rights of custody mentioned in subparagraph A above, may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state
        - Note: For an example see recording if interested 15:40

Parenting orders

- Per Lori: The vast of majority of things are dealt with or parties will come to some sort of agreement by way of mediation or negotiation
    - When Lori says a court will do … she is talking about these are the principals upon which negotiation occurs
- Peer Lori: In terms of parenting order you are really only limited by imagination – great flexibility in the structure of the parenting time
- Basic types of parenting order: (1) primary residence or (2) shared residency
- Parenting schedule: will vary based on circumstances and situations of the parties: parents schedule, age of children, etc.
    - Fact dependent

Interference with existing order or enforcement of order

- Cases that discuss interference to parenting time – one party acts to ignore it
- *Van de Veen v Van De Veen*
    - Mother was thwarting parenting time of dad and was in contempt of order; alienated children from father
    - at issue:
        - 3 kids and issue is parenting time
        - mom was upset during the marriage dad had affair, and in response moms emotions were made clear regarding dad – behaved as if she was on a witch hunt and thwarted dads parenting time
    - Assessor calls mother an alienating agent and she actively alienates the kids and on numerous occasions is in contempt of thee order
    - The problem was that alienation went on t0o long and kids now alienated… what do you do
        - Cannot relocate child residency because will hinder best interest of child because they were alienated
        - Judges could jail here but that would hinder best interest of child – has been used but very unlikely

        - Fine – levy fines but that would hinder best interest of child as it could deprive the finical resources
        - Court decides to give punitive costs (significant award) and the mom will have to indemnify the dad via matrimonial property (bc its matrimonial property it won't harm kids or their best interest)
    - Note: shows how difficult it is to deal with if alienation goes to far and is not delt with earlier on
- *Roberts v Salvador*
    - Divorce situation in which mom made allegation of abuse by he father against her and kids
    - Two assessments done: full-blown psychological and a bilateral assessment
    - Parties had agreed that they would share decision making but mom would have primary residence, but Justice felt need to make comments on the decision
        - Says there is no doubt that the defendant was a controlling individual who has less than satisfactory ideas of the roles of women within the marriage and I am also satisfied that on at least one occasion he defendant was physically abusive to the Plaintiff even if the city of Calgary police did not lay charges … however based on the report I do not believe that the defendant physically abused his children
            - Here is an example of courts saying we accept he was abusive to mom but not kids so its fine
                - per Lori highly doubt it would be said today
    - So what the justice is looking at here is that we have a situation where he was abusive to her but is it a situation where parties should not have to work together to make decisions (give decision making responsibility solely to mom) but she says that mom made allegation and lied to the court giving her sole decision making would reward her bad behavior

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REQUIRED READING: ALLEGATIONS OF SEXUAL AND PHYSICAL ABUSE/DEENIAL OF ACCESS

TS v AVT, 2008 ABQB 185

Facts: Mother and father were never married and were not living together when the child was born

- Shortly after birth, the mother began denying the father access to the child
- The father was granted guardianship of the child and joint custody was ordered when the child was 3
- The mother has exhibited a pattern of behavior of consistently thwarting the father's attempts to access the child and disregarding court orders
- The father has exhibited a pattern of behavior of diligently pursuing access to the child
    - The behavior of the parties is relevant

Issues: Whether the Court has legal authority to change the custody and residence of the child to the father

- Whether there is a change in the needs and circumstances of the child to justify a review of the custody and residence of the child
- What the best interests of the child are with respect to custody and residence

Held: Yes

- Yes
- Listed in s 18 of the FLA

Reasons:

The Court's Legal Authority

- The court has legal authority to change the custody and residence of the child to the father if, where there has been a final order, the Court is satisfied that a change in the needs and circumstances of the child has occurred since the making of that order, and if the court considers it to be in the best interest of the child

Change in Needs and Circumstances

- The burden of proof rests with the application maker (the father in this case)
- Test from Gordon v Goertz: For the threshold in a change of custody application to be met, the judge must be satisfied that

    - There is a change in the conditions, means, needs or circumstances of the child or in the ability of the parents to meet the needs of the child
    - That the change is material and affects the child
    - The change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order
- Once this threshold has been met, the Court must then determine what the BIOC is.
- There has been no final order with respect to the custody and residence of the child
    - Therefore, the court may consider whether the change in the custody and residence of the child to the father is in the best interest of the child
- If there has been a final order, there has been a material change in the needs and circumstances of the child to justify a review of the custody and residence of the child

Best Interests

- s 18 of the Family Law Act lists the factors used in determining the best interests of the child
- The best interests test is to be applied according to the evidence in the case viewed objectively
- In this case, it is the best interest of the child to have one parent take primary responsibility for the child
    - Both parents are good parents, but the child's best interest are served by the parent who will not alienate the child from the other parent and will ensure the child is in frequent contact with the other parent, grandparents and sibilings
        - This parent is the father

REQUIRED READING: INTERFERENCE WITH PARENTITNG TIME/ ENFORCEMENT/MAXIMUM CONTACT

Van de Veen, 2001 ABQB 753

Facts: Father brought an application for an order finding the mother in contempt for failure to obey the access order

- Essentially, she participated in horrible alienation or interfered with the father's access

Issues: What are the sanctions available to coerce litigants into obeying the orders of the court

Held: The Court could not adequately sanction the mother, but they prevented her from bringing future applications and awarded costs to the father

Reasons: Sanctions can include transferring the child to custody of the other parent, jail and fines

- The mother's alienating behavior was egregious and went on for so long that transferring custody was no longer feasible or in the child's best interest
- Jail was not feasible as it would likely harm the child
- Fines were not feasible because of the limited financial resources
- The mother denied influencing her kid's feelings towards the father despite there being clear voicemails and notes to teachers suggesting otherwise
    - There were also psychological assessments as well as indications in children's behaviour that she was engaging in alienating behaviour

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REQUIRED READING: INTERFERENCE WITH PARENTITNG TIME/ ENFORCEMENT/MAXIMUM CONTACT

Roberts v Salvador, 2006 ABQB 400

Facts: The parties were married

- The mother made allegations of abuse towards her kids
- Two assessments are completed, and the parties agreed that they would have joint custody and primary residence

Issues:

Held:

Family Law Part 2

Reasons: No doubt that the Dad was a controlling individual and satisfied that he was abusive on at least one occasion, but only towards the wife and not the children

- However, the Mother's behaviour regarding lying to the Court, and the untrue allegations about abuse towards the children is also serious
- She essentially orders a parallel parenting regime instead of a joint custody situation which would reward the Mother's bad behaviour

Note: When alienation has not gone too far, parallel parenting order may be a solution

November 12, 2020

- We have talked about the types of orders: **the interim order, the final order and the variation order**
- **Variation order**
    - **Remember**: keep in mind that section 17 of the New Divorce Act is our guidance for when we doing variation
    - section 17(1) Variatiton order
        - A court of competent jurisdiction may make a order wearing, or sending or suspending, prospectively or retroactively,
            - (a) A support order or any provision of onekama on application by either or both former spouses
            - (b) a parenting order or any provision of 1, on application by
                - (i) either or both former spouses, or
                - (ii) a person, other than a former spouse, who is the parent of the child, stands in the place of a parent or intends to stand in the place of a parent; oor
            - © a contact order or any provision of onekama on application by a person to whom the order relates to
            -
        - **Bottom line**: gives the court jurisdiction to vary on order
    - section 17(5) Factors for parenting order or contact order
        - Before the court makes a variation order in respect of a parenting order or contact order, the court shall satisfy itself that there has been a change in the circumstances of the child since the making of the order or the last variation order made in respect of the order, or of an order made under subsection 16.5(9)
        - **Bottom line**: makes it clear that there has to have been a change of circumstances before variation can be granted;
            - says before the court makes a variation order accord shall satisfy itself that there's been a change in circumstances of the child since the making of the order or the last variation
            - **Per Lori:** So there has to have been a change of circumstances - now this specifically says the change of circumstances of the child and I suspect that that's going to be the same as it always has been, meaning a significant change of circumstances in this situation not just with the child
                - For instance: So if you are doing some sort of shared residence and one of the parties is accepting a new job and they are not moving the kid with them but accepts the job out of town… there is definitely in that case going to be a change of circumstances such that the court can vary the last order
    - Section 17(5.1) Variation order
        - For the purpose of subsection 5, a former spouses terminal illness or critical condition shall be considered a change of circumstances of the child, And the court shall make a variation order in respect of a parenting order with regard to the allocation of parenting time

Family Law Part 2

- Section 17(5.2) Relocation – change in circumstances
  - the relocation of a child is deemed to constitute a change in the circumstances of the child for the purpose of subsection 5
- Section 17(5.3) Relocation prohibited – no change in circumstances
  - a relocation of a child that has been prohibited by a court under paragraph (1)(b) or section 16.1 does not, in itself, constitute a change in the circumstances of the child for the purpose of subsection 5

- What your basically looking at in terms of a variation
  - Keep in mind the first rule is always that change in circumstances is what has changed since the last order was granted → Ask yourself this would the court have ordered the same thing it did then, if it had the facts as they exist now?
    - There always has to have been a change in circumstances
      - Could be change in job, illness, when you got the original order the kids were young and now they are older (meaning the kids can do longer visits), someone has a new partner, alienation, sometimes can be just the passage of time (current schedule just does not work)
  - Need to say what has changed and why it is not working
- REMEMBER: Period of time you are arguing for a variation is from the last order that was granted

Appealing a Decision

- Note: We have talked about a fair amount of case law from the CA, but I do not want you to be mislead by this – the number one thing to remember is that the vast majority of issues are settled between the parties very few things actually go to a trial particularly with respect to parenting issues
- often what will happen especially parties are quite upset and they are trying to duke out everything is there will be 1 chambers application and the interim application parties will realize Oh my God we take a chance going court so lets try and work things out
  - one chamber application can lead people toward settlement
- But don't be misled do not think that everything goes to trial - it most certainly doesn't
- Even less things are appealed particularly when it comes to parenting issues
  - you know the major reason for that, is that, there is a huge amount of deference that the Court of Appeal gives to trial justices - particularly if it's an appeal from the trial
    - trial justices who have had the opportunity to see the witnesses into to gauge their veracity of the parties
  - Know because of the nature of parenting issues there is an expedited process at the CA when you are appealing something that has to do with parenting; the CA decided things need to be heard so changed from long wait times by way of expedited process
    - If appealing re: parenting there will be strict deadlines once filling your notice of appeal, the notice you are going to appeal
  - CA are fairly low in interfering with a trial justices decision; doesn't mean they wont do it but simply means that it is a high standard to meet to overturn TJ finding
    - In *Vanderpeer* Case scc discusses this and quote themselves in *Hickey v Hickey* and they say this about TJ:
      - That they must balance the objectives in fact are set out in the divorce act and in the provincial support statue with an appreciation of particular facts of the case, it is a difficult but important determination which is critical to the lives of the parties and the children … because of its fact based and discretionary nature trial judges must be given considerable deference by appellate courts when such decisions are reviewed
        - Key principal: deference to TJ – there is a great amount of deference given to TJ, particularly if been a trial
    - Continue to say in *Hickey v Hickey:*

Family Law Part 2

- Still the interests of the child being paramount must prevail over those of the parties and of society in finality, and appellate courts must be more then rubber stamp trial judgments unless serious issues appear on its face, otherwise the possibility for clear injustice exists, as indicated by the passages above a trial court ignoring relevant evidence or drawing of incorrect conclusion from the evidence may also require appellate interference

- **Per Lori:** Not just going to rubber stamp what comes out of the Trial but there is a huge amount of difference for trial justices
  - Again like any other appeal you have to have either an error of law that they misinterpreted or misapplied the law on something that's contrary to a statue or there has to be an error of fact ,we have misunderstood the facts or a vital finding of fact that is simply not supported by the evidence, is simply wrong
  - Within an appeal the standards of review for error of law is correctness (was the court correct) and for an error of fact its reasonable (was the conclusion reasonable given the evidence that the courts have)

- When you are contemplating doing an appeal, an appeal of an interim decision can be difficult, courts will often say it is an interim decision let's just move it along to trial or conclusion, whether by JDR or some other way
  - Not impossible to appeal a interim but difficult
  - Ask yourself: You're go to chambers and your client will say I want to appeal this … so you know just because they don't like it, it is not a reason to appeal. This is really difficult to explain to clients particularly when we're talking about the children.
    - First thing you have to say to yourself: is there something which you can hang your hat – is there an error of law or error of fact?
    - Second: is it worth it – it is an expensive process to appeal
  - **Per Lori:** Need to be able to say its not worth overturning
- One of the reasons the CA put in the expedited process when talking about parenting issues is that because of the long waits and it's just the nature of human beings and in the nature of kids that things would have changed between the time that you appealed the decision and the time that you appeared in front of the Court of Appeal. There could have been significant changes and those changes are of course are not part of the evidence that's before the board of appeal.
  - So can you get fresh evidence in front of the CA?
    - Yes but there is a strict test for fresh evidence – emerges out of the case *Howard v Howard*
      - Basically it is difficult to introduce fresh evidence into appeal; it has to be evidence not known at the time of trial and it is relevant to the issues at hand
        - **Per lori:** it cannot just be after the appeal or trial that the party started doing something because you lost … it has to be something that was not known at trial and it is relevant to issues at hand
    - If you are in chambers or in trial and you get your decision and you know that you are going to appeal the decision, the first thing you do is say to justice who gave chambers or trial decision, you ask for a stay of the order pending your filing of appeal, you may or may not get it. If not then you need to file a notice of appeal and in the CA you can make an application for a stay pending the outcome of the appeal.
      - The **test for a stay**: Is it in the best interest of the children
- **Per Lori:** Know appeals are a specialized process and know what the standard is and be sure there is a valid reason to launch an appeal, especially if it is an interm
- **Per Lori:** Business advice – lots of people don't want to do appeals so setting up a firm that does appellate work for family law then you would make a good living in it

Costs

- Nothing drives clients up the world more than the issue of costs

Family Law Part 2

- so when you file your pleading - whether it's a statement of claim for divorce whether its claim under the family law act it's a an application for an interim application - you should always plead costs: should always say that isn't what I'm asking for – I am asking for example an application that the other side parenting time be supervised and for costs
- The idea for cost is sort of a deterrent; basically to the victor goes as follows:
    - if you are successful in your application you can at the end of the application say " I am seeking costs of the trial"
- Costs are this, found at back of rules of court in a schedule
    - If you do fam law chamber application and are successful you could ask for costs and say the amount you would get under that schedule in back of rules of court
    - Basically always schedule C, column B in back of rules of court
        - This is what we use for parenting issues
        - $750 for morning chambers and even more costly for afternoon chambers
        - It does not cover your clients legal costs but pursuant to that table the idea is that you will get costs if your successful or if you successfully defend against something
    - Idea to keep people from making stupid applications or to try and deter people from not agreeing to thing that our reasonable
- REMEMBER: costs are not legal fees at all
- Per Lori: Always ask for costs but only do so if reasonable ; use your common sense
    - Sometimes it might not be reasonable or appropriate to ask for costs
        - i.e. if nobody was completely successful don't ask for costs
        - i.e. you had big success ask for each party to cover their own costs
        - i.e. relocation application – these are difficult decisions, someone is loosing time with child so it may not be appropriate to ask for costs if you win the relocation because the other party is already losing
- Solicitor-client costs: Be aware that there are solicitor-client costs – refers to covering someone's legal fees
    - Difficult to get; it has to be so outrageous that the court is using the costs as a punitive measure
- Note: Possibility for costs can be awarded to other party in that you have to pay costs to the other client or costs can be awarded against lawyer
- Costs paid from one party to another
    - Collecting can be difficult to enforce sometimes

Orders you will deal with in terms of parenting in new divorce act

- We have discussed:
    - Best interest of child
    - Past history
    - Maximum contact provision: maximizing contact as is in best interest of children in this situation
- What is new is the contents with respect to actual orders – so we need to have a detailed look at these order:

Parenting Time Orders

- 16.1(1) Parenting Order
    - A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by
        - (a) either or both spouses; or
        - (b) a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.
    - Note: Discuses who has jurisdiction and who can apply for application
        - Who can apply is different from old divorce act – now an application can be made a person who is not one of the parties but is a parent or a parent who stands in place of a parent, they can make an application
- 16.1(2) Interim Order

    - The court may, on application by a person described in subsection (1), make an interim parenting order in respect of the child, pending the determination of an application made under that subsection.
- 16.1(3) Application by person other than spouse (a person who is a parent of the child but not party to divorce – stand in the place of a parent – that you can make an application for a parenting order)
    - A person described in paragraph (1)(b) may make an application under subsection (1) or (2) only with leave of the court.
- 16.1(4) Contents of parenting order (IMPORTANT SECTION)
    - The court may, in the order,
        - (a) allocate parenting time in accordance with section 16.2;
            - i.e schedule – need to have something that sets out allocation of parenting time
        - (b) allocate decision-making responsibility in accordance with section 16.3;
            - **Note:** in old divorce act no provision; in family law act 2005 this was addition to it
        - (c) include requirements with respect to any means of communication, that is to occur during the parenting time allocated to a person, between a child and another person to whom parenting time or decision-making responsibility is allocated; and
            - **Note**: So for example this may be the parent who does not have care of child has right to contact the children via telephone, face time, skype no more than 2x week
        - (d) provide for any other matter that the court considers appropriate
            - **Note**: catch all provision – i.e. may be conditions on it
        - **Note**: these are the kinds of things that go into a parenting order
- 16.1(5) Terms and conditions
    - The court may make an order for a definite or indefinite period or until a specified event occurs, and may impose any terms, conditions and restrictions that it considers appropriate.
    - **Note**: Allows the court to put any terms or conditions;
- 16.1(6) family dispute resolution process
    - Subject to provincial law, the order may direct the parties to attend a family dispute resolution process.
    - **Note**: it may say something like before this matter returns to court the parties shall attend mediation or an ADR process
        - This is different from previous years under the old divorce act where the position was (including the benchs position) that you could not force someone into a voluntary process. Now it has been changed that an order can have that provision for mandatory participation in process
- 16.1(7) relocation
    - The order may authorize or prohibit the relocation of the child.
    - **Note**: It can be silent on it or it can say neither parties shall remove the child from a specified area without and order of court or it may say this person will have primary residence but is authorized to relocate the child to a specified area
- 16.1(8) supervision
    - The order may require that parenting time or the transfer of the child from one person to another be supervised.
- 16.1(9) prohibition on removal of child
    - The order may prohibit the removal of a child from a specified geographic area without the written consent of any specified person or without a court order authorizing the removal
    - **Note:** not talking about relocation but about travel with child; it may say neither parties shall remove the child from specified area without consent of other parent or written order by the court
        - Can prohibit a relocation (16.1(7)) or a removal (16.1(9))

Family Law Part 2

- 16.2
  - 16.2(1) Parenting time
    - Parenting time may be allocated by way of a schedule.
  - 16.2(2) Day-to-day decisions
    - Unless the court orders otherwise, a person to whom parenting time is allocated under paragraph 16.1(4)(a) has exclusive authority to make, during that time, day to-day decisions affecting the child.
  - Note: You are going to have a schedule, and unless the court/order says otherwise, when I have my parenting time with the kids the day to day decisions, lies with the parent who has parenting time that day
- 16.3 Allocation of decision-making responsibility
  - Decision-making responsibility in respect of a child, or any aspect of that responsibility, may be allocated to either spouse, to both spouses, to a person described in paragraph 16.1(1)(b), or to any combination of those persons.
  - Note: 99% either parent A or parent B or both parents; here we are talking about major decisions
  - Recall: in *family law act* we looked at the types of decisions (medical, heritage, cultural, religious decisions) and those types of who is going to make these decisions are right in the material that you fill out in the *family law act*;
    - Per Lori: she suspects the new divorce act will eventually adopt something similar
- 16.4 Entitlement to information
  - Unless the court orders otherwise, any person to whom parenting time or decision-making responsibility has been allocated is entitled to request from another person to whom parenting time or decision-making responsibility has been allocated information about the child's well-being, including in respect of their health and education, or from any other person who is likely to have such information, and to be given such information by those persons subject to any applicable laws.
  - Note: there is a difference between decision making ability and entitlement to information
  - Note: Basically, you are entitled to info from other party and you are entitle to info from third parties (school, medical, coaches etc)
  - Per Lori: The reason it was included was that one of the biggest difficulties in the past has been the issue of someone having primary residence of child and this person who has primary is of the opinion that the other party is not entitled to any info.
    - One reason of the specificity in section 16.2 is to elevate these concerns – stop the disputes saying you are not entitle to information unless the court says otherwise
    - So if you are allocated any parenting time or decision making ability you are entitled, unless the court says otherwise, to information from any third party and you are entitled to be given that information subject to any particular laws
- Question: What happens if joint decision making and parties don't agree?
  - If you have decision where there is joint decision making, in certain situations that wont work out so you are going to have to may put something in the order such as "if parties cannot make a decision before coming to court for adjudication they will go to mediation or go to parenting coordinator who can make the decision, or could specific someone will have the ultimate power to override in disputes etc…" – ultimately if it does not work need to make application and court will decide

EXAM: PER LORI " I SUSPECT THE ISSUE OF PARENTING MAY VERY WELL SHOW UP ON THE EXAM THIS YEAR"

Contact Orders

- Section 16.5 discusses this
- Section 16.5(1) Contact order
  - a court of competent jurisdiction may, on application by a person other than a spouse, make an order providing for contact between that person in a child of the marriage

Family Law Part 2

- Section 16.5 (2) in term order
  - the court may, on application by a person referred to in subsection 1, make an interm order providing for contact between that person and the child, pending the determination of the application made under that subsection
- Section 16.5(3) leave of the court
  - a person may make an application under subsection one or two only with leave of the court, unless they obtained leave of the court to make an application under section 16.1
- Section 16.5(4) factors in determining whether to make an order
  - in determining whether to make a contact order under this section, the court shall consider all relevant factors, including whether contact between the applicant and the child could otherwise occur, for example during the parenting type of another person
  - **Note:** Getting at that there is parenting time allocated between parents and then somebody else want contact (i.e. grandparent), the court will look at this and consider if necessary: is it an attempt to get more time or is it actually needed
- Section 16.5(5) Contents of contact order:
  - The court may, in the contact order,
    - (a) provide for contact between the applicant and the child in the form of visits or by any means of communication; and
    - (b) provide for any other matter that the court considers appropriate.
- Section 16.5(6) terms and conditions
  - the court may make a contact order for a definite or indefinite period or until a specified event occurs, and may impose any terms, conditions and restrictions that it considers appropriate
- Section 16.5(7) supervision
  - the order may require that the contact or transfer of the child from one person to another be supervised
- Section 16.5(8) prohibition on removal of child
  - the order may provide that a child shall not be removed from a specified geographic area without the written consent of any specified person or without a court order authorizing the removal
- Section 16.5(9)Variation of parenting order (IMPORTANT)
  - If a parenting order in respect of the child has already been made, the court may make an order varying the parenting order to take into account a contact order it makes under this section, and subsections 17(3) and (11) apply as a consequence with any necessary modifications.
  - **Note**: If the parenting order will be varied the court needs to consider if the variation will impact the contact order; it is likely contact order won't have to much affect when varying an order
  - **Per Lori**: Courts are pretty sticky about giving contact orders, the contact needs to be really important to the child, there must be a reason to actually get the court to step in

Procedure or Practice in Family Law

- Keep in mind that procedures change constantly in family law
  - Covid has changed things and is an example of changing constantly
    - One of the biggest changes is in QB they are not doing in person chambers applications and therefore everything is virtual unless reason to do in-person;
    - what used to be the situation was that if you wanted to bring an application you would go online find out what dates were available, let the other lawyer know the date you want to bring an application, send down documents to be filed and then you would be on the list for that day.
    - We have a new situation that the first thing you do is go through family docket court – basically a triage system – so say you want ultimately an order that …. And then family docket court justice will say well have you done this or tried that to resolve it and then you get a chambers date
  - **Per Lori:** stay up to date on changes, check website and stay up to date with practice notes as it can help with keeping up to date with procedure

Family Law Part 2

- Keep in mind that when you are doing this type of work you are seeing people whose personal lives are falling apart
    - Remember what your job is – your job is not too be there friend or mouth piece; you are there to give the legal advice and to present their position in court in the best light – you are not there to say anything and everything they want you to say nor are there to tell them everything they are doing is correct
        - There are laws and they are subject to them like anyone else

      Your job is to tell them what the court will see or say; what the law is
    - Do not get tied up with a client; be a lawyer and do not eat out of the hands of your client
- When you are in court it is really important to have respect – be respectful
    - Do not talk when the judge is talking
    - Do not talk over a judge
    - Do not continue to talk if judge tells you to STFU!
    - Engage your justice when you talk – eye contact
    - KEY: LEARN HOW TO READ YOUR JUDGE
- Learn to be prepared that you have to go off notes – often the case that the judge wont care about your notes you want to follow
- In terms of parenting: do not involve the kids
- Remember that when dealing with clients you cant undue all the decisions they have made in the past – they come to you in hopes that you can save them but you cant always do that, you can help but you cant change everything they did in the past
    - They need to remember this and you need to make this clear
        - Most people will appreciate you being straight up
- Most things are negotiated and not go to trial – in negotiations keep going back to the child and the childs best interest
    - NEGOTIATION IS BETTER THAN COURT
- Do not be afraid of court or the knowledge you have being relatively new to practice
- Don't be afraid tto ask questions

November 17, 2020

PART VI: DIVISION OF PROPERTY

Note: Going to look at the division of family property - we have a new act it's called the *Family Property Act* which just came into effect on the 1st of January of this year

- Prior to that it was the *Matrimonial Property Act* which was had been in place and virtually unchanged since 1979

Note: You are going to see in your materials that all of the cases refer to matrimonial property and that's simply because we haven't had the family property law in effect for long enough to have any significant written decisions on it

- basically the *family property act* is almost virtually the same as what the *matrimoniale property act* had been; the big difference is that it now applies not only to people who are legally married but to common law relationships where the parties are adult interdependent partners
- Remember: any place in your materials where you see matrimonial property used you can just substitute family property now

Twen sheets + Final Exam: I posted on twen some materials for this portion of the class, one of which was a matrimonial property statement and some facts that went with it; Please please please look at that I can guarantee you will be doing a matrimoniale property statement on your example I can guarantee you that

- What the matrimoniale property statement is this: you look at your facts you determine the value of all the assets and the value of the debts and then you determine who wants to keep what so that at the end of

the day you can determine if everybody is keeping these assets and everybody is keeping these debts is there money owed from one party to the other
    - if an asset or a debt appears on your matrimonial property statement it is being divided in some form or another
- The basic structure of the matrimonial property statement is you have the assets and then you list the debts and then list any exemptions or section 7(3) property and at the end of the day you have everyone's net property – basically what they are keeping; then from there you determine those numbers should be equal and if not who owes who owe money
- For the particular statement provide by Lori:
    - There are three sets of things about that that you need to know:
        - Firstly, that the wife had owned a condominium at the time of the marriage
        - she sold it for $50,000 and she put that money into the purchase a family home (joint name)
        - Secondly, at the time of the marriage the husband had RRSP'S in his name with $50,000
        - Third during the marriage the wife got a settlement for an accident (injuries alone), received $80,000 and she used it to pay down the mortgage on the jointly owned home
- Remember: Keep the matrimonial property statement in mind
- EXAM: you will need to do a matrimonial statement inn the exam

Family Property act

- the act that governs the division of family property and now that includes some common law couples is the family property act

Definitions:

- the most important one in terms of changes is the definition in Section 1 the definition of an **adult interdependent partner**
    - Section 1(a) in this act, adult interdependent partner means
        - (i) an adult independent partner within the meaning of the *adult interdependent relationship act*
            - Section 3(1) of *adult interdependent relationship act*: Subject to subsection 2, a person is an adult interdependent partner of another if
                - (a) the person has lived with the other person in a relationship of interdependence
                    - (i) for continuous. For not less than three years; or
                    - (ii) of some permanence, if there is a child of the relationship by birth or adoption

                or
                - (b) the person has entered into an adult interdependent partner agreement with the other person under Section 7
            - **Note:** Basically what this refers to is non married people; so for the family property act to apply you have to be an Adult Interdependent partner (go to the act for a definition); looking for is do they satisfy the definition
        - (ii) a former adult interdependent partner
    - **Note:** This family property act section 39(5) states: The new act applies only to adult interdependent partners who had not begun living separate and apart and had not become former adult interdependent partners before January 1st , 2020
        - What that means is this: for Family property act to apply they had to have separated on or after the 1st of January of this year - if they were separated before this act came into effect it would be governed by constructive trust - we previously had an equitable remedy called the constructive trust- that is what we have to govern the division of that property if separated prior to this new act coming in (Case to reference *Kerrn v Barnow*)
- **Family home**
    - Section 1(a.1) in this act, family home means property

Family Law Part 2

- (i) that is owned or leased by one or both spouses or adult independent partners
- (ii) that is or has been occupied by the spouses or animal independent partners as their family home , and
- (iii) that is
    - (a) a house or part of a house, that is a self-contained dwelling unit
    - (b) part of business premises used as living accommodation
    - (c) a mobile home
    - (d) a residential unit as defined in the condominium property act; or
    - (e) a suite

▪ Note: The family home as referred in the act can be owned or leased; cannot divide something you are leasing but there is an action re: *Exclusive Possession* – you want exclusive possession of the family home that can refer to both owned and leased premises

- Household Goods
    - Section 1(b) In this act household goods mean personal property
        - (i) that is owned by one or both spouses or adult independent partners, and
        - (ii) that was ordinarily used or enjoyed by one or both spouses or adult independent partners one or more of the children residing in the family home, for transportation, household , educational, recreational, social or aesthetic purposes

***Note: where in the act it refers to both married spouses and adult interdependent partners in the same Lori will refer to them as parties

Part 1: Family Property under the Act

- Application by spouses
    - Section 3(1): A spouse may apply to the court for a family property order only if
        - (a) the habitual residence of both spouses is in Alberta, whether or not that the spouses are living together
        - (b) the last joint habitual residence of the spouses was in Alberta, or
        - (c) the spouses have not established a joint habitual residence since the time of marriage but the habitual residence of each of them at the time of marriage was in Alberta
    - Section 3(2): notwithstanding subsection 1, if a statement of claim for divorce is issued under the divorce act in Alberta, the plaintiff or the defendant may apply for a family property order
- Application by Adult Interdependent partners (AIP)
    - Section 3.1: an adult interdependent partner may apply to the court for a family property order if
        - (a) the habitual residence of both adult interdependent partners is in Alberta, whether or not the adult interdependent partner are living together
        - (b) the last joint habitual residence of the adult interdependent partners was in Alberta, or
        - (c) the adult interdependent partners have not established a joint habitual residence since becoming adult independent partners but the habitual residence of each of them at the time they became adult interdependent partners was in Alberta
- Note: Section 3(1) and 3.1 basically means you have to show some sort of habitual residence or connection to Alberta to access the family property act; so it does not mean necessarily you have to be living in Alberta now but it could be when you two were together
- Note: What you need to know re jurisdiction is this: The Alberta court under this act can divide property - they can order the sale or the transfer or an encumbrance - of any property, whether it's real property or personal property, here in Alberta; IMPORTTANT TO NOTE that they do not have jurisdiction over properties in other provinces because property legislation is provincial jurisdiction
    - Example: so you may have a situation for instance where parties are dividing their property under the family property out here in Alberta that and they have a rental property, let's say they have a rental property in Winnipeg, and they went to University students
        - so the value of that is taken into account when we look at the matrimonial property statement; take that into account who's going to keep it, what is the value of it, what's the mortgage; the court can take the value of an into account and can adjust any equalization payment owed from one party to the other

Family Law Part 2

- But they cannot order for instance the sale of the property in Winnipeg, the encumbrance of the property in Winnipeg or cannot say that Winnipeg property shall be transferred from one to another → only have jurisdiction over property in Alberta but property outside of jurisdiction is taken into account despite no jurisdiction

- Note: How property is dealt with outside the province? Do you have to go to court in other province?
  - It depends on the circumstances – could be dealt with in that jurisdiction but could also be dealt with within jurisdiction that does not have jurisdiction
  - Not necessarily it depends if you know if it's a situation where one party is saying I want to keep this property out of province and the other party is saying I want to keep this property, then it may well be a situation where they would have to commence an action in that jurisdiction to deal with that one particular property; if it's a situation where one party saying no I want to keep that property another party says I don't care if they keep it then it is it's a matter of then it goes on you know, you put it on your matrimonial property statements and you can say in your decision the parties have agreed that it would be transferred from one to another (if parties agree you have jurisdiction)
- Form of application
  - Section 4: An application for a family property order shall be made by statement of claim
    - Note: but when it's the situation where the parties are married, the vast majority of time when you commence an action you do a statement of claim for divorce and division of matrimonial property
      - even though one is a federal statute and one is a provincial statute we have to use being able to bring one statement of claim to deal with both of them

    If you are an AIP you would do statement of claim for division property
- Conditions precedent to application spouses & AIP
  - *Section 5
    - Point out Section 5 to you but with an Asterix because we're going to see that it's possible for courts to make interim orders and with the family property act in Section 5 talks about conditions president to the application; Section 5(1) deals with spouses and section 5.1(1) deals with adult interdependent partners → again it said it's virtually the same type of provision
  - Section 5(1) A family property order in respect of spouses may only be made
    - (a) if
      - (i) a judgment of divorce has been granted, or
      - (ii) a declaration of nullity of marriage has been made with respect to the marriage,
    - (b) if one of the spouses has been granted a judgment of judicial separation,
    - (b.1) if one or both of the spouses have obtained a declaration of irreconcilability under the Family Law Act,
    - (c) if the Court is satisfied that the spouses have been living separate and apart for a continuous period of at least one year immediately prior to the commencement of the application,
    - (d) if the Court is satisfied that the spouses are living separate and apart at the time the application is commenced and the defendant spouse
      - (i) has transferred or intends to transfer substantial property to a third party who is not a bona fide purchaser for value, or
      - (ii) has made or intends to make a substantial gift of property to a third party, with the intention of defeating a claim to property a spouse may have under this Part, or
    - (e) if the Court is satisfied that the spouses are living separate and apart and one spouse is dissipating property to the detriment of the other spouse.
  - Section 5.1(1) A family property order in respect of adult interdependent partners may only be made

- (a) if they have become former adult interdependent partners,
- (b) if the Court is satisfied that the adult interdependent partners are living separate and apart at the time the application is commenced and the defendant adult interdependent partner
    - (i) has transferred or intends to transfer substantial property to a third party who is not a bona fide purchaser for value, or
    - (ii) has made or intends to make a substantial gift of property to a third party, with the intention of defeating a claim to property an adult interdependent partner may have under this Part, or
- (c) if the Court is satisfied that the adult interdependent partners are living separate and apart and one adult interdependent partner is dissipating property to the detriment of the other adult interdependent partner.

▪ Note: Take section 5(1) and 5.1(1) with a grain of salt; the court has the ability to make interim orders and you can get an interim order without having been separate and apart for a year or show dissipation

- Time for application – spouses &. AIP
    - Section 6(1)
        - An application for a family property order to which section 5(1)(a), (b) or (b.1) applies (a) may, notwithstanding subsection (2), be commenced at or after the date proceedings are commenced for a decree of divorce, a declaration of nullity, a judgment of judicial separation or a declaration of irreconcilability under the Family Law Act, but (b) may be commenced not later than 2 years after the date of the decree nisi, declaration or judgment.
    - Section 6.1
        - An application for a family property order to which section 5.1(1)(a) or (c) applies may be commenced not later than 2 years after the date the applicant first knew, or in the circumstances ought to have known, that the applicant had become a former adult interdependent partner.
    - Note: talks about time for an application; what they mean here when they say application nis basically commencing the action and here is the two things you need to know:
        - When dealing married parties (6(1)), if for some reason somebody has commenced an action for divorce only (not seeking property), the parties are divorces and the property act has not yet started you have 2 years from date of granting of the divorce (divorce judgment) to commence your action under the family property act or you cannot access this
        - When dealing with AIP (6.1) then you can commence no later than 2 years from the date the applicant first knew, or in the circumstances ought to have known, that the applicant had become a former adult interdependent partner.
        - RULE: Essentially two years from breakdown of marriage to bring property action
- Sections 7 to Section 10 are the meat of the act for our purposes; emphasis on sections 7 & 8
    - Basically says: section 7(3) tells us there are three types of property:
        - (1) section 7(2) exempt property - If you can prove property is exempt it is not available for division or distribution
        - (2) section 7(3) property – # of types of property, usually refers to increase in value of exempt property or subsequent use of exempt property
            - Section 7(3) property is available for distribution in order for division of it, but it can only be divided in a manner that is just and equitable
        - (3) section 7(4) property all other property that is not section 7(2) or 7(3) property and subject to presumption of equality - the presumption is a 50/50 division – strong presumption (can be rebutted if unjust) unless you can use the factors in section 8 to argue against equal division
            - Section 8 how do we know if we can rebut that presumption of equality? Section 8 sets out the factors we are to look at in determining the division of family property

Family Law Part 2

- Section 7:Distribution of property
    - 7(1) The Court may, in accordance with this section, make a distribution between the spouses or adult interdependent partners of all the property owned by both spouses or adult interdependent partners and by each of them.
    - 7(2) If the property is
        - Note: List of property that is exempt – not available for distribution; parties do not have to share
        - (a) property acquired by a spouse or adult interdependent partner by gift from a third party,
            - Note: one party gets a significant gift (i.e. $50,000 for a birthday present, gifted you a vehicle) it is exempt from distribution
        - (b) property acquired by a spouse or adult interdependent partner by inheritance,
        - (c) property acquired by a spouse before the marriage, in the case of spouses who were not in a relationship of interdependence with each other immediately before the marriage,
            - Note: if not living together before marriage, pre-marital property is exempt
        - (c.1) property acquired by a spouse before the relationship of interdependence began, in the case of spouses who were in a relationship of interdependence with each other immediately before the marriage,
            - Note: property acquired by AIP before relationship began is exempt (i.e. land owned before relationship established; property had before started relationship)
        - (c.2) property acquired by an adult interdependent partner before the relationship of interdependence began,
            - Note: property acquired by AIP before relationship began is exempt
        - (d) an award or settlement for damages in tort in favour of a spouse or adult interdependent partner, unless the award or settlement is compensation for a loss to both spouses or adult interdependent partners, or
            - Note: if you get in accident and injured, and you receive funds for your injuries, if those funds are only for you then they are exempt from distributtion
        - (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses or adult interdependent partners,
            - Note: if you were a beneficiary of life insurance for someone and you received that money, that would be exempt if for you alone;
        - Note: at the time these funds are received (beginning of relationship, beginning of the marriage, beginning of relationship before the marriage) those properties are exempt; you need to ultimately be able to trace these properties (show they exist) or trace them into an existing property in order to get the exemption

      the market value of that property on the applicable date under subsection (2.2)(a), (b) or (c) is exempted from a distribution under this section.
    - 7(2.1) Unless a written agreement by the parties that meets the requirements set out in section 38 provides otherwise, the relevant date for valuation of property to be distributed under this Act is the date of the trial.
    - 7(2.2) The market value that is exempt under subsection (2) is the market value of the property on the following date, as applicable:
        - (a) in the case of spouses who were not in a relationship of interdependence with each other immediately before the marriage,
            - (i) on the date of the marriage, or
            - (ii) on the date the property was acquired by the spouse, whichever is later;
        - (b) in the case of spouses who were in a relationship of interdependence with each other immediately before the marriage,

- (i) on the date the relationship of interdependence began, or
- (ii) on the date the property was acquired by the spouse, whichever is later;

- (c) in the case of adult interdependent partners,
  - (i) on the date the relationship of interdependence began, or
  - (ii) on the date the property was acquired by the adult interdependent partner, whichever is later.

- 7(3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:
  - (a) the difference between the exempted value, as determined under subsection (2.2), of property described in subsection (2), referred to in this subsection as the "original property", and the market value at the time of the trial of the original property or property acquired
    - (i) as a result of an exchange for the original property, or
    - (ii) from the proceeds, whether direct or indirect, of a disposition of the original property;
    - Note: discuss exempt value vs market value – say you got $50,000 worth of shares when came into the marriage and at the time you were dividing your property they were $80,000… $50,000 would be exempt because of value at time but the increase $30,000 that is available to divide (may not be 50/50 but it is an increase in value)
    - Note: If you have an exempt property and you sold it and then used the funds for something else – the increase in value of the something becomes section 7(3) property as a whole; you keep the exemption if stays in your name but if in joint name its different; you can change the property but any increase in value becomes section 7(3) property
      - Ask Lori
  - (b) in the case of spouses who were not in a relationship of interdependence with each other immediately before the marriage, property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);
  - (b.1) in the case of spouses who were in a relationship of interdependence with each other immediately before the marriage, property acquired by a spouse with income received during the relationship of interdependence or the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);
  - (b.2) in the case of adult interdependent partners, property acquired by an adult interdependent partner with income received, at any time on or after the date the relationship of interdependence began, from the original property or property acquired in a manner described in clause (a)(i) or (ii);
  - (c) in the case of spouses, property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage, a judgment of judicial separation or a declaration of irreconcilability under the Family Law Act is made in respect of the spouses;
    - Note: If property is acquired after divorce but property has not been divided property acquired after the divorce is section 7(3) property after granting of divorce
  - (c.1) in the case of adult interdependent partners, property acquired by an adult interdependent partner after becoming a former adult interdependent partner;
    - Note: a bit of an inequity because once you have separated from common law partner any property you acquired after is section 7(3) property, once you separate from spouse if married anything acquired after separation but before divorce is section 7(4) property and only after divorce is section 7(3) property
      - Inequity towards to the people who are married

        - Per Lori: there is no justification for the distinction – should be 7(3) or 7(4) property
    - (d) property acquired by a spouse by gift from the other spouse, including property acquired by a spouse by gift from the other spouse during any period in which they were in a relationship of interdependence with each other immediately before the marriage;
        - Note: gifts between parties are section 7.3 property – this can be the biggest crap shoot when dividing property – unless the gift is significant worth something there often not worth fighting about
        - Example: Lori case re: jewels vs fancy clothing; one retained value the other didn't – what is just and equitable – ultimately agreed to let it go
        - Example: wedding rings are not a gift, it is rather in consideration of the marriage
    - (d.1) property acquired by an adult interdependent partner by gift from the other adult interdependent partner at any time on or after the date on which the relationship of interdependence began.
        - Note: gifts between parties are section 7.3 property – this can be the biggest crap shoot when dividing property – unless the gift is significant worth something there often not worth fighting about
    - Note: Section 7.3 property is typically referred to as increasing value of exempt property or subsequent use of exempt property
    - Note: distribution may be zero-100 or any range
- 7(4) If the property being distributed is property acquired by a spouse during the marriage or during a relationship of interdependence with the other spouse immediately before the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.
    - Note: If property doesn't fall within section 7(2) or 7(3) it becomes section 7(4) property (married); available for distribution and subject to the presumption of 50/50
- 7(5) In the case of adult interdependent partners, if the property being distributed is property acquired at any time after the relationship of interdependence began and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the adult interdependent partners unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.
    - Note: If property doesn't fall within section 7(2) or 7(3) it becomes section 7(5) property (common law/ AIP); available for distribution and subject to the presumption of 50/50
- 7(6) Nothing in this Act enables
    - (a) a transfer from a pension plan of a benefit under the plan,
    - (b) a payout of contributions to a pension plan, or
    - (c) a transfer of money in a retirement account where requirements in legislation applicable to the pension plan or retirement account have not been met, or to a person who is not eligible to receive a share of the benefit, contributions or retirement account under legislation applicable to the pension plan or retirement account, but the Court shall distribute the value of the benefit, contributions or retirement account in accordance with this Act when making a family property order.
    - Note: What this means is this, when you are married pensions are automatically property to be divided, it's not necessarily the case in common law because some pension plans do not allow you to share with common law; what this act is saying is that this act does not replace the pension legislation – if pension leg does not allow sharing with common law then this law does not make is allowable;
    - Note: but the act goes on to say the Court shall distribute the value of the benefit, contributions or retirement account in accordance with this Act when making a family property order – basically saying if you are common law and one of you has a pension

and the leg surrounding the pension says you cannot share with common law partner nothing in this act says pension will be divided but it says the value of the pension has to be taken into account when dividing the property (i.e. someone accumulated pension of $100,000 you cannot divide but you can take into account there was $100,000 asset on one side of party and thus the $50,000 will be made up somehow)

- **Issue:** What if only assets is the pension – and you cannot divide but there is no other property to offset it…

- 7(7) In subsection (6),
  - (a) "pension plan" means a plan, scheme or arrangement organized and administered to provide a series of periodic payments to members of the plan on retirement;
  - (b) "retirement account" includes a locked-in retirement account or a life income fund as defined in the Employment Pension Plans Act and any similar locked-in account intended to provide income to the owner on retirement.
- Per Lori: when talking about section 7(3) property trying to determine what is just and equitable, what kind of division is just and equitable or when we are dealing with section 7(4) or 7(5) (i.e property subjected to presumption of equality) property – how do we rebut the presumption of equality or rebut what is just and equitable → for that we look to section 8: outlines factors that will be taken into account

- Section 8: The matters to be taken into consideration in making a distribution under section 7 are the following:
  - (a) in the case of spouses, the contribution made by each spouse to the marriage, to any relationship of interdependence with the other spouse immediately before the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
  - (a.1) in the case of adult interdependent partners, the contribution made by each adult interdependent partner to the relationship of interdependence Family Law: Statutory Materials 104 and to the welfare of the family, including any contribution made as a homemaker or parent;
  - (b) the contribution, whether financial or in some other form, made by a spouse or adult interdependent partner directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or adult interdependent partners or by one or both spouses or adult interdependent partners and any other person;
  - (c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse or adult interdependent partner to the acquisition, conservation or improvement of the property;
  - (c.1) in the case of spouses who were in a relationship of interdependence with each other immediately before the marriage, any contribution referred to in clause (b) or (c) that was made during the relationship of interdependence;
  - (c.2) in the case of adult interdependent partners, any contribution referred to in clause (b) or (c) that was made during the relationship of interdependence;
  - (d) in the case of spouses, the income, earning capacity, liabilities, obligations, property and other financial resources
    - (i) that each spouse had at the time of marriage, or if the spouses were in a relationship of interdependence with each other immediately before the marriage, that each spouse had on the date the relationship of interdependence began, and
    - (ii) that each spouse has at the time of the trial;
  - (d.1) in the case of adult interdependent partners, the income, earning capacity, liabilities, obligations, property and other financial resources
    - (i) that each adult interdependent partner had on the date the relationship of interdependence began, and
    - (ii) that each adult interdependent partner has at the time of the trial;

- (e) in the case of spouses,
  - (i) if the spouses were in a relationship of interdependence with each other immediately before the marriage, the combined duration of the marriage and the relationship of interdependence, or
  - (ii) if subclause
  - (i) does not apply, the duration of the marriage;
- (e.1) in the case of adult interdependent partners, the duration of the relationship of interdependence;
- (f) whether the property was acquired when the spouses or adult interdependent partners were living separate and apart;
- (g) the terms of an oral or written agreement between the spouses or adult interdependent partners;
- (h) that a spouse or adult interdependent partner has made
  - (i) a substantial gift of property to a third party, or
  - (ii) a transfer of property to a third party other than a bona fide purchaser for value;
- (i) a previous distribution of property between the spouses or adult interdependent partners by gift, agreement or family property order;
- (j) a prior order made by a court;
- (k) a tax liability that may be incurred by a spouse or adult interdependent partner as a result of the transfer or sale of property;
  - Note: when you are looking at RRSP, if you have $100,000 in RRSP that does not mean you have $100,000 of after tax cash when you cash them in it will be subject to taxes…so if trying to figure out after tax values we need to do a nominal reduction for tax purposes before can divided between parties; also take into account tax liability
- (l) that a spouse or adult interdependent partner has dissipated property to the detriment of the other spouse or adult interdependent partner;
- (m) any fact or circumstance that is relevant.

- Per Lori: these are the types of things you look at if you are looking to divide section 7(3) or dislodge the presumption of equality
- Section 9
  - Discusses what a court can do when they are dividing the property
  - 9(1) If part of the property of the spouses or adult interdependent partners is situated in Alberta and part elsewhere, the Court may distribute the property situated in Alberta in such a way as to give effect to the distribution under section 7 of all the property wherever it is situated.
  - 9(2) The Court, in order to effect a distribution under section 7, may do any one or more of the following:
    - (a) order a spouse or adult interdependent partner to pay money or transfer an interest in property to the other spouse or adult interdependent partner;
      - **Note**: equalization payment – I keep these assets, you keep these assets, I have $200,000 and you have $100,000 so I shall pay $50,000 to you
    - (b) order that property be sold and that the proceeds be divided between the spouses or adult interdependent partners as the Court directs;
    - (c) by order declare that a spouse or adult interdependent partner has an interest in property notwithstanding that the spouse or adult interdependent partner in whose favour the order is made has no legal or equitable interest in the property.
    - **Note:** fairly significant power to give effect to any orders they give under section 9(2) → see 9(3)
  - 9(3) To give effect to an order under this section the Court may do any one or more of the following:
    - (a) order a spouse or adult interdependent partner to pay money over a period of time with or without interest;
    - (b) order a spouse or adult interdependent partner to give security for all or part of any payment;

- (c) charge property with all or part of a payment to be made under the order and provide for the enforcement of that charge;
- (d) prescribe the terms and conditions of a sale ordered under subsection (2);
- (e) require a spouse or adult interdependent partner, as a condition of an order, to surrender all claims to property in the name of the other spouse or adult interdependent partner;
- (f) require a spouse, as a condition of an order, to execute a release of dower rights under the Dower Act with respect to all or any property owned by the other spouse or transferred to the other spouse;
- (g) impose a trust in favour of a spouse or adult interdependent partner with respect to an interest in property;
- (h) vary the terms of an order made under subsection (2) in accordance with this subsection;
- (i) if property is owned by spouses or adult interdependent partners as joint tenants, sever the joint tenancy;
- (j) make any other order that in the opinion of the Court is necessary.
- Per Lori: majority of people settle on property; most people don't have money to go to trial; issues will arise during negotiation, so you need to know the terms of the act
  - Vast majority of things are settled

- Section 10: discusses specific situation where someone is trying to get rid of property to the detriment of another - Return of gift or property when insufficient consideration
  - 10(1) When an application has been made for a family property order and the Court is satisfied that
    - (a) a spouse or adult interdependent partner has
      - (i) transferred property to a person who is not a bona fide purchaser for value, or
      - (ii) made a substantial gift of property,
    - (b) the spouse or adult interdependent partner making the transfer or gift did so with the intention of defeating a claim that the other spouse or adult interdependent partner may have under this Part,
    - (c) the transferee or donee accepted the transfer or gift when the transferee or donee knew or ought to have known that the transfer or gift was made with the intention of defeating a claim a spouse or adult interdependent partner may have under this Part, and
    - (d) the transfer or gift was made not more than one year before the date on which either spouse or adult interdependent partner commenced the application for the family property order,

    the Court may do any one or more of the things referred to in subsection (2).

    Note: basically trying to transfer assets to another person's name to avoid division of assets
  - 10(2) If subsection (1) applies, the Court may do any one or more of the following:
    - (a) order the transferee or donee to pay or transfer all or part of the property to a spouse;
    - (b) give judgment in favour of a spouse against the transferee or donee for a sum not exceeding the amount by which the share of that spouse under the matrimonial property order is reduced as a result of the transfer or gift;
    - (c) consider the property transferred or the gift made to be part of the share of the spouse who transferred the property or made the gift, when the Court makes a matrimonial property order.
    - Note: if you cannot get the property back or it is futile to give the wronged party a judgment from the transferee the court can say that the asset still exists and we are going to put it on your side (wrongdoers side) matrimonial statement such that the other side can get there half of it → if you have that situation go to court and ask for one of these three things to be done and if you know this is happening or potentially happening

you can go to court and say here is my evidence and now I want an order saying the transfer should not occur
        - Note: if you make an application under section 10 you will need to serve the donee or transferee, the person who received the property, you need to serve them and they become a defendant for purposes of the application
    - 10(3) For the purposes of this section, the value of the property transferred or the gift shall be the market value at the time of the trial.
    - 10(4) If a spouse applies for an order under subsection (1), the applicant shall serve the transferee or donee with notice of the application and shall include the allegations made and the nature of the claim of the applicant as it affects the transferee or donee.
    - 10(5) A transferee or donee who is served with notice under this section is deemed to be a party to the application for the matrimonial property order as a defendant with respect to any allegation or claim that affects the transferee or donee.
- What happens if there is not an actual transfer or what happened was more than a year before you commenced your action or there was a transfer/gift but the third party had no idea that they were being used or what if there is wastage or spending of assets – how do you deal with that?
    - Cannot fall under section 10? How do you argue it?
    - This what we call dissipation – recall one of the factors under section 8 that a court can look at is subsection (L) which Status post or adult interdependent partner has dissipated property to the detriment of the other spouse or adult interdependent partner
        - They transferred property in a way that you cannot use section 10 or simply wasted – usually situations where for instance someone has cashed in all the RRSPs and they used the money to fund a drug habit or gambling or because they have a side hoe or cashed it in for some other reason
            - You can argue that they dissipated property to the detriment of the other party
        - The case that address this is Cocks v Cocks decision
            - Situation where one of the parties sold shares and used the money to fund gambling habits
            - Usually what the courts is stuck with is that say we can establish the person dissipated an asset … what do we do now? Court can say okay we are going to look at what property exists still and do an unequal division of property in favour of the wronged spouse or they can do what the legislation talks about in section 10 (say we are going too pretend the assets exists and put it on the wrongdoers side of matrimonial property statement and then divide the property)
            - If you look in the Cocks decision it gives the principals we are looking at for dissipation:
                - 1. Section 7(4) and 7(5) creates a presumption of equal provision
                - 2. Section 8(l) allows for taking into account dissipation
                - 3. Dissipation does not necessarily result where an asset is worth less at trial then at separation; dissipation requires a degree of intent although intent does not need to be to intentionally deprive the other person – it is sufficient if one spouse intends to dissipate the assets for their own enjoyment and that dissipation results in a detriment to another spouse
                - 4. There must be actual detriment
                - 5. The law generally does not find the dissipation in the reduction of assets as due to reasonable expenditures made on behalf of the family. The court will look to see could those expenses been paid without depleting the assets; purely personal expenses that do not benefit the other party that is paid from matrimonial property may also be considered dissipation – could it have been paid another way

    - 6. If an asset is sold or otherwise reduced the court will not consider this dissipation if you can trace it to another asset
    - 7. If assets are sold for less than fair market value the court may determine if the sale was done improvidently, hastily or fraudently in deciding if it was dissipation
    - 8. The total amount dissipated to the detriment is half of the value of the asset found gone
    - 9. ultimately it is up to the TJ to determine
- If you are going to argue dissipation you need to argue it was for personal enjoyment, not by agreement, had no knowledge of it and I lost X amount and I want an equal division of property plus losses due to disapation

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REQUIRED READING: DISIPATION/SECTION 10 APPLICATION

Cox v Cox, 1998 ABQB 987

Facts:

- married 20+ years, had 5 kids
- H was the sole provider, W managed home, kids and budget
- H owned shares in company which he sold to partner, the proceeds to hold in trust
- W made application under section 10, holding „partner" as a third party (H made sale after an order not to dispose of any matrimonial assets)

Analysis:

Matrimonial Property Division

- date of separation or date of trial?
    - Value had decreased due to (a) buy-out (b)excessive spending of cash by H
    - General Rule in AB: date of trial (absent special circumstances stick with this)
    - Special circumstances: When a person willfully dissipates assets in the period between separation and trial, the valuation is better set at date of separation
    - TRIAL b/c no standing allegation of dissipation of shares still at trial
- Exemption
    - W received 8000 in a personal injury award, funds which no longer exist as the funds were used to purchase some of the property in the house
    - Can it be traced? Exemption applies to original property (or its substitute) still owned by the parties
    - W claims bought furniture , accepted, but judge found that investing in family furnishings was also to benefit H by giving him 1⁄2
    - Thus reduction reduced to 6000, and value of furniture 16 to 10 thousand
- Section 8 (l) Considerations and Unequal Distributions
    - Section 7(4) the Act provides that the court shall distribute non-exempt matrimonial assets equally, unless it is unjust or inequitable to do so, considering section 8 factors (including: That a spouse has dissipated property to the detriment of the other)
    - Examples on p. 574 – of dissipation
    - Dissipation includes an element of intent, though the intent does not have to specifically be to deprive the other spouse (just to dissipate assets and this results in detriment to other spouse)
    - There must be an actual detriment to the other spouse
    - If asset is sold or otherwise reduced, it will not be deemed dissipation if it can be traced to another asset o Not dissipation is reasonable expenditure made on behalf of family

Family Law Part 2

- Application: Money withdrawn from the company and used as a deposit on furniture an house was not dissipation BUT the money used as interim support payments (when made out of matrimonial assets) are dissipation
- Traced 60 000 that was used towards home, this is not dissipation, its traceable and still equity that W can share in

November 19, 2020

Last day we were talking about dissipation - what you can do after dissipation or section 10 what you can do after you found out that somebody has inappropriately transferred or sold an asset

- you should be aware that there are things that you can do prior to that in order to stop that kind of thing
    - Section 34 order - the first thing you have available to you in section 34 of the family property act
        - Section 34 order - Prevention of gift or sale
            - 34(1) If the court is satisfied that this post or animal interdependent partner intends to transfer property to a person who is not a bona fide purchaser for value or to make a substantial gift of property that may defeat a claim of the other spouse or adult interdependent partner under this act, the court may, by order, strong restrain the making of the transfer or gift
            - 34(2) an application for an order under subsection one may be made while spouses or adult interdependent partners are cohabitating
            - 34(3) an application for an order under subsection one may be made as an application and proceedings commenced under this act or by separate application
            - 34(4) An application for an order under subsection one may be ex parte
            - 34(5) if an application is made expertise, the court may dispense with service of notice of the application or direct that the application be served at a time and in a manner that it sees fit
        - Section 34 for the Act allows us to make an application to the court to stop somebody from selling and/or gifting property if it's going to defeat the interest of the other party
            - It basically a form oof injunction – you are asking the court to prevent something prior to it happening
        - When you are doing that kind of thing what is it that you have to prove? Really there is a 5 part test you need to prove
            - Must prove 5 part test (*3rd Canadian shipping* v *Union Marine*):
                - 1) Full frank disclosure of all matters relating to the claim or that are material
                - 2) State the particulars of your claim - what you're asking for
                - 3) Belief and grounds that the other party has the assets
                - 4) Factual grounds for your belief that the other party is going to move assets or dispose of them to your detriment
                - 5) Justices may say you need to undertake to be responsible for any damages as a result of this
            - Example: Interaction with the court - tell the court that these are the assets that I believe are being transferred and here is the evidence to back this up and I am asking for an injunction that says the party should not dispose of any assets or transfer those assets until further notice from the court
    - Freezing order (common law) – you can get a freezing order which freezes the assets
        - Example: worried they will take everything out of bank or rrsps or sell shares, you can ask the court for an order freezing those assets

- Freezing order means that neither party can touch or use or avail themselves of those assets until further order of the court
  - Basically freezes it for both parties
- Example: Line of credit: if there is room, a crazy spouse may look to maximize this and take everything out OR use maximum overdraft in bank account → freezing order cuts things off for both parties unlike us. 34 injunction order

- Note: Section 34 order and freezing order
  - For Both Orders: Need to serve the institution that is holding the asset
  - Example: if you are freezing a bank account make sure you are serving it on the institution holding it – i.e. local branch. If you have the filed order, you need to serve to financial institutions, so they know it is in place
- Certificate Lis Pendens (*Litigation Pending*):
  - This is a protection to put on <u>real property</u> to prevent sale of assets
  - Is a document you register at land titles office against title (attaches against the title)
  - What it means is it is registered against title and if someone goes to sell it or a buyer is going to search title it indicates that there is litigation pending
  - It's a protection you do that you put on real property to ensure until the family property is divided that someone does not just start selling of assets
  - Section 35: Certificate of Lis Pendens
    - Filing certificate of lis pendens
    - 35(1) A spouse or adult interdependent partner who commences proceedings under this Act may file a certificate of lis pendens with the Registrar of Land Titles.
      - Note: Anyone who is a party may file a certificate of lis pendens with the Registrar of Land Titles.
    - 35(2) When the Registrar accepts a certificate of lis pendens for registration under this section, the Registrar shall make a memorandum of the certificate of lis pendens on the certificate of title to which it relates.
      - Note: Talks about that is is registered on title
        - When a certificate of lis pendens is accepted onto title, there shall be a memorandum of the certificate of lis pendens on the certificate of title to which it relates.
      - Per Lori: when you search title you will see that;
      - Note: its priority comes with date of registration – anything registered against title after the lis pendens is subject to the supremacy of the lis pendens
    - 35(3) If a certificate of lis pendens has been registered under this section, any instrument that
      - (a) is registered after the registration of the certificate of lis pendens, and
      - (b) purports to affect land included in the certificate of title,

      is subject to the claim of the spouse or adult interdependent partner who filed the certificate of lis pendens.
  - Notes: this is a statement subject to litigation pending
    - Ex. if someone wants to sell, they would need to bring an application to the court to discharge the lis pendens and would need to provide you with notice
  - Usually a good idea to put this against any property that is held solely in someones name. If you dont someone could sell the home meaning the assets & money will be gone.

Family Law Part 2

        - Some will also register lis pendens against the family home or anything that has both parties names but this is an extra layer or protection (though it is not necessarily needed) since bc name is on it, you will be aware and need to consent
    - Options:
        - Real property: can use s. 35;
        - Anything that isn't real property: can use s. 34 (injunction) or a freezing order
        - Note: usually if you use an injunction or a freezing order, they are done ex parte (without notice to other side)
            - You get the order and you serve the order and it will say the order shall be reviewed on a later date (usually 10-14 days down the road) because you are doing it without notice to the other side so the other side has to be able to review. These are done PRIOR to someone doing something inappropriate

Issue of Appeals on Family Property

- Standard: Is the application of the law correct and is the understanding of the facts reasonable
- One of the things that was originally when the act first came in and surprisingly still argued is that people will argue that the TJ didn't go through all the Section 8 factors when looking at the property division → This is incorrect
    - see *Dwelle v Dwelle* (ABCA):
        - Specifically says the TJ does not need to do a factor by factor analysis in s. 8. Only need to address the relevant factors when discussing – in their mind they need to go through all factors but when addressing parties do not need to do factor by factor analysis. Failing to go through some is NOT a grounds of appeal.
        - The CA also talk about omissions in a judgement or reasons of judgment: "The mere omission in reasons for judgment of specific mention of a particular piece of evidence given by a witness does not justify an assumption that the trial Judge overlooked it, still less that a factual finding was based on 'disregard' of material evidence. Of course, it is another matter if it can be shown the trial Judge was led into error due to failure on his part to take cognizance of some evidence going to a material fact." → the mere omission of a piece of evidence i.e. the court does not need to go through each and every piece of evidence that is before them, the mere fact that they didn't mention every aspect in the reasoning is NOT grounds for appeal
            - it would be different if you could show that they disregarded evidence and it led them to a wrong conclusion
                - To have a ground for appeal, for example, you must show that they disregarded material evidence that lead them to a wrong conclusion.
            - Mere omission does not ground an error that can be automatically appealed
            - Note: the same is for section 8

Interim orders under FPA

- You can get interim orders under the FPA
    - Injunction, freezing order, prohibition under s. 34, exclusive possession of family home, order for interim distribution of property, Interim cost (types of interim orders you can have)
        - Note: there are other ones such as an order to dispense of the necessity of the other side to give the dower consent to a sale if someone is being obstructive
    - Be wary: you cannot go for just one piece of property absent the family home - vast majority of things are either negotiated or property is divided in total at trial
- Under part II: Family Home Possession → have the ability to get exclusive possession of home

Family Law Part 2

- Idea here is that parties are living separate in the same home or are about to be separated and neither one will leave the home OR they just come back whenever they want
- Exclusive possession has no bearing on ownership of the asset, on your ultimate portion that you receive, it has not effect on ownership → JUST possession and who will be in possession of the home until whatever the triggering event is – i.e until further order from the court, can be X months, can wait till trial
- Section 19 → Jurisdiction to grant an order
  ***NOTE: i changed "spouse or adult interdependent partner" to "partner"
  - 19(1) The Court, on application, may by order do any one or more of the following:
    - (a) direct a partner be given exclusive possession of family home
    - (b) direct that a partner be evicted from the family home;
    - (c) restrain a partner from entering or attending at or near the family home
    - Note: exclusive possession order but can also act as a restraining order hybrid (include terms of restraining order and EPO order) → Not every order has a restraining order part or EPO part and doesn't say anything about the other party not being able to show up. If you are worried about it you should include a provision that addresses it but if you are not then not necessary
      - If include provision add terms like "after you vacate the home you are not allowed near except for X purposes (ie. picking up children)"
    - Per Lori: gives the jurisdiction to grant it
  - 19(2) in addition to making an order under subsection 1 the Court May, by order, give us spokes or adult interdependent partner possession of as much of the property surrounding the family home as is necessary, in the opinion of the court, for the use and enjoyment of the family home
    - Example: some people will say you excluded me from the home but not the garage or shed. I will live in there lol
      - Can include language that addresses all property in and around home
  - 19(3) An order under this section may be made subject to any conditions and for any time that the Court considers necessary.
    - Example: I am granted exclusive possession BUT the condition is that I alone will be responsible pay the mortgage; OR granted exclusive possession it will only be the kids and I that live there (cannot move someone else in); OR exclusive possession for only 3 OR exclusive possession for only 6 months where it is reviewed
    - Note: Can have conditions or time limits on them
  - 19(4) order may be varied by the Court on application by parties
  - 19(5) An order under this section does not create a subdivision Within the meaning of part 17 of the m*unicipal government act*

Matters to be Considered for exclusive possession of home:

- Section 20 shows what we need to prove when making an application + gives us the TEST to apply
  - Trying to show continued cohabitation is rendered intolerable and cannot continue to live together; this can no longer go on and it NEEDS to be intolerable
- Section 20: In exercising its powers under this Part, the Court shall have regard to
  ***NOTE: changed "spouse or adult interdependent partner" to "partner"
  - (a) the availability of <u>other accommodation</u> within the means of both the partners,

        - Example: are there rental properties? Is one party involved on a new relationship they can move in? Does one party have family here and the other does not and can they move in with family?
        - Note: Availability of other accommodations
    - (b) the needs of any children residing in the family home,
        - Example. If one party cannot work from home, and they need to stay home for classes, what are the needs of the kids here – should the person who can help them with there stuff be moved in
        - Note: the needs of the kids
    - (c) the financial position of each of the partners, AND
        - Example. One party makes way more $$ and can afford to move into a condo
    - (d) any order made by a court with respect to the property or the support or maintenance of one or both of the spouses or adult interdependent partners.
        - Is there an order for support? Is one person supposed to pay child and spousal support to the other scuh that they can afford to move out OR any order with respect to the division of the property
- Steps to prove (what you must show):
    - 1) COHABITATION must be INTOLERABLE
        - if gone/living elsewhere or not together this isnt applicable and go straight to s. 20
    - 2) apply factors from s. 20
    - Usually exclusive possession it is argued about or occurs in two situation:
        - (1) both parties are stubborn and won't move out so one (or both file for exclusive possession) OR
        - (2) after one party have moved out because their name is on title they take the position since they are on title they can show up whenever they want and hanging around when not welcome
- ALSO be aware of these sections Re Possession
    - S. 21: Precedence of order
        - 21 order takes effect notwithstanding the fact that there may have been an order for partition and sale
    - S.22: can register for exclusive possession at land titles if you want
        - 22(1) If an order is made under section 19 with respect to a family home and the family home or part of it is real property that
            - (a) is owned by one or both of the spouses or adult interdependent partners,
            - (b) is leased by one or both of the spouses or adult interdependent partners for a term of more than 3 years, or
            - (c) is the subject of a life estate in favour of one or both of the spouses or adult interdependent partners, the order may be registered with the Registrar of Land Titles.
        - 22(2) An order registered under this section binds the estate or interest of every description that the spouse or spouses or the adult interdependent partner or partners have in the property to the extent stipulated in the order.
        - 22(3) A spouse or adult interdependent partner against whose estate or interest an order is registered under this section may only dispose of or encumber that spouse's or adult interdependent partner's estate or interest with the consent in writing of the spouse or adult interdependent partner in possession or under an order of the Court.
    - S.23:
        - 23 If the Court makes an order under section 19 and the family home is a mobile home owned or leased by one or both of the spouses or adult interdependent partners, a

financing statement may be registered in the Personal Property Registry under the Personal Property Security Act
    - Note: can register exclusive possession for a mobile home as Personal property security registry (PPSR)
- S. 24: Spouse or adult interdependent partner as tenant
    - 24 If a family home is leased by one or both of the spouses or adult interdependent partners under an oral or written lease and the Court makes an order giving possession of the family home to one spouse or adult interdependent partner, that spouse or adult interdependent partner is deemed to be the tenant for the purposes of the lease.
    - Note: Exclusive possession of a leased premises or are a renting home - the person that gets exclusive possession automatically becomes the tenant under the lease even if it was under the other persons name
- S. 25: Orders re Household goods - exclusive use and enjoyment of any household goods (can be conditional).
    - 25(1) The Court, on application by a spouse or adult interdependent partner, may by order direct that a spouse or adult interdependent partner be given the exclusive use and enjoyment of any or all of the household goods.
    - 25(2) An order under subsection (1) may be made subject to any conditions and for any time that the Court considers necessary.
    - 25(3) An order made under this section may be varied by the Court on application by a spouse or adult interdependent partner.
    - Example: In situation where parties in house - A gets exclusive possession and party B gets X days after the order to take the shit they want. After this period A can have exclusive possession, use and enjoyment (cannot sell but have possession)
- S. 26: Can register household goods at the PPSR
    - 26 If the Court makes an order with respect to household goods under section 25, a financing statement may be registered in the Personal Property Registry under the Personal Property Security Act.
    - Note: not common
- S.27: effect of registration
    - 27(1) If a financing statement is registered under section 23 or 26, the financing statement
        - (a) is notice of the interests of the spouses or adult interdependent partners in the property described in the financing statement during the time that the registration is effective, and
        - (b) takes effect, as against subsequent creditors, purchasers and mortgagees, only from the date of registration of the financing statement.
    - 27(2) A spouse or adult interdependent partner against whose interest in property a financing statement is registered under section 23 or 26 may only dispose of or encumber that interest with the consent in writing of the spouse or adult interdependent partner in possession or under an order of the Court.
    - Note: effect of registration with others (notice of interests + takes effect, as against subsequent creditors, purchasers and mortgagees)
- S. 28: Rights additional to rights under Dower Act
    - 28(1) The rights under this Part are in addition to and not in substitution for or derogation of the rights of a spouse under the Dower Act.
    - 28(2) If a spouse is in possession of a family home and a life estate in the family home vests in that spouse pursuant to the Dower Act, the registration of an order under this Part may be cancelled by the Registrar of Land Titles on application by that spouse

        - Note: Doesn't replace dower interests; exclusive possession is in addition to these Dower interests
    - S. 29: cancellation of registration an order
        - 29(1) The person against whose property an order is registered under section 22 may apply to the Court for an order directing the Registrar of Land Titles to cancel the registration.
        - 29(2) The person against whose property an order is registered under section 23 or 26 may apply to the Court for an order cancelling the registration.
        - 29(3) The Court may make an order under this section on any conditions the Court considers necessary.
    - S. 30: An application under this Part
        - 30(1) An application under this part
            - (a) may be joined with, or heard at the same time as,
                - (i) a matrimonial cause between the spouses, or
                - (ii) any cause between adult interdependent partners arising from or relating to their relationship as adult interdependent partners,

            or
            - (b) may be made as an application in an action or proceeding between the spouses or adult interdependent partners under the Family Law Act or Part 1 of this Act.
            - NOTES: CAN make a stand alone application for exclusive possession under FPA,
                - doesn't need to do a statement of claim for the division of family property but you can simply make an application under FPA for exclusive possession
                - Can be combined with anything else but rarely occurs
        - 30(2) An order may be made under this Part on an ex parte application if the Court is satisfied that there is a danger of injury to the applicant spouse or applicant adult interdependent partner or to a child residing in the family home as a result of the conduct of the respondent spouse or respondent adult interdependent partner.
        - 30(3) If an application is made ex parte, the Court may dispense with service of notice of the application or direct that the application be served at a time and in a manner that it sees fit.
    - Usually when you make these applications sometitmes they are ex parte - you need good reason to get this ex parte bc the party is literally in the house so need to give them notice before kicking them -- judge usually will not grant this unless judge believes the other party will harm them or the property (evidence to demonstrate the other side will destroy the property or cause harm)
        - Applications can be made on notice or ex parte
    - Should always keep in mind if asking for exclusive possession: need to be aware of the children when considering exclusive possession; you have to speak to the parenting plan at the time you make your application for exclusive possession
        - When they say I have exclusive possession and other spouse is excluded from the family home except for the purposes of picking up the children, you may have to allow that as part of the order
        - However, can put in order that the person picking stuff up might need the police with them and can only pick up certain things as listed
- IN SUM: depending on the circumstances, the order may or may not include some or all of these provision

CASE LAW: EXCLUSIVE POSSESSION

Family Law Part 2

Portigal v Portigal (1987), 187 AR 17 (CA)

- Facts: Wife at trial, granted exclusive possession of the home (note: usually not given at trial, usually interim). Parties had 3 children (9, 10 and 12 at trial).
- Trial Judge: Wife gets exclusive possession until youngest turns 18 (aka saying she has exclusive possession for another 9 years) per TJ -- this is rare.
    - Court gave order that during 9 years she was to pay mortgage and property tax BUT when sold she would get credit for the mortgage amounts (i.e receive back from sale proceeds) and half of the tax payments.
- Husband appealed bc for the next 9 years the husband would not have access to the home NOR the equity in it → he argued that there was significant debt owed and they needed to sell the house to pay it off
    - CoA: at trial he said the business partner would pay the debt SO at CoA he lost on this argument and court didn't overturn exclusive possession
- HOWEVER VERY RARE that someone gets exclusive possession for 9 years and that it would preclude them from accessing their equity in the house bc the idea behind the division of property is a full and final break between the parties
- CoA: upheld exclusive possession BUT OVERTURNED PART of the order that she needed to pay the tax and mortgage provisions but then got these back upon selling -- the CoA does not accept that
    - What this means is that although she is making these payments but she gets it all mortgage payments and half of the tax payments back -- it is unfair that she can live here with essentially no accommodation expenses.
    - CA says no because there is no cost for her to reside there for 9 years
    - Per Lori: usually if one party is staying in the home almost always there is a mortgage against the home and whoever is staying in the home in most case is the person who is going to be making the mortgage payments on the home; technically they are reducing the debt and increasing the equity in the home
        - party living in home will argue should get credit for reducing debt and increasing equity
        - Other side argues: you have had exclusive use and enjoyment of that asset, i haven't had access at all and now have had to pay to live somewhere else
        - Result of these arguments: usually a wash -- If mortgage is paid, but living there exclusively and the other side is living somewhere else needing to pay expenses to live, the court usually doesn't accommodate for this
            - If there is a significant difference bw mortgage payment that is negligible but the other parties rent accommodation is lots, the court may modify the split;
            - If someone is in family home and there is no mortgage rate or accommodation costs and the other person is paying somewhere else, this is called occupation rent
- Lori: thinks that the CA would have overturned the exclusive possession order because it is outrageous to say someone has no access to their equity in their own home for 9 years, except for the fact the husband argument is that he needs to pay off the debt but he unfortunately for him he had testified his business partner will pay off the debt (took meat out of argument)
    - if the business partner statement paying the debt fact kinda screwed him and it would been decided otherwise

Tawiah v Tawiah, 2002 ABQB 314

- Facts:

    - Wife made interim application for exclusive possession. No kids, older people. Not claiming physical abuse but she said she was fearful of his quick temper. She also ran a catering business from the home and this is how she made money.
    - He said he didnt have a quick temper, said both very religious and said that catering was out of local curling rink. Also stated they have been living separate and apart for some time with no violence or dissipation of assets – what we need to do is sell this house, each get our portions
    - she said he earns moroe money and has more money and he can find better find accommodation
- Court: granted exclusive possession
    - Found her evidence was more believable, she had her business out of it, and he could financially find another place.
    - Court also said there was tension between them (Per Lori: duh they are getting divorced – most people are going to have tension) but likely judges way of saying that there was not evidence to support physical violence.

Other costs include property tax and house insurance

- Usually the party that stays there pays these things BUT are less clear than mortgages.
- Sometimes judges will say the person staying in the house didnt benefit any more then the other person because it kept the house in good standing.
- Quiet often the property taxes should be divided among parties; if one party paid all the taxes then the paying party should get at least half back because its simply maintaining the property.
- Sometimes it is made towards house insurance – sometimes it works sometimes it doesn't, apparently.

Interim Distribution of property or interim costs

- Other interim orders you can get: interim distribution of property or interim costs
- Interim Distribution of property: need to deal with one piece of property right now
    - Ex. if one party is living in the house and is not paying the mortgage and risks foreclosure, they may bring application to put it for sale; may ask for an order that this asset to be sold to fund litigation → might be dealing with one particular piece of property
- Interim Costs: asking for significant costs
    - Ex. i want $X from other side bc i cannot afford to run my litigation and get experts, accountants, appraisers, etc. bc other side is holding all the money. I need an interim order to fund litigation
- NOTE: these applications are often brought together
- Example of these applications:
    - *Gartner v Ewasiuk, 2002 ABQB 797*
    - *Tarapaski v Tarapaski, 2007 ABQB 81*

Gartner v Ewasiuk, 2002 ABQB 797

Facts:

- parties married for 32 years. Divorced but property had not been resolved. Separated for 7 years.
- Wife wanted the following: s. 34 preservation order to stop him from granting property and shares to kids, freezing on investments and banks, interim distrib of property & costs (she wanted money).
- Parties had substantial real estate and corporation assets and held in a privately held corporation. Husband had control of the corporation since separation.
- After the separation, he eliminates her shareholdings (wife unaware) and reduces his by changing the share stocks. He also transferred investment ($420k) from joint account to one from her name to the

three kids without her consent (basically gifted them property). He also gifted the real property in the corp to the kids.

- She wants the court to stop these and deal with the inappropriate transfers.
    - Has to under section 10 add kids to action as defendants since he transferred real property to them

Held:

- Justice granted freezing order for some of the assets, gave order that Husband was to pay Wife 200k in interim distribution of property (what that means is an up-front payment and when dividing property, she has essentially has gotten an advance on this), and Granted her 10k in costs

Analysis:

- Justice looked at the reasons or facts she considered in reaching this conclusion:
    - Husband kept doing shady stuff without knowledge of wife which is blatantly trying to defeat her interest AND got the kids involved when it wasn't needed.
    - The evidence discloses that the majority of the assets were acquired by the parties during the course of the marriage;
        - Most property subject to presumption of equality;
    - The net assets available far exceed the amount of the interim distribution;
        - I.E. more than enough money to grant 210k in interim distribution costs
    - The Respondent has had control over virtually all of the matrimonial assets since the parties' separation in 1995 → husband had control of everything;
    - Corp has liquid assets in the form of shareholder's loans which can be used to come up with the necessary cash to provide an interim distribution or, if necessary, could borrow the necessary funds;
        - There was the ability and money there to get the money to her
    - The interim distribution can be made without serious prejudicial tax consequences;
    - An interim distribution can be made without a serious prejudicial effect on the matrimonial/other assets;
        - Granting this would cause a lot of taxes and effect other assets
    - The Applicant is in need of funds to meet capital demands; and
    - There is a fundamental imbalance between the parties in their ability to protect their respective interests ie. cannot fund their litigation;
        - This argument is often met with why don't you apply for spousal support so you have source of income
            - here: he had control of all the assets and she had v little access to any pool of funds
            - she said she needed expert reports, business valuation assessments, etc and even if she was using spousal support wouldn't be sufficient to fund all this without saving- it is not cheap

Tarapaski v Tarapaski, 2007 ABQB 81

Facts:

- v contentious - each parties had matrimonial & corporate fees -- close to 1 million in fees.
- Wife applied under rule 221 of the rules of court for partial distribution of a company.
    - Judge denied under the rules of court BUT instead let this application go through as an interim distribution of property under s.9(3) of matrimonial property act instead of the rules of court.
- Husband tried to say that the court did not have jurisdiction to make this interim order BUT court said we can and will under s. 9(3).
- Wife sought a transfer of 50% of shares in one company to her. Number of corporate entities and this one she was after was in his name alone and she wanted half of it transferred to her

Held: this was allowed; she got 50%
Analysis: this interim distribution was allowed for the following reasons:

- "The circumstances in this case are such that the court should exercise its discretion to allow an interim distribution of property. In coming to this conclusion the court relies on the presumption in law that the shares of [company] should be divided equally between the parties."
    - i.e. this is s.7(4)/(5) property so equality presumption
- "Moreover, effecting that distribution now would not prejudice husbands position relative to other matrimonial property" (similar to last case)
- "There appears to be sufficient remaining matrimonial property to compensate Husband for any potentially unjust distribution of shares to her"
    - Ie. Enough other property to offset any distribution to her
- "As to Mr. A.K.T.'s potential prejudice arising from a personal judgment in the Tycholis matter, Ms. S.L.T. acknowledges that she should be required to save her husband harmless from that potential result." AND THAT "The admittedly serious problem of the inability of the parties to cooperate" [NO QUESTION ABOUT THIS - he said you transfer the shares it will paralyze the company bc they cant agree on anything] and the justice acknowledged this by saying this "can be dealt with in the short term through the Monitor, and in the longer term by the imposition of a shot-gun buy-sell agreement."
- "Finally, the parties, and the public, would benefit from the removal of Company from the list of contested trial issues: the parties would be spared one week of costs, and the court would have one additional week of trial time to make available to the public"
    - Public policy reasoning - trial was set for too long for matrimonial property - saves 1 week of court time and costs by removing this particular property
- Justice also notes: just bc an interim distribution results in non-prejudice of the other side doesn't mean that you are entitled to it – you also must show there is a benefit to the distribution since it is out of the ordinary.

Can also ask for Interim Costs:

- Almost always the argument is to "level the playing field" (ie. i cannot fund my litigation without pool of money - lawyer, experts, etc.).
- This award basically provides money from one to the other and not accounting for the division of property
- Example. A pays 25k to B, this 25k, if this is costs, won't be considered in the division of property and in most cases the courts will do an interim distribution of property
    - Ex. party a provides to party b an interim distribution of property AKA it is an advance on their share of property to fund litigation (ie. needing to use property to fund litigation - is this fair that you need to use your property? Spousal support can help save this but not always)
- DISTINCTION B/W INTERIM COSTS AND INTERIM DISTRIB OF PROPERTY
    - INTERIM DISTRIB OF PROPERTY: advance on property
    - INTERIM COSTS: pool of money granted to you and isn't taken into account
        - Harder to get to fund a litigation (typical argument re: matrimonial property)

Interim Costs Application Test (*BC v Okanagan Indian band, SCC*)

1. To get order, the person needs to be impecunious (poor) to the extent that without this order that party would be deprived of the oppoortunity to proceed with their case (ie. i shouldn't have to use my property to litigate and proceed)
2. Establish there is a prima facie case of sufficient merit to award (not difficult to find in a case of division of property)
3. Special circumstances sufficient to satisfy the court that this is w/in the narrow class of cases where this extraordinary exercise of powers is appropriate

Family Law Part 2

- special circumstances that put it into this narrow class that puts it into these extraordinary measure and remedies that it is essentially a gift to pay for your litigation

Note: test used if you are making an application as a starting point, an application for interim costs

Section 31

- 31(1): If an application has been commenced under Part 1, each spouse or adult interdependent partner shall
  - (a) file with the Court a statement, verified by oath, disclosing particulars of all the property of that spouse or adult interdependent partner, whether the property is situated in Alberta or elsewhere, AND
    - AKA a Sworn statement of assets and liabilities that is served to the other parties → this is stuff required disclosure – always a sworn statement of assets and this is by way of legislation
  - (b) serve the statement on the other spouse or adult interdependent partner
- 31(2) A statement made under subsection (1) shall include particulars of property disposed of by that spouse or adult interdependent partner within one year before the application was commenced.
  - Ie. If you look at statement of assets and liabilities used by every lawyer and that the court generates, it doesn't have a provision that says what have you sold BUT you still must provide this information on assets and liabilities and if they have sold or disposed of anything in the year prior to this
- (3) A statement made under subsection (1) shall (a) be in the form, and (b) contain the information, prescribed by the regulations.

Section 33

- 33(1): If proceedings have been commenced under this Act, a spouse or adult interdependent partner who knows or has reason to believe that the proceedings have been commenced shall not
  - (a)dispose of or encumber any household goods, or
  - (b) except in an emergency, remove from the family home any household goods that are household appliances or household effects or that form part of the household furnishings of that family home,

  Without an order of the court or the consent oof the other spouse or ADP
- 33(2) a person whoo contravenes subsection 1 is guilty of an offence and liable to a fine of not more than $1000
- Per Lori: CANNOT sell household stuff. She thinks that in drafting this, they should have went further to include any matrimonial property

Section 34 : prevention of gift or sale

- 34(1) If the Court is satisfied that a spouse or adult interdependent partner intends to transfer property to a person who is not a bona fide purchaser for value or to make a substantial gift of property that may defeat a Family Law: Statutory Materials 110 claim of the other spouse or adult interdependent partner under this Act, the Court may, by order, restrain the making of the transfer or gift.
- 34(2) An application for an order under subsection (1) may be made while the spouses or adult interdependent partners are cohabiting.
- 34(3) An application for an order under subsection (1) may be made as an application in proceedings commenced under this Act or by separate application.
- 34(4) An application for an order under subsection (1) may be made ex parte.

Family Law Part 2

- 34(5) If an application is made ex parte, the Court may dispense with service of notice of the application or direct that the application be served at a time and in a manner that it sees fit.

What Date Determines Valuation of Assets and Liabilities

- Old act: when do you value assets and liabilities ; what date do you use: is it upon separation, the current date, date of trial?
    - This was never specified in the old act and the common law developed that it was the current date/date of trial that was to be used
        - Ex. 7 year separation, and in 7 years someone has probably paid a lot of the debt (doesn't look like it exists anymore) and some things lose equity (ex. vehicles) as time goes on while other assets increase → always an argument about this.
- When FPA was drafted there was a ton of contribution of the need to add something that made this clear (ie. should be date of separation like some places, or current date? Or something in between)
- NOW: FPA section 7(2.1): Unless a written agreement by the parties that meets the requirements**, the relevant date for valuation of property to be distributed under this Act is the <u>date of the trial</u> (i.e. current date)

  **AKA unless there is a prenup or agreement that makes it clear when to evaluate things, the date to be used is the current date)
    - How to Apply: FIRST look at the current value of assets and value of the debts at the <u>current date</u> AND THEN, if possible, SECOND argue for unequal division per s. 8 including:
        - 1) Property was acquired or the debt was paid down during period of separation
            - Ex. If i have paid back all (50k) of debt and it no longer exists, can say that it doesn't appear here but we still need to take this into account and should get back 25k of the 50k
        - 2) Property was acquired after separation but before divorce and had nothing to do with the other side
            - Ex. Parties separate, spousal support and child support are being paid by supporting spouse, and this spouse is saving up money earned from working that was then used to put in tax free saving account or buy something → In this scenario it can be argued that there was no contribution from the other side, there was no matrimonial or family funds to get there, and that therefore this should not be divided equally or at all or if I have paid down all the debt and it does not exist but we have to take into account I paid x amount towards the debt thus I should get credit for half
            - You use the current date but you can use factors in section 8 to argue for unequal division of property

Negotiation vs Court: determining what date to use

- NEGOTIATION bw parties (aka no court) = they can use whatever date they want when dividing property in negotiation (very flexible about when they divide unlike as if they are in court)
- COURT = CANNOT argue for the date of separation AND MUST use current date

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REQUIRED READING: POSSESSION OF THE SHARED HOME

PORTIGAL V PORTIGAL (1987), 187 AR 17 (CA)

<u>Facts:</u> At trial, wife was ordered the right to exclusive possession of the matrimonial home until the youngest child reached 19 years old with the intention of disrupting the lives of the children as little as possible (she was also granted custody)

- Husband had to make all the mortgage payments and Wife would make ordinary maintenance payments
- Husband appealed because he wanted the home to be sold immediately to pay off matrimonial debt

Issues: Did the TJ err in giving the wife exclusive possession of the matrimonial home?
Held: No error.
Reasons: The court, by virtue of the Matrimonial Property Act, can direct that one spouse get exclusive possession and for any amount the Court deems necessary

- The CA, however, said that the Mother could not get to live both rent free and get her share of the proceeds in the eventual sale
- You must also take into account the fact that the other part was paying rent somewhere else

REQUIRED READING: POSSESSION OF THE SHARED HOME

Tawiah v Tawiah, 2002 ABQB 797

Facts: Wife wants to keep possession of the home because she operates a catering business out of it (the basement is the office and storage, but most of the cooking is done on site)

- The wife receives $1100 a month from this operation and is her only source of income. The Husband has paid for the bulk of the expenses and the house is in his name.

Issues: Can the wife get exclusive possession?
Held: Yes.
Reasons: Since the home operation is her only source of income and the fact that she makes substantially less the Husband, the Court grants exclusive possession to her

- Further, there is some tension between them, and it would not be good for them to both live in the house, and the Husband can afford to move out

Note: That was an interim decision and so the wife only had exclusive possession until the property is settled.

REQUIRED READING: INTERIM DISTRIBUTION OF PROPERTY / INTERIM COSTS

Gartner v Ewasiuk, 2002 ABQB 797

Facts:

- W makes application to freeze ability of H and children to gift, encumber or otherwise deal with property and bank accounts that are matrimonial (Interim Freezing Order)
- H and W acquired assets including a company.
- After separation, H restructure the company and transferring investments (from JT to all the children) , so made gifts to the children (making kids the dfd‟s under section 10 of MPA)

Issue: Can the Court Grant an interim distribution order?
Decision: yes
Analysis:

- Matrimonial Property Act section 9(3)(j)
- Consider that the assets were acquired during marriage, net assets exceeded interim distribution, H had had virtually control over all the assets since separation, it can be made without serious prejudicial effect on the property, there is
  a fundamental imbalance between the parties in their ability to protect their respective interests
- Ordered H to pay W 200 000 as an interim and money for experts to evaluate property

Family Law Part 2

REQUIRED READING: INTERIM DISTRIBUTION OF PROPERTY / INTERIM COSTS

Tarapaski v Taraapaski, 2007 ABQB 81

Facts

- - Teem Energy is a matrimonial property, all shares in H‟s name
- - W applies under RULE 221 to get 50% of shares of company
- - H is agreeing equal distribution but not to the method of distribution because of potential lack of cooperation with management AND that because the exact amount the company was worth not known and judgment could be for too much

Issue:

Decision:

Analysis

- potential problems resulting from parties inability to cooperate in management of Teem could be dealt with by Monitor or imposition of shot-gun buy-sell agreement
- there was enough matrimonial property remaining if turns out the distribution was inappropriate
- caution: not about showing that it wont prejudice either spouse, need to show that it will benefit one of them

RULE 221

- Court can order any matter to be tired at, before or after trial; It can make orders in relation to those matters (even such that it can render the issues no longer of importance at trial and dismiss them)

November 24, 2020

- How to deal with Section 7(2) and Section 7(3) property; the exempt property and the list of property in section 7(3) that is subject to the presumption of equality
    - section 7(2) property anything that's exempt, if can you prove your exemption is not available for distribution; not available for division
    - Section 7(3) property is available for distribution but there is no presumption of equality that attaches too it, it is to divided in a matter that the court deems just and equitable
- Per Johnson: you have a client that provides you with a list of property they have, you need to go through that list first and identify are there any exemptions? is there any section 7(2) property?
    - if there is section 7(2), does it still exist?
        - In order to claim an exemption, the property must either exist in the form it was received or you must be able to trace it into an existing asset
            - For example: so for instance $100,000 and you use that inheritance to take a trip around the world or cruise around the world, you cannot trace that into an existing asset… so that exemption no longer exists
            - For example: so if you got a gift of $30,000 from a friend to pay off your credit card unless you can show that you used the card to acquire an asset, you do not have the exemption
        - **Note:** You have to be able to show that the exempt funds that you have received with exempts asset that you have received existed in one form or another
            - Example: say you're father just gifted you a car, if that car still exists have the value of this is exempt; if you have taken the car and then traded it in

the exemption value is the trade in value if you still have the replacement car

- Will have to be able to trace; again the fact that you received inheritance or the fact that you got money as a gift to use, or received proceeds from an accident or what have you… that isn't sufficient enough in and of itself just to show but you have to **show that it still exists and have to show in what form it existed - has to be in a certain asset**

- Then once you determined that you have to look at has there been any change in it?
  - Did you take exempt funds and put them into a jointly owned asset?
    - Ex: inheritance check and put in account in your name alone = exempt but if you put in account in joint name = makes a difference
      - Note: Getting exempt funds and putting in joint assets makes a big difference

Case Law

Quig v Quig (CA)

- First kick of the can
- The situation here was that the husband owned a home at the time of the marriage and he had about 14,000 equity in it, they get married and live in home and title does not change
- They then sell the home and put the proceeds of the sale of his home into another home that was in joint names
- Get to trial and husband is claiming he has $14,000 equity in this home at the time of the marriage so that should be an exemption i.e. the first $14,000 belongs to me – claims an exemption
- At trial the TJ says the house is in joint names and b/c it should be divided equally and simply ignored the exempt portion
- At trial it is in joint names it should just go 50/50, the initial argument was because of that it was not subject to the matriominal property act and the court rejects that argument of course.
  - Says even if its joint names it is subject to a division under section 7 is subject to the act
- The court says here says look at section 36 of the act, this is the important section
  - Section 36 states about the presumption of advancement
    - 36(1) In making a decision under this Act, the Court shall not apply the doctrine of presumption of advancement to a transaction between the spouses or adult interdependent partners in respect of property acquired
      - (a) in the case of spouses, by one or both spouses before or after the marriage, or
      - (b) in the case of adult interdependent partners, by one or both of them before or after they became adult interdependent partners.
  - Section 36(1) says the court should not apply the presumption of advancement
    - Presumption of advancement means: is the suggestion that property that is transferred from one spouse to another is a gift, it defeats of any presumption of a resulting trust
    - Idea that if you put something into to joint names it is intended to be a gift and the transferor has to show that it is not
    - The legislation says you do not proceed by the presumption of advancement to a transaction between the spouses
  - Section 36(2)
    - Not withstanding subsection (1)
      - (a) the fact that property is placed or taken in the name of both spouses or adult interdependent partners as joint owners is proof, in the absence of evidence to the contrary, that a joint ownership of the beneficial interest in

the property is intended, and (b) money that is deposited with a financial institution in the name of both spouses or adult interdependent partners is deemed to be in the name of the spouses or adult interdependent partners as joint owners for the purposes of clause (a).

    - You don't apply the presumption of advancement however the fact that property goes into joint names is proof absent evidence to the contrary that joint ownership was intended
        - That is how you approach the issue at bar/ in front of them
- The CA says there was sufficient evidence to show he had no intention to gift that $14,000
    - so there was sufficient evidence to rebut the absence to the evidence to the contrary indication because it was placed in joints names it is proof that joint ownership was intended
    - Gave him the full exemption
        - At trial there was no exemption but at CA received full exemption
- Per Lori: Section 36 is still an important section
    - Keep in mind that just because something goes into joint property it does not mean it is automatic that it is going to be divided such that it is section 7(4)/7(5) property; that you can show no intention to divide those

Note*: Harrower v Harrower & Jackson v Jackson*

- Referred to as Harrower & Jackson but note these are TWO SEPARATE CASES
- Came out on same day from CA – and has remained as good law
- Basically the starting point when talking about how you deal with exempt property that has gone from one person's name to an asset in joint names

Jackson v Jackson

- Here the husband got a gift from his mother of $61,500 and he upon receipt (this money was exempt – section 7(2)) he put the money into assets that were joint names
    - Used part of it for a down payment on a duplex – went into joint names
    - Used part of it to pay down the mortgage on the existing house
        - When you are paying down a mortgage it is adding equity
    - The entire $61,000 was at issuue
- At trial the TJ said the Husband gifted half of the cash to the wife - $30,750 belongs to wife alone; therefor that money is not exempted
    - Such that the wife ended up, despite it being a gift from Husband mom to husband, the wife ended up with 2/3 of the gift
- CA says no that is not how you do it
    - When he received the money it was exempt
    - Once he put it into joint names half of it remains exempt; the other half is section 7(3) property
    - When you took the $61,500 and put it into joint assets his exemption is only half of that, $31,750, and the other half is section 7(3) property so it will be divided in a manner that is just and equitable (sometimes referred to as a gift to the relationship)
- Per Lori: in the vast majority of cases when the exemption is money that has gone into the family home in the vast majority of cases that second half, the portion that becomes section 7(3) is divided 50/50 if it is a family home → almost always
    - You can per *Quig* with regards to the section 7(3) (the later half) rebut the presumption that it was meant to be a gift to the marriage by showing evidence you had noo intention to share it
        - This is tough though
    - This is the structure used: you take exempt funds place in joint asset, half of exempt funds remain exempt while the other half becomes 7(3) property that is available for distribution;

- in case where exempt funds put into family home it is almost always that second portion is divided equally 50/50

Harrower v Harrower

- The H got a $75,000 gift and he receive it and putts it into paying debt and joint property.
- At trial the parties had a home with a large mortgage and some pension to be divided
- First the court looked at the issue of tracing i.e you have to be able to trace your claimed exemption into an existing asset; you have to show where it went
    - So if you 10 yrs ago get a $100,000 and you want to claim that money as an exemption then you have to be able to trace what you did with this money (i.e first in tax free saving, then I took this and purchased thte boat, then sold the boat and used the funds for x) … you need to be able to trace the funds/show the funds
    - The court talks about tracing and whether it is necessary in all cases or how you can go all about it… it says the following:
        - I recognize that there are a number of cases in which judges have rightly not tide exemptions to substantially traced assets (per lori: so they have been cases where they haven't had to trace it) In a great many cases the parties will not demand tracing (per lori: if people know that is where the money came from and people agree than you don't have to do tracing) When significant capital injections from exempt sources are shown, they are often presumed to be traceable. (Per Lori: what they are talking about is say there is a situation where you have two struggling law students who don't have any assets and they purchase of the house and the funds come from exempt funds from inheritance…situation where, where else would the money come from and then suddenly they got money to put on a house). The costs of putting a party to tracing will often not be justified. **Tracing can be inferred, implied, or presumed*****.** The continued exemption is, after all, for property acquired directly or indirectly.
            - The starting point you need to trace it – it can be as the court says inferred, implied or presumed
            - However if there is an argument over the source of the funds then you will have to trace it
                - Must be able to show what you did with the funds
- What they said was that here he could not trace the money, all he had left was debt, he may have used it for some family assets but he couldn't trace it into specific assets and all there was left to divide was debts
    - He may have got all this money but he could not trace it therefore he had no exemption – you must be able to trace it, doesn't matter if its in a different format, just need tot be able to show it is still there and he was not able to do so
- Court also makes the statement that losses in an exempt property is not distributable or divisible
    - What they are talking about is this, for example, you get $100,000 in gift, you put it into some sort of GIC and at the end of the day when you go to divide your property its $150,000
        - The $100,000 is exempt, not available for division, but the $50,000 is an increase in exempted property i.e. section 7(3) property available for division
            - What happens if you get you $100,000 and put it into stocks and bonds, you loose most of it and now it is only worth $50,000… the court says your exemption is only worth $50,000 … you may have originally got $100,000 but you can only show $50,000 now…. So losses in exempt property are not divisible
- Your exemption if you lost from the original, it is reduced from the time you received it, it is the amount you currently have
- Increases in value of exempt property is shareable but losses in value of exempt property are not

Family Law Part 2

Per Lori: *Harrower v Harrower & Jackson v Jackson* - from these two cases we have the standard

- Take exempt property into jointly owned assets
- Half remains exempt for the person who had the exemption
- The other half is section 7(3) property that is available for distribution in a manner that is just and equitable

Brokopp v Brokopp

- Here this was a 21 yr marriage
- Had a house that was purchased with money from the wifes father, but there was no exemption there because that was a gift to both to them
- Few yrs later they moved that house onto land owned by the Husbands father and there was an agreement signed that the husbands parents acknowledged the house and the improvements would remain the husbands separate property
- They farmed the husbands dad property with the understanding that it would potentially be inherited by the husband
- About 10 yrs later the wife inherited about $27,000
- At trial it was clear she could trace $5000 of that into investments in her name, and her claim the other $22,000 had gone to pay matrimonial debts or to acquire matrimonial property
- TJ gave her the full exemption: $22,000 exemption
- CA looked at the exempt funds spent on debt and they looked at the trace – she could trace some of these funds (some of the $27,000) into investment certificates but the courut says yes but then you used these investment certificates for debt and you defaulted on the debt and the bank took the security so the funds that were exempt are gone
- So she has to be able to trace it and not into payments of debts
- At the time she could show $14,000 of the $27,000 traced into assets and all of the assets were in joint names
- Using the *Harrower & Jackson* formula then she would get have $7,000 exempt and the other $7,000 would be available for distribution on basis of it being section 7(3) property
- CA says her exemption is $7,000 – they cut exemption from TJ holding of $22,000
- KEY: You have to be able to see where it went
- After CA her exemption was cut by 2/3rd
- Also in the case the husband had beneficial interest in the dads land as the agreement was he would inherit it; the court called this a gift to the husband and therefore it was exempt
- Court makes it clear that we are dividing property in the same way set out in the matrimonial property statement – for each of the parties you look at their total assets from that and subtract there total debts from that, and then you subtract any exemptions that can be proved or any unenqual division on section 7(3) property
    - That leaves you with the net divisible property
    - You add those up, divide by 2 and each party should have x amount of dollars, compare and someone will owe someone an equalization payment
    - Per Lori: this case makes it clear this is how you look at it
    - Note: you do not divide each piece property individually, these arguments about exemptions are always in terms of what number is plugged into the Matrimonial Property statement when we are determining the final division between the parties

Sparrow v Sparrow

- These parties were married for 14 yrs prior to separation, separated in 2000

Family Law Part 2

- Before the parties were married the husband parents had a cabin which was ttransfered to the husband and the brother of the husband – owned premarital so husband has exemption
- After the marriage the parents continued to pay the property taxes on the cabin and in fact the only upkeep was that it was stained, which was paid for by the parents
- At the time of the marriage the cabin is worth $160,000 and husband thus owned $80,000
- At trial the cabin was worth over a million dollars - $100,055,000
- So there had been a significant increase in value - $895,000
    - The husbands share value went to $442 500 because he owned half
- It is section 7(3) property because the cabin remained in the name of him and his brother, he could establish what his exemption was $80,000, huge increase in value and it was clear that the increase was due to inflation or market forces
- At trial what the courts did was split that increase in value, split the section 7(3) property 50/50 – basically she gets half the increase on the exempt property
- CA says no – this is wrong
    - Made it clear that what they thought the TJ had done was treated the increase in value as section 7(4) property and applied the presumption of equality
    - Of course it was wrong because it was section 7(3) property and there is no presumption of equality
- CA then says then its obviously section 7(3) property, what is just and equitable division here
    - For that we look at the factors in section 8
    - The CA says the TJ talked exclusively about the responsibilities or roles each other had while they were at the cabin and the CA says that is wrong
    - CA say the following
        - "Although it is unnecessary to conduct a factor by factor analysis, a trial judge should at least consider the factors that the parties have clearly raised in the evidence and during argument. The trial judge did not consider the fact that the increase in value of the Lake Property was solely attributable to increased land value, or that the husband's parents could have chosen to distribute this property on their death rather than when they did, in which case the wife would not have been entitled to any share in the property. The trial judge also failed to consider the fact that, in the words of s. 8(c) of the MPA, the husband's parents' contribution to the land taxes and maintenance of the Lake Property was made "on behalf of" the husband. These factors require consideration and must be balanced against other s. 8 factors that favour a distribution to the wife. The exercise of judicial discretion can never involve consideration of only one side of a social-economic equation. In the face of legal error and the failure to consider relevant factors, we must arrive at a fair and equitable division of the increase in value of this exempt property."
        - Ultimately what they end up doing is saying that increase in value he gets 70% of that and she gets 30%
        - What the court says it was a mistake for TJ to treat this as section 7(4) property and its not. Then when you are looking at s.8 factors you do not need to do a factor by factor analysis but the TJ does need to at least turn their attention to the evidence that was brought before them.
        - Here the TJ only looked at was when they were at the cabin and both had equal responsibilities and contributions in terms of the roles they took
- Per Lori: significance difference between half and 30% of the value
- Other issues that arise
    - Because this was a cabin, because it was not a primary residence either of the parties, the husband rightfully said when we are valuing this cabin we should take into account capital gains tax

- Per Lori: this is how it works – if it is your primary residence when you sell the home there is no tax that attaches to it, when it is a rental or recreational property, if it is a property that is not your home, when you sell it you are subject to capital gains tax
    - Capital gains tax is a tax on half of the increase in value from the time you bought to time you sold it; half of that is subject to capital gains and capital gains tax varies but usually somewhere in the range 34-35%
    - Example: bought a piece of property for $300,000 and sold it for $500,000 so your increase in value is $200,000; half of that is subject to capital gains tax so if it is 34% you would be paying 3400 on capital gains tax on the sale of that property
        - Capitals gains tax would be taken into account
- This is what the husband was saying – that we are looking at an increase in value and half of that will be subject to capital gains tax, so there is going to be a huge tax bill when it is sold so it should be considered when valuing the property
    - Per lori: he is right

- The Court says (which is unexpected and unusual) no we are not going to take into account capital gains because number one it may never sell - the family may never sell -so what that's not what we're supposed to look at it was supposed to be looking at fair market value and #2 because the tax laws could change well you know (well you could say the tax laws are going to change and never take tax into account and section 8 says take into account any of the tax implications)
    - The court does not take into account the capital gains which was unusual as in the vast majority of cases they would because it is a significant amount that would reduce the value to be divided
- Exam note: should we ignore this case because it is rare when considering tax gains in a exam?
    - If the issue of capital gains comes up what Lori would be looking for is a discussion saying this property is subject to capital gains but I am not taking it into account because of the *Sparrow* case because it is rare, but looking for the recognition that something is subject to capital gains more than whether or not you attach it or not
- Issue with respect to debt
    - At the time of the separation the husband owed CRA $41,000 on personal income tax and he had not yet filed for the previous year and when he did that total was $91,000; now during the marriage both parties often owed taxes on their income, and his parents payed off the tax matter. Indeed the year of separation he ultimately owed $91.000 and is parents gave him money to pay it off after separation
    - He claimed at trial that the $91,000 that his parents had paid off to CRA was a matrimonial debt i.e. she is responsible for half
    - The TJ said no its not a matrimonial debt because there was a pattern in the past of is parents paying off there tax debt
    - CA says no – this was a debt accumulated during the marriage so it is a debt of the marriage i.e. she would be responsible for half of that
    - They point out that this parents paid off taxes in past for both parties as both parties have used it to maintain their life style and both benefited; that would have been the same with the debt that existed at the time of the separation. After separation he has 91,000 debt
        - She should be responsible for her and that is exactly what happened in the court appeal is correct here – if there is a debt that was accumulated during the marriage on the face the debt, absence of evidence to contrary, that is going to be a family or matrimonial, AIR debt; it is going to be shareable
            - It might show up on the matrimonial property statement and thus being divided
    - Per Lori: be wary when dealing with money that comes from one parties parents, you will find people will say my parents gave x amount for ___, if it is not characterized at the time you

have a problem because what was likely a gift at the time then after the parties separate it becomes a loan and we owe parents money – are there any papers for that, any repayments, was it characterized as a loan at the time, was there any repayments made, any request for reparent. Money that comes from parents, parties often want to recharacterize it

Felker v Kelker

- This was a farming case, the H had a farm with a cattle operation
- The parties had a really rocky common law relationship prior to the marriage for about three years; they had a 6 month separation and then get back together and marry
- They live together after marriage for 12 weeks and then separate
- The husband established that at the time his assets were worth $200,000
- At time of cohabitation (4 years earlier) he had just been divorced which he could show his assets at time were worth $364,000
- So his basic argument was that when we got together my assets were $364,000 and exempt; now my assets are $200,000 – there is nothing to divide here, there has been a loss in my exempt assets – that is not divisible, I cannot get judgment for her to have half my loss to be divided, it is all exempt therefore I do not know why we are here
- The wife started an action for matrimonial property and then added the equitable remedy of constructive trust to it for the period that they lived together
- The wife position was that because of the nature of his business he cannot trace his exemption, particularly the cattle herd and she was arguing that they needed full trial to get value for the assets
- This was a special chambers application
- Justice Hilar in an odd decision gave a final order here: property cannot be finally divided in chamber it has to be divided in trial or ADR, you cannot get a final decision in chambers in most cases
    - Justice gave a final order even though it was a chamber application
- Wife argument was lets take a look at what happened during the time together:
    - He sold two quarter sections of land and he used that to pay down his operating loan
        - He thus lost that exemption
    - Then she says there was a reduction in the mortgage of the home quarter from the sale of the other two quarters and the sale of the cattle and some of it went into reduction of mortgage and some of it went into equipment, some to purchase others, some went to pay down the debt on tractor
    - Then she discuss that twice there was a complete disposition – he sold his entire herd of cattle
    - Her argument was that he cannot trace it because he used it to pay off the operating loan and he lost all of his exemption so the remaining should be section 7(3) property available for distribution because it was all exempt in the first place
- The question was what is the effect of dispositions and acquisitions on the effect of the exemption?
    - His basic argument was the value is less now than was when they got together so we do not need to look at how this came about because there is nothing to be divided
    - He argued the repayment of debts if he is repaying debts off exempt property doesn't create for her non-exempt property and the court agreed with this
        - Court said just because he used exempt property to pay off an existing debt it does not mean it creates equity for her
        - Basically court says you need to look at the nature of this business, what is the nature of the business – this is normally how it would work: he would sell the heard, pay down the operating loan, then use the operating loan to purchase more cattle and to purchase equipment and when he sold the cattle down the road and repeat this cycle
        - Look at the nature of the business

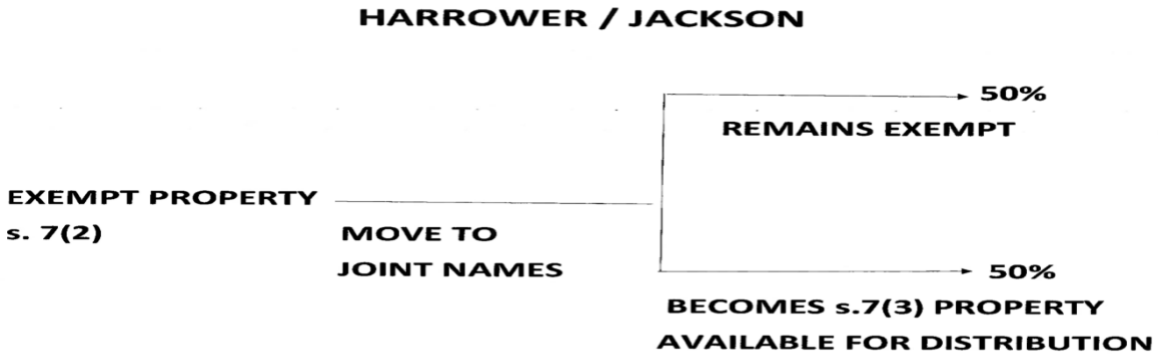
Family Law Part 2

- Justice discusses the issue of tracing and starts out with *Harrower;* indeed CA states in *Harrower* that tracing could be implied, inferred and presumed – but then eh says you need to look at this business, the nature of the particular business, and says the following:
    - In this case the Defendant has provided records that show he sold his herd in February 2001 largely to pay down the operations loan, which was a major source of the money used to purchase and contribute to the herd. A smaller portion was used to purchase farm assets in his name alone, including the Dodge truck. I am able to infer that paying down debt at that time would improve the financial viability to purchase a new herd by July. The Plaintiff's position ignores the nature of the farming operation which would inevitably see a variance in sale or acquisition of cattle, equipment and refinancing or sale of properties to service debt loads.
    - He says he can infer part of the exemption because of the nature of business
    - He then goes on to say that tracing may be necessary where there is an issue raised with regard to the source of a replacement assets and he sites two earlier CA decisions (including Harrower) which says
        - The Court in Roenisch stated that drawing an inference that the source of an existing asset is an exempt asset is not limited to situations where the source is clear and established: Roenisch at para. 16 Roenisch was later reviewed by this Court in Hughes v. Hughes (1998), 232 A.R. 224, 1998 ABCA 409 at para. 33. In Hughes, the Court interpreted Roenisch to mean that **"while in appropriate cases, tracing might not be necessary, because it could be inferred from the evidence, tracing is necessary where on the facts, an issue was raised as to the source of the replacement assets"**: Hughes at para. 33.
            - It may not be necessary if it is obvious where it came from but is necessary if there is an argument as to where the money came from for these assets in the first place
            - Note: this is what the wife was saying in the first place – you know he lost all is exemption when he paid down the debt and stopped there but did not take into account the debts went up to replace those assets because of the nature of the buisness
- The justice goes on to say it is traceable bc he paid down the debt of the farm or the situation would have been considerably worse; he points out the property never came into joint name, no evidence there was a gift and because there was nothing to divide he basically giving a summary judgement said we are going to dismiss the application of the wife

- Per Lori: when you are sitting down and determining how you aree going to do you matrimonial property statements, ask yourself a number of questions:
    - How do you do you property analysis:
        - 1. Ask if there is a prenup or cohab agreement that sets out how you divide property
            - If yes and it is valid that is how you divide the property
        - 2. If there is not and all your property is together and then determine section 7(2) aka exempt, is there any section 7(3) property and the rest is section 7(4)/(5)
        - 3. With you exempt property ask yourself the following questions:
            - Does the property still exist
            - If yes, what is the value – what was the value at the time of acquisition (if pre-relationship) and what is the current value

- If the property does not exist, has it been exchange for a different form
- If it has been exchanged then how much of the exempt property went into the second property, can you trace it
- Has the exempt property been put into joint names, if so then go to *Harrower & Jackson* – half exempt half section 7(3)
    - If it is this situation can you show evidence there was no intention to gift it to the marriage
    - One of the question re section 7(3) is has the exempt property ever been brought into the matrimonial regime
        - Ex: rental home from prior to marriage/relationship – so whatever the value was at the time of relationship marriage is exempt throughout the relationship that party alone delt with all the renters, kept money separate, used rent money to pay down mortgage, the other party had nothing to do with it, then come time to divide it the section 7(3) any increase in property would be available for distribution
            - One argument you could make is that property was never brought into the fam regime; It was always treated as if it was the one parties and thus no division should be allowed

- 4. Once you determine what you section 7(2) property is, then look at the current values – is there any increase in value of the exempt property, are thehre any gifts that should be considered section 7(3), anything else that doesn't fall into categories should be 7(4)/(5) – presumption of equality
    - If you have exempt property and it stays in your name alone, if there is an increase in value your exemption is the amount when you received it. If there is an increase in value that section 7(3) property and it is available for distribution; if it is in your name alone and the current value is less than the value when you received it i.e. loss you exemption is the current amount (i.e. $100,000 inheritance and now it only $70,000 = 70,000 is your exempt value); if you have exempt property and you put it into joint names the value of the exemption you start with is what was it worth at the time you transferred it, half is exempt and other half is section 7(3) property. Increase in exempt is divisible, loss is not



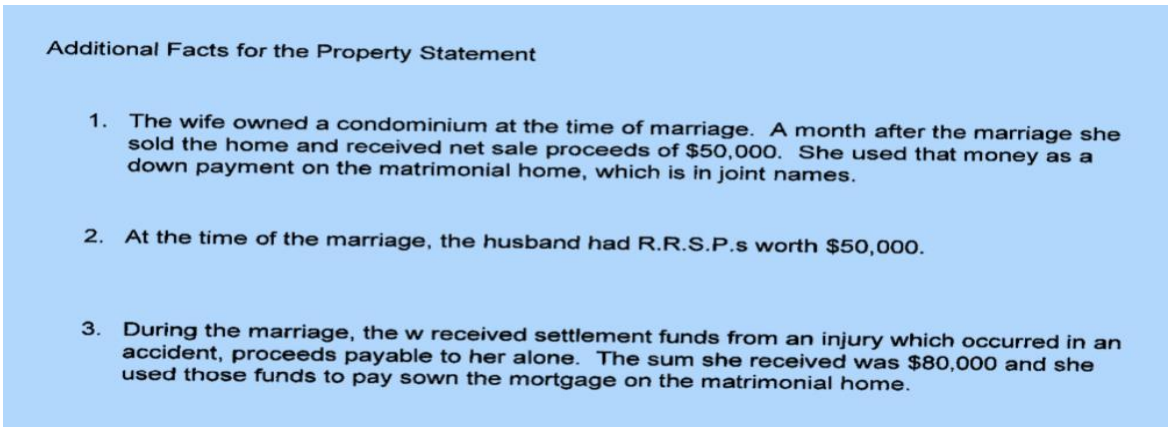
Family Law Part 2

Lori Matrimonial Property Statement

Matrimonial Property Statement (With Taxes)

	WIFE	HUSBAND
ASSETS		
Matrimonial home	$400,000.00	
Condominium		$200,000.00
RRSPs	$80,000.00	$200,000.00
Vehicles	$2,000.00	$50,000.00
Travel trailer		$10,000.00
Investments	$20,000.00	$40,000.00
Corporation		$500,000.00
Total Assets:	$502,000.00	$1,000,000.00
DEBTS		
Mortgage	$100,000.00	
Taxes on RRSPs (20%)	$16,000.00	$40,000.00
Taxes on investments (20%)	$4,000.00	$8,000.00
Total Debts:	$120,000.00	$48,000.00
NET ASSETS:	**$382,000.00**	**$952,000.00**
EXEMPTIONS		
House (pre-marital)	$25,000.00	
House (settlement proceeds)	$40,000.00	
RRSPs (pre-marital) (after tax)		$40,000.00
Total Exemptions:	$65,000.00	$40,000.00
NET MATRIMONIAL ASSETS:	**$317,000.00**	**$912,000.00**
TOTAL PROPERTY:	$1,229,000.00	
EACH PARTY ENTITLED TO:	$614,500.00	
EQUALIZATION PAYMENT:	$297,500.00	($297,500.00)
FINAL POSITION:	$614,500.00	$614,500.00

Family Law Part 2



Additional Facts for the Property Statement

1. The wife owned a condominium at the time of marriage. A month after the marriage she sold the home and received net sale proceeds of $50,000. She used that money as a down payment on the matrimonial home, which is in joint names.

2. At the time of the marriage, the husband had R.R.S.P.s worth $50,000.

3. During the marriage, the w received settlement funds from an injury which occurred in an accident, proceeds payable to her alone. The sum she received was $80,000 and she used those funds to pay sown the mortgage on the matrimonial home.

- Is there any exempt properties 7(2)?
  - Premarital house, settlement proceeds and RRSPs
    - Wife had condo at time of marriage and she sold it for $50,000 and put it into purchase of the matrimonial home so when she had $50,000 it was hers but because she put it into joint names it becomes half exempt and half is section 7(3) property $25,000
    - Wife settlement - $40,000 of the $80,000
    - Husband had RRSP for $50,000 he now has $200,000 now – he had 50,000 at time of marriage; so the amount at time of marriage is exempt and increase is section 7(3) property
- Is there any section 7(3) property?
  - The other half of the $50,000 exempt is section 7(3) property – *Harrower & Jackson*
    - We put the exemption on there and then here you would say I am assuming the other section 7(3) is divided equally
  - Same with wifes proceeds of $80,000 settlement – she used to pay down the mortgage of the home, although paying down debt she is adding to equity so basically put into a jointly owned asset so half remains exempt and the other $40,000 would be section 7(3) and bc went into house we would assume it would be divided 50/50 despite it being section 7(3) (typically house is 50/50)
  - Husband had RRSP for $50,000 he now has $200,000 now – he had 50,000 at time of marriage; so the amount at time of marriage is exempt and the increase would be section 7(3) $150,000 increase
    - We would put the 200,000 under his assets and now bc RRSP is pre-taxed, if you take it out it is subject to tax; so you put pre-tax amount under assets and debts we have a notional deduction that is would be subject to tax; so we are dealing with after tax #
    - His exemption would be $50,000 pre-tax soo we would use the same deduction for taxes on exemption leaving him with $40,000 as after-tax amount
    - We assumed the increase value would be divided equally but is not necessarily a bad assumption here because RRSP contributions come from people pooling their funds
- Per Lori: would be looking for why the exemptions in the house are what we have and if section 7(3) what you do with it; if there was an unequal division of section 7(3) property would go after exemptions you would put unequal division of section 7(3) and show the division because what we are looking for is taking into account debt, taxes, exemption and unequal property because what we are left with is the total property, take into account everything, everything else is section 7(4)/(5) and entitled to half of that, what does each party have – each party is entitled $614,000 she short and heh is over so in order to equalize e would owe her $297,000 to equalize the property

- If I am acting for this guy and he owes her almost $300,000 in assets and I say where are you going to get that money, he does not have the cash but he does have investment and RRSP so I might say lets equalize the RRSP separately or otherwise not sure where he would get the money to pay her off
- Remember: if you are putting it on here it is being divided; what we do at the end of the day after taking into all the debts, exemptions and taxes we are left with after tax total money and each should have half from there

- **Exam:** must be able to understand and read this

REQUIRED READING: Section 7(2) Property (b) Method of Distribution of Exempt Property and Increase in Value of Exempt Property (Section 7(2) and Section 7(3))

Quig v Quig (CA) (1983) 44 AR 5

Facts: The husband had equity in the home at the time of marriage (i.e. had it before marriage), that he sold with proceeds going towards the new matrimonial home

- Title to the matrimonial home was in the name of both parties
- The property was sold to facilitate the division of property during divorce proceedings
- The TJ divided the proceeds equally and the husband claims that his original equity was exempted pursuant to the MPA which exempts property brought into the marriage

Issues: Should the initial equity be exempt?
Held: Yes – no evidence it was a gift

- Joint property comes within the distribution provisions of the Act so s 7(2) applies

Ratio: You must ask: was the property intended as a gift, or was it simply put into both names?
Reasons: The wife argued that joint property is not subject to distribution under section 7, but section 36 of the Act does not support this proposition since it says that there is no presumption of advancement (property transfer between spouses is presumed to be a gift) unless it is placed in joint names

- Section 36(2) says that if property is in joint names, absent evidence to the contrary, then this is prima facie proof that joint ownership was intended. In this case, there was no evidence that it was a gift
- Joint property still comes within the distributive provisions of the Act.
- The husband is allowed an exemption of $14k before equal division of assets

Note: this case was followed by the next two cases, which now stand as the leading cases on exempt property

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REQUIRED READING: Section 7(2) Property (b) Method of Distribution of Exempt Property and Increase in Value of Exempt Property (Section 7(2) and Section 7(3))

Jackson v Jackson (1989) 97 AR 153

Facts: The husband's mother gave him $61,500 in cash which he used to pay down the mortgage on a jointly owned home and buy a duplex in the husband's name

- The TJ said it was exempt, but took ½ off as being a gift to the wife

Issues: Is an exemption lost in a joint interest situation when the interest was transferred without consideration to the spouse?
Held: There was no error in the decision

- The exemption was lost as one-half interest had been given to the wife

Ratio: Once you put exempt property into joint name, you get half back as exempt property under s 7(2), and the other half is s 7(3) property which has no presumption of equal division

Reasons: s 36(2) of the MPA presumes that money deposited in the name of both spouses is deemed to be in the name of both spouses

- Here, the husband failed to rebut that presumption
- Joint ownership presumed when form is chosen
    - Consistent with the sharing the Act contemplates. No reason to ignore the legal consequences of making a gift in face of clear recognition by the statute.
- From the $61,500 half of that ($30,750) is s 7(2) property, and the other half is s 7(3) property
    - Which has no presumption of equal division

In this case, the 7(3) property was split equally

REQUIRED READING: Section 7(2) Property (b) Method of Distribution of Exempt Property and Increase in Value of Exempt Property (Section 7(2) and Section 7(3))

Harrower v Harrower (1989(, 97 AR 153 (CA)

Facts: The Husband claimed an exemption for $72,000 which was bequeathed to him and which was traceable into the first matrimonial home

- That home was sold to pay off debts and a second home was later bought
- The trial judge found that the amount of money was not traceable into this second home, and therefore the Husband could not claim the exemption

Issues: Is the property exempt despite a lack of traceability?
Held: Not exempt.
Reasons: If the $72,000 was put into joint names, the husband in effect gave the wife one half of the money

- If the property cannot be traced, there is nothing to exempt from distribution
- Tracing can be inferred, implied or presumed
- A gift to a spouse of a joint interest removes that joint interest from the category of exempt property; the interest held by the donor spouse remains exempt in accordance with and to the extent recognized by the Act
- Not traceable here
- Paid off debts which freed up money to lessen financing on house but allowing this to be an exemption could lead to a person getting full title
- Losses are also not distributable
    - For example, if someone inherits $100,000 which is put in a joint investment, then $50,000 is section 7(2) and $50,000 is section 7(3)
    - If that investment is only worth $60,000 sometime later, then the calculation is performed at the current date, meaning that $30,000 is section 7(2) and $30,000 is section 7(3).
- The TJ has discretion – it is not a reversible error to refuse to draw inference that the money went into the second matrimonial home (nor would an opposite finding)
    - Two factors gave need to trace:
        - Considerable evidence of unwise business decisions
        - Main distributable asset, the husband's pension, is attributable to his employment, not investment of gifted funds

Class finding: No. Tracing can be "inferred, implied or presumed." Property gained directly or indirectly. If significant capital injection, often presumed traceable. If asset dissipated, not converted, no longer traceable, or exempt.

- BUT Trial Judge has discretion. Not a reversible error to refuse to draw inference money went into second matrimonial home (nor would opposite finding). Here, two factors gave need to trace:
    - Considerable evidence of unwise business decisions ($ could be squandered, not preserved)

- Main distributable asset, Husband's Pension, attributable to his employment, not investment of gifted funds.

REQUIRED READING: Section 7(2) Property (b) Method of Distribution of Exempt Property and Increase in Value of Exempt Property (Section 7(2) and Section 7(3))

Brokopp v Brokopp (1996), 181 AR 91 (CA)

Facts: The wife's father gave them money ($27,000) to buy a home
- They later moved that home onto the husband's father's land
- The trial judge said the amount of the wife's inheritance that was spent on the matrimonial debts was exempt
- The wife was able to show that $5,000 could be traced to investments in her name alone, with the remaining $22,000 in joint name

Issues: Whether the wife's funds are exempt
Held: Yes – exempt. The gift was for the daughter, not the father in law. There was an awareness that it was inheritance to the daughter
Ratio: The formula is Total Assets – Total Debts – Exemptions – S 7(3) Unequal Division = What is to be split 50/50
Reasons: Exempt funds are lost unless you can trace them into an asset
- The Court says if you spend money on a debt, you cannot trace it to an asset
- They recognise that $14,000 could be traceable into an asset of which $7,000 would be exempt, and the other $7,000 would be section 7(3).

Class Notes on Case
What about a Windfall? The importance of s 8 factors for s 7(3)
- Husband's parents transfer lake property to husband and brother prior to marriage. At date of marriage, worth $106 000, now, completely due to market forces, worth $1055 000.
- What is "just and equitable" division of increase in value based on s. 8 factors?
    - Unnecessary to consider all s. 8 factors, but "should at least consider the factors the parties have clearly raised in evidence and during argument." Exercise of discretion "can never involve only one side of a social-economic equation."

REQUIRED READING: Section 7(2) Property (b) Method of Distribution of Exempt Property and Increase in Value of Exempt Property (Section 7(2) and Section 7(3))

Sparrow v Sparrow, 2006 ABCA 155

Facts: The Husband and his brother jointly own a cottage in BC which was given to them by their parents, and the parents continued to pay taxes and upkeep on the property
- The cabin shot up in value (from $106,000 to $1,055,000)
- The trial judges said this was matrimonial property and the husband's share in the increase in value from the date of marriage to the date of trial was to be divided equally between the spouses.

Issues: Is the cabin matrimonial property?
Held: No.
Reasons: There was an error in applying the presumption of equal sharing with respect to the cabin
- It should have been exempted by the trial judge
- Under the MPA, an increase in value for exempt property should be distributed in a manner which is just and reasonable
    - Hence, there is no presumption of equal sharing under this section.

- Applying the just and reasonable standard, the Court of Appeal found that 70% of the Husband's interest would remain with the husband, and 30% would go to the wife
- The factors that the trial judge did not take into account include that the fact that the parents could have distributed this property at the time of their death which means that the husband would have gotten everything as exempt property, the fact that the husband's parents contributed to the property which falls under section 8(c).
- The Court also looked into capital gains tax
    - Recall that half of the increase in value of property is subject to capital gains tax
    - The Court says that we are not going to take into account capital gains tax because the parties may never sell the property and tax law might change
        - This is not the normal approach
    - The vast majority of time capital gains are going to be taken into account and you will have to make a notional deduction.
- The final issue was debt
    - The parents often paid off their debt
    - After separation, the husband claimed that the outstanding debt is matrimonial
        - Generally, if one party owes debt, then the debt will be considered matrimonial and each party has to pay half unless there is a good reason why it should not be paid
        - The wife claims the parents' past choices to pay off the debt should prevent her from having to pay off her half. The Court does not buy this
- Factors favouring greater distribution to Husband: Increase in land value solely based on market, husband's parents could have kept for inheritance, parents paying taxes and maintenance "on behalf of" husband and brother, wife did nothing to acquire or increase value.
- Factors favouring greater distribution to Wife: Bore disproportionate share of familial responsibilities, role in maintenance, main role in child-rearing but stay at home, husband played lesser but real role.
- Just and equitable division of increase in value = 70% - 30%

NOTE: When there is money owed to parents, look to how the money was obtained, if the parents intended to receive the money back, if there were any discussions at all

- If you are going to claim something as a debt you better prove evidence, else it will be a gift
- A lot of client will claim a debt to their parents in an attempt to get their spouse to pay their parent's half of the so-called debt
- Just because you are in a separation does not mean you can recharacterize something as a debt when it was originally a gift.

REQUIRED READING: Section 7(2) Property (b) Method of Distribution of Exempt Property and Increase in Value of Exempt Property (Section 7(2) and Section 7(3))

Felker v Kelker, 2005 ABQB 365

Facts: The husband wants an exemption to farm and cattle that he acquired before the marriage and claims that the exemption value is greater than the value of the property, so he should not have to distribute any to the wife

- Over many years, he bought and sold cattle to pay off loans, debts and to purchase more cattle.

Issues: Can the husband trace and claim the full exemption?
Held: Yes.
Reasons: As per section 7(2)(c), if property is acquired before the marriage, the value at the time of the marriage or the date acquired is the amount exempt

- The decision to sell the herd, pay down farm debt, and then reinvest in the same assets does not destroy the exemption

- The Husband showed that none of the exempt assets, including any proceeds of sale, was ever invested in joint title property
- The value exempt exceeded the value currently in existence, thus no real application for property distribution at trial

Class Notes:

- Repaying debts from proceeds of exempt property does not create non-exempt equity, does not result in any notional gift (or support any trust), does not infer a gifting for any portion of that money.
- None of exempt property was ever registered in joint names or otherwise gifted in whole or in part. No property or proceeds from sales ever invested in joint title property. No evidence of "co-mingling or gifting" = differential stands on its own merit ($16 000).
- Friedland: this is a case that makes sense

steps to take

First, ask if there is a prenuptial agreement

- What does it say to exemptions, increases in value, etc?

If there is no prenuptial agreement, look as to whether these parties lived as common law before any marriage, because you have to deal with constructive trust property before dealing with the matrimonial property

- For matrimonial property, separate it as per section 7
- Look to any increases in value
- If property no longer exists, see if it exists in another form, and see if some exempt property went into joint name or not.

Consider then the factors listed in section 8 to argue that an equal division under section 7(3) is not appropriate

- What is just and equitable?

After all of that, you have section 7(4) which has a presumption of equal division that may be rebutted by a consideration of the factors in section 8.

November 26, 2020

Explore the sort of a historical progression of the way the courts have looked at exempt property and section 7(3) property but also section 7(4)/(5) (Note: 7(4) married & 7(5) Adult Interdependent Partners)

Case Law

Mazurenko v Mazurenko

→Per Lori: You will see in more recent case law over and over that this case is still good law in alberta

- This was a court of appeal decision
- It was a farming operation
- The issues were how to characterize and apparent gift to one of the spouses (H &W), the consequences of that gift, time of evaluation (do you evaluate time of separations or currently) and then the general principles for dealing with section 7(3) & 7(4) and the interplay with section 8
- Long term marriage, together for 27 yrs. before separation. At one point earlier in their marriage they had separated for awhile and the wife had moved out, separation was a couple of years, then she moved back and they were together until final separation. The final separation was in 1972
- Three pieces of land at issue
  - 1. H parents had transferred a quarter section from their name to name of H
    - At time of trial had been sold but not fully completed due to caveat that had been listed
  - 2. 10 yrs later they transferred the home quarter from their name to name of HH
  - 3. 10 yrs after that they transferred a 3rd quarter section to the H
    - This transfer occurred 2 yrs after the parties had separated

        - By the time they got to trial this land had been sold so they knew the value
    - At time of transfers all three of these sections were characterized at the time of transfer as a gift from H parents to H alone
- There was also another issue a year after the separation – the H had a house in town and what he had done is he had transferred it into joint name of himself and his two daughters (one was of age and the other was a minor)
- Goes to trial and at trial the TJ divides all of it equally, saying they contributed equally to the operation thus it should be divided equal
    - This was kind oof the first CA "kick of the cat" with respect to the interplay of all these sections
- CA says no the TJ is wrong, you have to look at what the statute says. States the following:
    - The first quarter section transferred (per Lori: keep in mind it was transferred from H parents to H). The CA characterized that as a gift not just to the H but a gift to both parties, and this had been transferred shortly after the 1st separation, and the court says she came back, she was promised a portion of the farm, she provided services, she worked hard on the land so even though it was his name alone on title, they characterized it as a gift from HH parents to both H & W.
        - If it is a gift to both parties it is section 7(4) property, meaning equal division due to being subject to the presumption of equality
    - The 2nd & 3rd quarter sections transferred, the CA said when they transferred the value of property at time of transfer is exempt and not available for distribution and the increase in value is section 7(3) property
    - With respect to the house the W argued that the H transferring interest to daughters are not bonified purchasers, and the CA says no there is no evidence of this. So what happened was heh took it from his name (property subject to division) and basically transferred to him and his daughters names leaving a 3rd of it as divisible property. The CA said it is okay and there is no evidence that this was done to defeat the wife's interest.
        - Court says, "In the absence of an intention to defeat the wife, this was a normal family transaction, bestowing part of the benefits of family property on the children."
        - Per Lori: her difficulty with that is you have to divide the property first before you start talking about what the kids are going to get now or at time of inheritance BUT that is just her opinion that she thinks they are wrong
- The Court talks about the approach to the division of property and the legislation
    - "There is merit to these expressions of concern if a court does have to assess and weigh each factor**. Such a process is not, in my view, contemplated by the statute. It gives a presumed distribution and allows the court to reassess on a consideration of the described factors."
        - **Per Lori: discussing section 8 factors
        - What they are talking about is that there is at least for section 7(4) property a presumption of equality and the court has the discretion to reassess that using the factors set out in section 8
    - "It would be extremely difficult, indeed impossible, to establish any formula for the application of the heads in s. 8"
        - I.e. we do not have to go through each and every one
    - "The legislation avoids formulation. The court must, in my view, look at the relevant facts under s. 8 and then ask itself if it would be unjust or inequitable to divide the property equally. That conclusion would not be lightly reached. There must be some real imbalance in the contribution having regard to what was expected of each or attributable to the other factors in s. 8. In establishing the presumption** I take the Legislature to have decided that in ordinary cases equality is the rule
        - ** presumption of equality

        - Per Lori: this is the proposition that people say *Mazurenko* is good law – that in ordinary cases when it is section 7(4)/7(5) property equality is the rule.
            - You can rebut the presumption of equality but difficult to do
- Here with respect to the first ¼ section the only factors that were argued here under section 8 was contribution and here, because they already deemed it to be section 7(4) property court found there was no difference in the contribution which was the section 8 factor being argued so they divided the property equally
    - There was insufficient evidence to rebut the presumption of equality
- Then they looked at the other two ¼ sections – of course the amount, the equity in those lands, when transferred to the H are section 7(2) property and exempt; the increase in value is available for distribution
    - Court says this: "I am of the view that in looking at the increment or proceeds we must ask ourselves whether or not the exempt property was brought into the matrimonial regime, did it come in to be used for their mutual benefit and account? This is a particularly apt test for farm property. The clear answer is that the land acquired in 1964 was brought into the regime. It was farmed, improved, maintained, enjoyed and dealt with as part of the family farm. In these circumstances I am of the view that the increment and any proceeds should be shared and shared on the same basis as the other matrimonial property."
    - What they did here is said that for the increase in value, ask yourself was the exempt property brought into the matrimonial regime, was it used for mutual benefit in account? The more strongly the answers are yes then the more likely it is that the increase in value is just and equitable to divide it equally and that is exactly what the court did for the 2nd ¼ of land.
        - There was an exemption but the increase in value, because of the way the property was subsequently used was divided equally – so that section 7(3) was divided equally
    - Contract with the 3rd ¼ section – the property was transferred to the H after separation and the court says the property never came into the matrimonial regime, it was not employed for mutual benefit or account of the parties, it was gifted after separation and there was no matrimonial regime to come into because the parties were separated
        - So the H got his exemption and the increase in value the court says should be divided such that the H gets 100% and wife gets 0%
- CA says the 1st ¼ divide equally, the 2nd ¼ section he has his exemption and the increase in value is divided equally, as for the 3rd ¼ he gets his exemption and the increase is all his and wife gets none.
- Per Lori: gives us an idea of how to look at the interplay between section 7(2) 7(3) 7(4) and 7(5)

Dwelle v Dwelle

- Previously discussed in terms of it standing for the proposition that you do not need to do a factor by factor analysis of section 8 factors, not going through the entire list is not an appealable error, but you do need to turn its mind to the factors actually argued
- Here what we had was a farm case
- at the time of marriage the H was 53yr widower who had been farming for years; the wife was a 30yr old hair dresser who had 4 kids and no money at the time
- At trial the judge goes on about how good to her he was and the kids and post separation some of the kids stayed with him
- Well into the marriage she threatens to leave and the husbands response is to purchase a duplex for her and put it in her name alone – technically speaking that is a gift from one to another making it section 7(3) property
- One of the things the trial decision shows is the difficulty sometimes in valuing land or farming operation at the time of marriage
    - the husband was trying to establish what his exemption was

        - At trial the H gives evidence was that the land was $150 an acre and her accountant gives evidence that it was $160 an acre but strangely the banking documents the H had signed for operational loan around the time the parties got married, he himself claimed the land was $100 acre ($50 less than what he was now claiming at trial)
        - Per Lori: It shows the difficulty in determining the value and the best evidence is of course what is the contemporaneous evidence, the evidence of what he said it was worth at the time not what he is saying at trial when he is presumably trying to establish a higher exemption
            - In doing this you can get historical appraisals if there has not been great changes to the land, you can look at similar listings, etc to determine value
- The Court talks about discretion here – the discretion that was in the matrimonial property act and that it belongs to the trial justice because they have the chance to see witnesses, judge the varacity, etc. It makes it clear that there needs to be an error in order for CA tot step in and they don't step in here ultimately
- Issue of tracing: when you read the case you'll see there's some difficulties sometimes in terms of tracing, trying to trace the money, where it went into, tracing it into an existing asset
    - Ultimately here what ended up happening was that with respect to the husbands exempt property (that would be the value of the land at the time that the parties got married) he got his exemption, the increase in value of his exempt property was divided such that he got or 80% and then she got 20%
    - With respect to the duplex it was the same thing… because it section 7(3) property 80% of that went to her and 20% went to him
- Per lori: be caution that when you read this it is clear here that the trial justices opinion - ultimate decision - was driven by his opinion of the wife
    - it's very clear that he didn't like her
        - this is one of the things that he said in his decision:
            - " it satisfies me the plaintiff, is being somewhat less than candid in her description of the marriage and in the ultimate breakdown of there off. I am satisfied that the attitude of the wife towards the marriage and her admitted adulterous conduct was the primary, if not the sole cause, of the breakdown of the marriage. I am satisfied on the evidence that the husband did provide a meaningful stable environment for the plaintiff and the children and he did provide economic security for her and her family to the fullest degree of his available income which is by any standards was substantial.
            - Per Lori: What I am going to respectfully suggest to you is that is does not matter why marriage broke down unless it is economic misconduct; CONDUCT IS NOT RELEVANT UNLESS IT IS ECONOMIC MISCONDUCT; It is really difficult if not impossible to get a court to say that because ones a jerk they should get less property
        - Basically the TJ calls the wife a gold digger and that was on of the reasons for an appeal as well – her conduct is irrelevant and should have no effect on division of property
            - CA says is that this did not drive thee TJ decision, it was something he said only, and was not strong enough to permit an appeal
            - Per Lori: suspects if stated today it would absolutely be a reason for appeal – it is clear, according to lori, it drove his decision
- Court again says you do not need to do factor by factor analysis, but you need to address the section 8 factors, which are relevant to the case or argued, but you do not need to go through each factor in each case and not doing so is not an appealable error

Family Law Part 2

- Per Lori: keep in mind in terms of conduct it is only economic misconduct that matters. Look at the act its self… look at section 8, 10 and 36. It is very seldom that bad behaviour will make a difference in the division of property
    - Note: in once case justice foster using the factors in section 8 stated a husband's abuse was a negative contribution and found for an unequal division of property in favour of the wife → this is rare
- Per Lori: In order to get something such as the above it would have to be such outrageous behaviour or economic misconduct

Jensen v Jensen

- From 2009
- Here the court makes the comment that the MPA, as it was, is substantially unchanged in all the years since it had been there - indeed it is.
    - even with the new act, FPA, that came into effect in January of this year, it is substantially unchanged but for the fact that it added adult interdependent partners and it added a definitive statement of date of evaluation
        - It's pretty much still the same thing
- The court then basically gives this decision – they felt the need to make a pronouncement on how the court should be dealing with section 7(2)(3)(4) property
- SO here the parties had got married in 1991 and separated in 2005
- The H was a rancher and had been ranching with his family for approx. 16 years prior to the marriage
- At the time of the marriage the wife was a detain
    - At the husbands request she quit that job and throughout the marriage she worked as a horse breeder, the trainer, she worked on the ranch including doing the books and she was primarily responsible for the kids in the household
- Now just before the parties got married, they incorporated a company, they were equal shareholders in this company and most of the assets that they had at the time were transferred into this company
    - before the marriage the husband had some land in his name alone and he had some land that was joint with his brother
    - during the marriage the parties acquired lands some of it was put into the name of the company some of it was put into the names jointly
    - there was one parcel of land which the Court of Appeal and TJ refer to refers to as the disputed land
        - This was land that 3 yrs after the marriage was transferred from H parents to parties in joint names; the parties provided the H parents with a promissory notes and mortgage in favour of them
        - Few months later the parties and H parents enter into an interest reduction agreement – which basically reduces what was owing on the promissory note and mortgage to zero.
        - About six months after that then the parties granted the husbands parents life estate with respect to those lands - it was a right to receive all the pain and suffering the surface lease
        - Essentially: The husband parents transfer the land, they get a promissory note and mortgage in exchange for that, few month later enter into this agreement which wipes out what the parties owe and then few months after that they grant the H parents a life estate
- H commences an action for divorce and division of property; the wife commences an action against him under the business corporation act, ultimately the two actions were joined together
- At no time in this process was the H parents party to either action

Family Law Part 2

- Finally before the trial the parties entered into an interim distribution agreement – there was an agreement that a certain piece of land would be transferred into the wife's name, she would receive $97,000 from the company, and said money would be characterized as income i.e. dividend so she would have to claim on taxes and pay taxes on it. The idea was it would allow her to build a house
- It goes to trial and at trail the TJ makes it clear that he does not believe the contributions of the party were equal and basically divides all section 7(3) and 7(4) property such that 70% to husband and 30% to wife
- With respect to the disputed lands what the TJ did was removed the lands completely from division of property and directed they would revert back to the parents
- So the CA has a huge number of problems with his decision and they take the opportunity to write this decision to remind all of us bench and bar as to the proper way to approach this - so this is this is what they say in summary:
    - for the reasons that follow the appeal must largely be allowed. The trial judge erred in his interpretation and application of the matrimonial property act. In failing to differentiate between exempt and non-exempt assets, in overlooking the presumption of equal division in Section 7(4), in requiring the parties contributions to be equal under Section 8 factors before awarding an equal distribution, in finding a resulting trust (IE given the land back to the parents), in valuing certain property, and in good measure and failing to determine the guideline income in accordance with the federal child support guidelines
        - Per Lori: basically, got nothing but the names of the parties right. Pretty much everything was overturned here
    - One of the biggest problems that the CA had with what the TJ did was this idea that you have to show equal contributions before you can apply the presumption of equality to section 7(4) and CA makes it is clear he is wrong – he put far too much on each parties contribution and it is not what the legislation states
        - At trial the TJ talked about the H was a rancher, most of assets acquired because of his work, been unequal of division of property, pointed out wife had domestic help in home, but fails to mention help husband had, but the CA is extremely unhappy with TJ focus
        - Number of reasons CA is unhappy
            - 1. Reason that the presumption of equality is the norm, it is the starting point and unequal division of section 7(4) property is the exception
                - Court states:
                    - "No formula for applying the section 8 factors, the presumption of equality for non-exempt property acquired during the marriage is the closes the legislature has come in posing a rule for Matrimonial property distributions.
                    - "Mazurenko remains the law in AB, the presumption of equal distribution is the rule and unequal distribution is the exception. The legislation was designed to protect against inequities arising from the dissolution of the marriage and to recognize the social and economic partnership. The respective contributions of the parties will rarely be identical or measure equally. Partners allocate expectations and responsibilities in a manner satisfactory to them. Those responsibilities may change and evolve over time. Put simply it is not a requirement nor a realistic view of marriage that the contribution of parties to be equal for there to be equal division.

Family Law Part 2

- CA says parties decide their own responsibilities whatever works for them, it is not a requirement that contributions be equal and it would virtually be impossible to find a situation where you can measure them such that they are equal but it is not a requirement that they be equal before applying the presumption of equality
    - The CA takes the stance that it is not a requirement or realistic view of marriage in direct contradiction to what TJ said

- CA goes on to say that the presumption of equal division in matrimonial legislation should not be disturbed lightly
    - The SCC specifically rejected an approach that analyzes whether the contribution of each spouse is equal to apply the presumption of equal distribution and go on to say rarely, if ever will the contribution of each spouse be the same. The purpose of the legislation is to avoid microscopic analysis of the respective roles each party plays to determine who did more. It is only in cases where having regard to the matters in section 8 it would be unjust and inequitable to have an equal division that the court should depart from the principle of equality
- Finally they say the division of property begins with the presumption of equal division (per lori: talking about section 7(4)), the question to be asked is whether there is some real imbalance in the contribution (per lori: if the argument being made is the contribution) having regard to what was expected of each. In unusual and exception circumstances it will be unjust and inequitable to divide the property equally
    - Per lori: gives you an indication of how strong the presumption of equality is for section 7(4) and 7(5) property
        - ALWAYS THE STARTING POINT; ALWAYS PRESUMED AND ONLY EXCEPTIONAL CASES IT WILL BE DISLODGED

- The second difficulty they had was the way the TJ valued the exemptions
    - Basically what the trial did was he looked at the value of the assets (say there premarital) looked at the value of them at the time but he didn't take into account any debts that are associated with it
        - Per Lori: So if the H had land worth $500,000 but owed $300,000 on it the exemption is going to be $200,000 on it – it is the equity he has at the time - it is not just the value of it. And that is what the judge did here
        - TJ did not take into account any debts associated with the exempt property
            - Per Lori: that is not the way you do it – it is what equity do you have in it
                - Example: if you have a car that is worth $30,000 at the time of relationship but you owe $20,000 the exemption would be $10,000

              You have to take into account any debt that is attached to an exempt asset
- The third problem the CA had was that the TJ there had been a sale of a heard of cattle and the TJ determined that all the proceeds of that sale would go to H and there would be no division at all
    - This was despite the cattle being assets of the company that the W was a 50/50 shareholder of…so it was corporate property

        - As the CA points out the wife was precluded from any involvement in the company at that time, so there is no question bc it was corporate property, section 7(4) property which the presumption should have applied to it rather than him getting the entire proceeds.
- The court took issue with the way in which the dealt with the disputed lands – he basically created a resulting trust…he basically said no we are going to ignore that land and give it back to the parents
    - So the CA says no that is a mistake
        - 1. Lets look at the pleadings here… resulting trust was never claimed by the husband, parents were never added as parties to any action (corp or matrimonial despite eventually being joined)- so technically the judge could not do what he did
        - 2. The court says look at the intention of parties at time it was transferred. You don't look at it now when there is regret because there is a divorce in play
            - What happened at the time? Well everybody got legal advice, documents were done, parents were able to take advantage of capital gain exemption, the documents at the time made clear what the intention was and that is the time when the intention is relevant (not later)
        - 3. CA then looked at what do we do with the consideration that was given i.e. mortgage and prom note.
            - Mortgage and prom note were transferred to the parties and they gave the consideration of the mortgage and prom note
                - That establishes the deal
            - But then what happens with the fact that the H parents basically reduce what was owing under the mortgage and under the prom note to zero. How do we characterize that?
                - The CA says that was a gift from H parents to son, so the CA then says the H shared that gift with the wife, they used the land to acquire other assets
                - Basically what they did was this: when did the mortgage and promissory note were given that was a gift to the son. But because he shared it with her and because it had gone in joins names, what the court said is they are going to treat that as if he took exempt property and put it into jointly owned property and did a *Harrower & Jackson*
                    - Half the amount given were exempt and the other half was section 7(3) property to be divided and here the court divided it equally
            - The court characterizes it as something on paper it does not appear to be
- There was an argument of this interim distribution agreement that the parties had signed prior to trial (where piece of land was transferred to the wife and $97,000 from the company was provided to her as a dividend)
    - So when they got to trial in the agreement they had given a value to the land [per Lori: does not remember the value so lets use $300,000]… so the $300,000 + $97,000 that she was given would have been an interim distribution i.e. an advance on her share of property

        - At trial the husband was arguing the value of the land used in agreement should not be used as it was just a "floor price" and it is not the real value now its worth more … we should use the current value
        - The CA said absolutely not you entered into the agreement, it met the requirements of section 37, 38 of the act, it was given the value and that is the value we will attribute to her
        - But interestingly the Court says we are not going to interfere with the agreement because it is valid but then they go on to interfere with it because they say the$97,00 given to her through the company should not be declared as income (should not be a dividend)
            - Per lori: basically if it is an advance on property then it should not be taxable; it should be instead reported as a debt of the company, as part of an interim distribution so the $97,000 is actually an advance on property and should not be declared as a dividend by the company and should not have to declare it for tax purposes
- Per Lori: You see here there are a number of issues that go to dealing with the interplay of the act, the stuff you deal with daily in this area of practice, section 7(2) to section 7(5) with the factors of section 8
    - This is a big case to dealing with the approach to this kind of thing; that is the approach you start with when looking at the division of property

Exam note:

- This is the thing you need to know

Lori Matrimonial Property Statement

- If you look at the statement this is what we got:
    - We figured out
        - what property there is
        - What exemptions there is
        - What section 7(3) property there is
    - We have some idea of what client wants to keep which asset
        - We have been told the W would like to keep the the matrimonial home, RRSP, vehicle and investments and H wants to keep condo (we are assuming that he is living in condo), RRSP, vehicle, investments, travel trailer
        - There is a corporation and it was recently valued, and the after tax value is $500,000
- When putting the statement together we take the values of all the assets and put under the appropriate column
    - Then we have each party having total assets
- Then we say what debts are associated with this
    - Here we have been told there is a mortgage against the matrimonial home of $100,000
        - Now If the W is keeping the home she is going to take the responsibility of the mortgage so it appears under her column
    - Investments and RRSP
        - These are pre-taxed funds
            - i.e. if you have 100K in there you are not going to realize 100k out of it – when you take money out of the RRSP there is withholding tax and you need to claim that on your tax return and claim it as income then you have tax on that.
            - This applies to investments – investments are subject to certain tax

        - Now when you are doing this it is never going to be an exact science trying to figure out the amount of taxes…
            - For example: if I took out all my rrsps now bc of my income I would be paying a high tax rate on them and the idea is that you only use RRSP when you stop earning an income
        - Normally you do not use the current one because you are not going to take them out; you have to do some sort of notional tax deduction because it could be years before touching them
            - For things like taxable investments and RRSP normally we use a notional deduction of 20% to 25% (almost always in this range; sometimes parties will agree to different)
            - Whatever you chose for a rate you use it all the way through
        - Idea is that the final position we are trying to get to is after tax dollars so we have to account for some sort of deduction
    - If there were debts associated with an asset it would be put on the respective side
        - H has car debt; debt goes on his side
        - Debt associated with travel trailer and H is keeping it; debt goes on his side
- We then subtract debts from total assets to get net assets
- Then we account for exemptions
    - If you are going to do an unequal division of section 7(3) property this you would put right after the exemptions
    - Here as we said the W had $50,000 from the sale of an exempt condo she had at time of marriage and she put it into the mortgage on the matrimonial home (increase home equity) but she took the exempt property and put it into the joint names meaning half is only exempt and the other half is section 7(3) property… she got $25,000 exemption
        - Exact same thing happened with W settlement money of $80,000. She took exempt property put in joint asset meaning half is exempt and half is section 7(3) property, now leaving her with a 40,000 exemption
    - Finally told H $50,000 of his RRSP at marriage so he has an exemption but it is subject to tax
        - So if he had$50k and you reduce by 20% (used previously must be consistent) tax that results in an after tax value of his RRSP in the amount of $40,000
        - Per Lori: if you have an exemption is in an asset that is subject to tax then you will have to account for the tax and take the taxes off at the same rate of tax previously used
    - Exam: if lori was writing she would say
        - The section 7(3) property is the other 25k in the house, the other 40k in the house and the other 150k of H RRSP
        - For the purposes of our example we are going to assume section 7(3) is divided equally
        - If you were going to say section 7(4) presumption of equality you were going to divide the other 40K in house in such a way that the W would get 2/3 and H get 1/3 then under exemption you would put section 7 provision for the other 40k and you would put 30 for her and 10 for him
        - After the exemptions is where you would put your unequal division of section 7(3) property
        - Here we have assumed that it is divided 50/50 and chances are with respect to those two things in the house (25k and 40k) because it is the family home it is almost always that a court will do 50/50

- With RRSP it may be different but if parties have joint accounts the court may say it is impossible to determine where the money came from so they will divide it equal as it is just and equitable

- We subtract from the net assets of the each of them their exemption and unequal division of property, that leaves us with the net matrimonial/family assets
  - This is the after tax amount of what everyone has after taking into account the debt, the exemption and the division of section 7(3) property; i.e. what we have left is section 7(4) – the presumption of equality
    - At the end of the day the wife has $317k and husband has $912k
    - You add those two numbers together = total property and divide in half
      - Each party should have $614, 500
        - Here W is short and H has extra – in order to equalize the property the H would have to pay to the wife $297,500 = equalization payment
          - W Net Matrimonial Assets $317,000 – Final position $614,500 = $297,500
          - and then at the end oof the day and it puts them both each having net assets of $614k

Matrimonial Property Statement (With Taxes)

	WIFE	HUSBAND
ASSETS		
Matrimonial home	$400,000.00	
Condominium		$200,000.00
RRSPs	$80,000.00	$200,000.00
Vehicles	$2,000.00	$50,000.00
Travel trailer		$10,000.00
Investments	$20,000.00	$40,000.00
Corporation		$500,000.00
Total Assets:	$502,000.00	$1,000,000.00
DEBTS		
Mortgage	$100,000.00	
Taxes on RRSPs (20%)	$16,000.00	$40,000.00
Taxes on investments (20%)	$4,000.00	$8,000.00
Total Debts:	$120,000.00	$48,000.00
NET ASSETS:	**$382,000.00**	**$952,000.00**
EXEMPTIONS		
House (pre-marital)	$25,000.00	
House (settlement proceeds)	$40,000.00	
RRSPs (pre-marital) (after tax)		$40,000.00
Total Exemptions:	$65,000.00	$40,000.00
NET MATRIMONIAL ASSETS:	**$317,000.00**	**$912,000.00**
TOTAL PROPERTY:	$1,229,000.00	
EACH PARTY ENTITLED TO:	$614,500.00	
EQUALIZATION PAYMENT:	$297,500.00	($297,500.00)
FINAL POSITION:	$614,500.00	$614,500.00

- As you will see because of the progression, if an asset or a debt is on the matrimonial property statement it is being divided in some form or another, bc at the end of the day we are getting to the equalization payment
    - Remember last day: Lori comment where is the equalization money coming from
- Note: If we are arguing about debt which accumulated after marriage and you do not want to be accountable for it do not put on the matrimonial property statement bc if one it will be divided in one form or another
- Exam:
    - What lori is looking for in the exam is not correct numbers but is looking for if we recognize the issues, what values do we use, what debts go on, our their debts that don't go one, are there exemptions, is there a unequal division of section 7(3)
        - Explain any assumptions and reasoning behind it
            - I look to see if you can do a statement, what you included, what you said about assumptions, etc

REQUIRED READING: PRINCIPLES OF DIVISION OF DIVISIBLE SECTION 7(4) PROPERTY

Dwelle v Dwelle (1983) 46 AR 1

Facts: The husband owns and operates a very successful ranch and had two kids at the time of marriage
- The wife was a self-employed hair dresser with 4 kids at the time of marriage
- She marginally helps out with the farm
- The husband buys her a plane and a duplex when she contemplates leaving
- She is adulterous and the judge splits the property 80/20 for the husband/wife for increase in value of property

Issues: Did the judge err in this decision?
Held: No error
Ratio: A court need not consider all of the factors in s 8, but they should consider the relevant factors
- Must look at anything that is addressed at trial or in evidence

Reasons: The Husband's original land value is exempt
- The increase is subject to s 7(3) which is a just and equitable division
- The judge did not err in not considering all the factors in section 8 (he was not overly influenced by the wife's conduct and thus gave less weight to her work, as claimed by wife)
    - Do not need to go through every single factor and does not need to be divided 50-50 just because the money / property went into the family pot
    - However, the duplex was deemed exempt as it was a gift from the Husband
- However, the trial judge said that the wife entered the marriage without the emotional connection one spouse should, and her adulterous behaviour was taken into account
- The Court of Appeal said this was not an error and was just necessary background facts → surprising remark
    - However, economic misconduct is really the only thing that is supposed to count.
- CA upholds trial judge's finding that ALL of Mr. Dwelle's assets fall under s. 7(3) – increase in value from s. 7(2) assets, rather than s. 7(4), so no presumption of equality between spouses, only what is "just and equitable" based on s. 8 factors. SOR- discretion, no material error.
- 80% of Mr. Dwelle's distributable property to Mr. Dwelle, 20% to Mrs. Dwelle. 80% of Mrs. Dwelle's distributable property to Mrs. Dwelle, 20% to Mr. Dwelle.

Family Law Part 2

REQUIRED READING: PRINCIPLES OF DIVISION OF DIVISIBLE SECTION 7(4) PROPERTY

Mazurenko v Mazurenko (1981) 30 AR 34

Facts: There was a transfer of farm land and for living for the couple, but it was argued as a gift to the Husband from the parents

- After separation, the husband bought a house and put in joint names with his daughters

Issues: Are the transfers by the parents' exempt? Is this just and equitable?
Held: Not exempt
Ratio:
The court must, in my view, look at the relevant facts under s 8 and then ask itself if it would be unjust or inequitable to divide the property equally. That conclusion would not be lightly reached. There must be some real imbalance in the contribution having regard to what was expected of each or attributable to the other factors in s 8. In establishing the presumption, I take the legislature to have decided that in ordinary cases equality is the rule. The legislation introduces a discretionary system with the presumption of equal sharing, which is similar to a deferred sharing scheme with a power of adjustment. The important point is that both of these schemes recognize "... the principle that a husband and wife carry on their married life, including their economic functions, for their mutual benefit and account and according to arrangements accepted by both for that purpose. That principle, if accepted, requires that the law provide in some way for the sharing of their economic gains between the husband and wife." That is done by the legislation and done with the presumption of equality.
Reasons: I accept the trial judge's finding that the wife, in consideration of her returning and providing other services was promised that a piece of land, would be transferred to the couple together, so the parcel of the land was not a gift from a third party

- However, it only applies to that piece of land
    - The other land should be exempt
- The husband has 1/3 equity in the house which can be distributed (the other two thirds is not part of the matrimonial property because it is held by the two daughters)
- There was no evidence that this purchase was to defeat the wife's interest
- This was a normal family transaction bestowing benefits to the children
    - Though there is an argument to be made that the wife should have at least been consulted

Notes on finding: Upholds Trial Judge's award for s. 7(4) property (some changes in exempt property): "The court must…look at the relevant factors under s. 8 and then ask itself if it would be unjust or unequitable to divide the property equally. That conclusion would not be lightly reached. There must be some real imbalance in the contribution having regard to what is expected of each or attributable to other factors in s. 8. IN establishing the presumption, I take the Legislature to have decided that in ordinary cases, equality is the rule."

REQUIRED READING: PRINCIPLES OF DIVISION OF DIVISIBLE SECTION 7(4) PROPERTY

Jensen v Jensen, 2009 ABCA 272

Facts: Parties were married in 1991 and separated in 2005

- Parties were ranchers, and their property included land and equipment used in ranching operations
- There was an interim distribution agreement entered into
- The wife was given some funds to build a house on lands, and some funds were paid to her as dividends
- TJ determined that relative contributions to marriage were not equal and divided most of assets in favor of husband on 70/30 basis

- With respect to disputed lands, the J ordered the land to be transferred back to the parents without dealing with it as a matrimonial property
    - Wife appealed

Issues: Was the property divided properly?
Held: Appeal allowed
Reasons: The MPA is premised on a presumption of equal distribution of non-exempt property acquired during the marriage

- The presumption should only be rebutted in the clearest of cases when, having regard to the s 8 factors, it would be unjust and inequitable to make an equal division
- When considering the s 8 factors, courts should not embark upon the weighing of each party's respective contribution and make divisions of property that are proportionate to the relative contributions of each spouse
    - Rarely if ever will the contribution of each spouse be the same
- The purpose of the legislation is to avoid microscopic analysis of the respective roles each party played to determine who did more
    - It is only in cases where, having regard to the factors in s 8, it would be unjust and inequitable to have an equal division that the court should depart from the principle of equality
- The trial judge also erred in valuing the exempted value of the property. The trial judge did not take into account the money owing on the land. The exempt property is only the equity
- The parents were not parties to the litigation so he could not order a resulting trust. Further, it is important to look at the intentions at the time of the transfer, not the intention at the time of the trial. In this case, it was clear that the lands were gifted to the spouses together
- Further, there was even some consideration given through a promissory note and a mortgage, even though that mortgage was essentially reduced to zero months later.

Friedland: Trial judge erred in law in his unequal distribution of assets. Law does not require equal contribution for property to be divided equally. Trial judge overlooked presumption of equality and focused solely on what he considered just and equitable. Should not have engaged in detailed examination of relative contributions

- The MPA is premised on a presumption of equal distribution of non-exempt property acquired during the marriage. The presumption should only be rebutted in the clearest of cases when, having regard to the s. 8 factors, it would be unjust and inequitable to make an equal division.
- "When considering s. 8 factors, courts should not embark upon weighing of each party's respective contributions and make divisions of property that are proportionate to the relative contributions of each spouse. Rarely if ever will the contribution of each spouse be the same. The purpose of the legislation is to avoid microscopic analysis of the respective roles each party played to determine who did more."
- The question to be asked is whether there is some real imbalance in the contributions having regard to what was expected of each. In unusual and exceptional circumstances…it will be unjust and inequitable to divide matrimonial property equally."

Dec 1, 2020

Focus today: What constitutes and what makes up Property that is being divided - can be ANY type of property (real or personal

- It can be things like any sort of land (houses, cabins, farms, rental properties, corp properties)
- as well as things like: time shares, furniture, collections, art work, vehicles, toys (boats and motors), recreational vehicles (trailers)
- it can be corporations & corp interests
- stocks, bonds, shares, rrsps, other investments, mutual funds, savings bonds, non-registered investments
- Life insurance policies [some have case value]

Family Law Part 2

- trust interests, bank accounts
- bonuses & severance (note: depends on situation if these are property),
- pensions
    - note: before Family property act there was argument that pension was not property to be divided but that is not the case IT IS PROPERTY TTO BE DIVIDED; in the last few years before the family property act came in what was happening was that judges were trying to use the date of separation for pensions value which is not the case under the new act which states that the value is from the current date unless stipulated otherwise
- debts
    - Kind of questions we look at with respect to debts is: Were these debts brought into the relationship? purpose of debt? when was it incurred? Was it incurred due to a family expense? Was it after separation? was it incurred w knowledge of person? why was it incurred? Etc. → trying to determine what the property is, what the value is, and what goes onto matrimonial statement

Value of Real Property: How do you determine the value of real property?

- 1) Best evidence is using a certified appraisal -- this is based on the state of the property in the current market (pay for this and they make a detailed report)
    - Note: these appraisals will only be stood by for 45 days (re-appraisal or update may be cheaper if the market is stable) – i.e. may be a letter saying "I certify that the opinion previously given is the same)
        - if you are going to trial and they are going onto the stand, make sure it is recent (45 days less)
- 2) Sometimes when parties are trying to determine, for the purposes of negotiation, what the value of the house is, one way to get evaluation is to:
    - Value of the house can be established by each party getting real estate agents to come evaluate your house
        - Note: zero cost
- 3) Third way to get a value is property tax assessments: Property tax assessments from the city - "this is the value of your house"
    - Note: these are NOTORIOUSLY wrong and inaccurate (do not depend on this)
- Once you get the valuation need to address the debts (include in debt section)
    - Is there a mortgage registered? is there a home equity Line of credit? Any encumbrances or outstanding property taxes → should always pull title on properties owned by the parties to see any encumbrances on the property and what you need to take into account
- Example: One side will usually keep the house, and the person that is keeping the house will give the value BUT when i sell it later, i want to take off a deduction for real estate commission and want a notional deduction (ie. realtor fees and lawyer fees when selling) → lori says that she NEVER agrees to this because they are not certain to occur (ie. unlike taxes on RRSPs when taken out, you may not use a realtor or use a family friend who doesn't charge these)
- Keep in mind: Rental properties - If it is not your primary home (rental home, cottage, etc) then you must take into account capital gains tax. If you are valuing this, there is no question that when someone sells this property that isn't their primary residence, they will be subject to capital gains tax. You have to determine what the original value was (purchase price), what the current value is, and half of the increase in value is subject to capital gains and then put this in as a debt on the property statement

Debts

- Looking to the assets and debts in the matrimonial property statement - example: if you keep the home, they get it put on their column and this includes the debts such as mortgages.
    - Same with vehicles - if they have a vehicle with 50k and a 30k loan on it remaining to be paid, you like the 50k as an asset and then include the debt that is against that asset of 30k.

Family Law Part 2

- If the asset is in the statement, the debt will be there on the matrimonial property statement unless you can argue otherwise (this is unlikely).
    - Do not ignore debt, always include it on there.
- If an asset or debt is on the statement, it is taken into account between the parties in one way or another and any debt that is associated with a particular asset, the person keeping it is responsible for the debt.
- If the debt isn't attached to a particular assent (ie. CC or LoC) you still divide it if it was brought into the matrimonial regime; doesn't need to be associated with an asset
    - Lets says the parties got a LoC and it is not associated with a debt it was just used for expenses, this goes on.
        - Determine:
            - Who take responsibility to repay it? Are they going to split it?
                - Ie. 40k debt, then 20k could be to each side.
                - I.e. If it was a student loan that was incurred while parties were together then it will be on there
                    - impossible to get someone to pay a debt - ie. get the non-student to pay it - so you put it under the students name and it is then divided regardless.
    - If something is incurred during the relationship it is prima facie included to be divided and the person arguing against it will need to prove it.

Timeshares

- You purchase the ability to spend X weeks at a vacation property - don't own it, but just have the right to be there at a certain time. These are a pain in the ass to value, and the contracts are usually insane (Per Lori: people dont read them and there is so much that is prohibited in transferring or selling it)
- Typically what happens is one party takes this at a specific value or no value, or occasionally they will keep it and just alternate years
- When you are dividing your property, make sure it is clear who is responsible for maintenance fees associated with these

Furniture, household good

- Per Lori: DO NOT get caught up on arguments valuing furniture, and household contents. -- used household items have little value
    - Ex. Person moves out with only their personal belongings. They leave party B in house and everything else is left (bedding, cutlery, furniture, etc). Even if you paid 80k worth of these things the actual value is less than this. If you are acting for the person keeping the house and the other side says this is all worth 80k, you tell them to pay the person that owns the house 80k and they can keep it all. Go buy new stuff with 80k
- Issues dividing property → Sometimes need a referee who helps to divide things between the parties - but it is usually not worth it to pay lawyers for parties to argue about this.
    - Per lori: Do not get caught up focusing on these
- Statement of assets and liabilities: make sure they do NOT list every single item in the house - you will end up with 100 pages of things and most of them will not be argued about
    - (Per Lori: Had a guy provide a list of assets and liability and it had things like 2 packs of batteries; 7 jars of cheez whiz)
    - NOTE - <u>COLLECTIONS ARE DIFFERENT:</u> artwork collections, sports memorabilia, etc. have a higher value and this value need to be appraised by a professional/expert (or websites that can do this) and should be listed in the statement.
        - Rule of thumb: If these are worth something of value, they should be appraised and taken into account

Family Law Part 2

Vehicles (boats, quads, rvs, trailers, skidoos, cars, etc)

- What someone paid for the vehicle is not the relevant number - looking at the current value of the vehicle if it was sold today on the market
    - Determining value: take it to a dealership and get a value, check online sites, etc.
    - Once you get the value, put value into the assets section family property statement as well as any loans or debts that are held against these items (leases, loans, lines of credit, etc. must be accounted for)

Bank Accounts (are these an asset?)

- The day your client swears their statement of assets and liabilities they may have X amount in their bank. This will change and fluctuate and may be more or less 1 year later
- MUST use your discretion when evaluating this:
    - Usually on a bank account, you look at 6 months of bank statements →if clear someone is putting paycheck in and then spending it all and this is a consistent cycle, chances are there won't be a lot of money in that account (don't use these accounts that fluctuate and are paycheck to paycheck)
        - BUT If there is an account with 12k in a savings account it will be put in there because this is significant
            - For Lori: general rule of thumb is that if there is more than $1000-$2000 OR MORE in a savings account then, depending how well off the party is, she usually lists this
    - 6 month bank statements establish patterns and should look to see if this 6 months covers the period of when they were together and now there is drastic reductions, there may be dissipations or there may be money being transferred out to family and friends
        - Note: try to get disclosure sooner rather than later

RESP: Registered Education savings Plans

- Typically, not an asset on a property statement because it technically doesn't belong to either party
- Plans where people contribute each year to kids post secondary education → contributions can be matched up to a certain amount by the gov't each year and these are tax deductible to a certain limit
    - Ex. 30k in RESPs -- these technically belong to kids and are monies set aside for their education. Typically not treated as an asset that one party or the other has bc if the children go to school, that is where it is going and it is not in one parties possession.
    - NEED TO LOOK AT in settlement: (1) who will administer the RESP until it is depleted; and (2) what happens if the kid never goes to school, the RESP collapses, and what happens to money and what are the tax implications (gov't contributions returned and the funds in there become taxable if not used for school purposes)

RRSP's: Registered Retirement Savings Plans

- There is 2 ways to divide these:
    - 1) Equalized by way of Rollover:
        - Ex. one party has 100k of RRSP and the other has 80k RRSP. All of it is s.7(4) or 7(5) and no exemption → parties may look to equalize these
            - Total is 180k and equal division would give them 90k in RRSP. 100k person would rollover 10k to the other party's RRSP account. Fill out T220E form from Canada revenue agency and this form directs which ever institution holding the fees to direct the 10k to be transferred from one party to the other – equalizing the amount of RRSP – equalizing the amount of RRSP
                - No taxes involved bc you are transferring from one pre-tax fund to another pre-tax fund - this is just rolling over this amount
            - Remember: if you take money out of a RRSP you are going to be taxed on it
                - i.e. don't have $85k in cash rather $85K pre-tax

- If decide to divide on this basis THIS DOES NOT GO ON PROPERTY STATEMENT IF USING THIS METHOD (it is an equalized in this scenario)
- 2) Want RRSPs intact therefore treat like any other asset
  - Put each RRSP into their respective asset columns as an asset and do a notional tax deduction (ie. 20%, 25%) because there are taxes involved upon withdrawal.
    - See example from last class to see this in action
    - RRSP value is 80k or 100k in PRE-TAX value → must reduce the tax value that is incurred upon withdrawal
      - if you are going to put it on the property statement, if it is subject to tax, you need to do a notional tax deduction cause trying to get after tax equalization parent
  - If they are keeping the RRSP it goes onto the statement and tax must be accounted for

Corporate Interests - these are family property

- These are assets to be divided → shares in a publicly traded company, corporate entity that is wholly owned by one or both parties, or may be a privately owned corp and one or both parties have the interests and there are some other 3rd parties involved
- Usually people set this corporate entity up to run their income through it → ex. Welder sets up corporation and the assets are funds in the account and the equipment
  - Goal: take advantage of lower tax laws for businesses
  - Note: Also present in professional corporations (ie. doctors, lawyers, dentists, accountants)
- Standard disclosure has last 3-year financial statements for any part of the privately held corporation that you have 1% or more interest in
  - Statement of balance sheet, statement of income and expenses
- Per Lori: Reading financial statements is important; if you cannot read it, you will need to pay for this to get an evaluation
  - Might be simple: bank account amount, receivables existing, and the hard assets (truck, equipment, etc) as well as any listed debts → usually straightforward so won't pay someone for an evaluation
  - Harder: intricacy of business, number of shareholders, type and amount of revenue shared, etc → will likely need a business evaluation done
    - Preferable to use someone who has been accepted by the court as an expert. This person will give a detailed description and will give the different ways to value the corporations and the different valuations; will give you there expert opinion
      - Note: if there is a child or spousal support issue then can also do an income stream analysis with respect to what is available (not necessarily whats on your tax returns) for the purposes of paying support
        - Depends on type of business and determining things like resale value (ie. if it was just my personal corporation, it has no value; if they have shares, it is a holding company, hold real property, etc.)

Cases on Corporate Interest

DBC v RMW, 2004 ABQB 954.

Facts:

- H owned 39% of the common shares and the wife owned 1% in Northern cross limited. One other shareholder who owed 40% and then Number of other minority share-holders involved. Both parties agreed they needed to hold the shares to realize the value of the pipeline. Agreed couldn't properly get the value of the shares now, and couldn't get rid of the shares right now and would need to determine value down the road.
- Issue became once they agreed to keep the shares, was that of the 40% she only had 1% in interest and the other 19% of her 20% was a beneficial interest. She argued that between the two of them, they had

40%. It should be transferred equally (20% each) rather than him holding his 20% and holding her 19% as a beneficial interest in trust.
    - She wanted 19% of his shares transferred to her so they were equal.
- H didnt want to do this - he said he would hold these shares in trust and feared corporate disruption and interference if transferred.
- Also said there was a potential for creditor interference and that she would use her shares as collateral for her debts and she had a number of debts

Issue: Should 19% of shares be transferred to her so she had a full legal interest and not just a beneficial interest
Analysis:
(1) Shareholders agreement (USA)+ transfer of shares

- Judge looked at this and found the parties had a unanimous shareholders agreement that restricted the transfer of shares. Any transfer of shares required approval of the board of directors.
    - "the transfer of shares were restricted. No shares of the corporation can be transferred without approval of the board of the directors (BoD was husband and his best friend)"
- Judge: court has the ability under the act to declare the wife's has proprietary interest in a certain amount of shares in the company…i.e. she has the ability under the act to do what the wife was saying that she could transfer these shares. However, the court is not in the position to override the companies restriction on the transfer of shares. The company would not be obliged to register any transfer that may be ordered, the company is not a party to these proceedings and its articles and bylaws clearly prohibit the transfers of shares, without the approval of BoD and it is unlikely such approval would be forthcoming, given that the two Directors of the company are Mr. W. and his long time friend and business partner
- Grant wishes and transfer the shares BUT the agreement prevents this transfer
    - "the company would not be obliged to register any transfer that might be ordered… [the companies] Articles and Bylaws clearly prohibit the transfer of shares without the approval of the Board of Directors. It is unlikely that such approval would be forthcoming, given that the two Directors of the company are Mr. W. and his long time friend and business partner"
        - AKA the bylaws require approval and you are unlikely to get this approval
    - "as a result of the company's restriction on transferring the shares, the legal interest in the remaining shares held by Mr. W. will remain with him. However, he will hold in trust for her one half of his Class C Preferred Shares and a sufficient number of his Class A Common Shares to make up the remainder of her one-half interest in that class of shares." →
        - AKA he is holding 19% of shares in trust for her
        - Specifically say court has ability to do this but for the USA she could transfer it
    - Note: Tarapaski this exactly what happend - court transferred the shares in one company to equalized the shares between them BUT THIS IS DISTINGUISHED because there are no unanimous shareholders here
    - Court stated he didn't need to consult with the wife on the votes associated with her shares but he had to vote in a manner that is reasonable and that would vote in her best interest and exercise due diligence in looking after these shares

In sum: This was an odd case since they had to hold the shares. In most cases, you would typically get a business valuation and then determine what 40% of the value is and then determine if one keeps it or are transferring to get equal access. The term in the agreement prevented the wife from getting what she wanted

(2) Stock options

- HERE the husband got stock options as incentive to start a new job after separation – parties separate, H starts new job and stock options in new companies starting are given because they usually don't have the ability to pay a large salary (these stock options are an incentive)
- Wife argued she was instrumental to getting these stock options bc of the love and support she provided when together .
    - Court REJECTS this -- this was one of the factors in s. 8 and the stock options were an asset acquired after separation and in this case there is no reason to divide it equally → H got all of it W got none

Note: When looking at shares, stocks, bonds, etc.

Family Law Part 2

- What you would do is determine the current value, put this in as the asset, and again you are subject to tax when you sell shares in a publicly trade company so you next figure out the tax implications (ie. 100k so you do a notional tax deduction as part of the property valuation so you get the after tax value of it)
  - Stock options may also be used as part of the compensatory package for an employee with an established company (example telus) → ie. if you meet these goals, you get X amount stock options – issue become someone has stock option is this an asset and how is it dealt with?
    - <u>almost always an asset to be divided</u> and the question becomes is it vested/exercisable now or exercisable in future
      - Gardiner (1996), 191 AR 139 (ABQB) is about

Gardiner (1996), 191 AR 139 (ABQB) (addresses stock options in employment)
Facts: Husband got stock options in employer each year. Upon exercising this stock option, he would get a taxable benefit on the difference btw the exercised price of the stock now as opposed to the market value when he acquired it
Argument: H is saying this is part of my compensation and this therefore is my income and is not property to be divided
Held: Court REJECTS THIS – This is NOT part of income, these are assets that should be divided; if they are exercisable now, or in the future, they are property, thus property to be divideed

- "The options which have been exercised currently have a value that has been determined and I have included that in the final distribution of assets" → can determine the value of these options if they are exercisable now
- "Those stock options that have been allocated but are not exercisable fall in the same category as the unvested pension plan. It is a present right to acquire something in the future. The terms of the plan are clearly laid out. Mr. Gardiner already has the options, he must simply wait until he can exercise them. The only question is whether they will have any value at the time they can be exercised." → once they can be exercised, you can determine value and put this value on his statement
- Stock options that aren't available right now, it is a present right to acq something in the future → wife entitled to when those become exercisable, to half of the after tax value of them, if there is any value
- Clearly states not part of income but to be divided

Contrasting Gardiner = McDonald v McDonald (1997), 209 AR 178 (CA).

McDonald v McDonald (1997), 209 AR 178 (CA).

- Issue: did the H's stock option, bonuses, and severance package are property or income
- Facts:
  - H said they already divided property and the bonus, stock options and severance that he is receiving, if this taken into account, then she is double dipping -- she now gets my share of what has already been divided and now they are dividing it against
  - Chambers: options, bonus, severance were all property and NOT taken into account as income for spousal support
    - Issue here was a variation in spousal support, it goes then to CA
  - CoA: all of this is income and not property. There was no property action btw the court, the property had been done, and she had received her share. Double dipping is not allowed and all of this was his income
- Different than Gardiner: in Gardiner the stock options were property not income
  - Per Lori: "Cowards way out to say it is all income bc there is no property action before the courts" → basically this will be dependant on how they are characterized (are they income or property) as to whether or not there is a property action before the court and whether or not the property has been divided
    - Here: big difference if this was added to his income for variation to support whereas if this was property then nothing goes into support considerations

Family Law Part 2

Bonuses: if there is property action, then normally stock options are an asset taken into account - very seldom that a bonus is anything other than income unless you are getting the bonus and putting it into a bank account and building it up, then the account is an asset (rather than the bonus itself)

Severance

Reed v Reed (quoted in Sutton v Davidson)

- Two components to severance: (1) Recognition for past service and (2) loss of future income
- Court states:
    - The first portion of the severance of recognition for past service is distributable as family property if past service was while they were together
    - The second portion of loss of future income is not property because it is attached to income and not available for distribution
    - Per Lori: nice distinction but issues
        - Issue with this distinction set out: when looking at severance, things are never set out clearly - may say you get X amount for past service (may indicate partly what is for past service BUT it doesn't set out what is for past service vs what is for lost income)
            - Depends on the wording of the agreement (usually real life agreements are not as clearly stated as the test indicates)

Interests on a trust

- Property to be divided → if you don't know this or don't understand this, phone someone who practices in this area to help understand the terms of trust.

Pensions:

- Property to be divided
- Caution: if you look at case law, do not go back further than 10 years -- the law changed (used to be you cannot divided pensions in anyway). Formerly couldn't divide pensions aside from to say that when the pension partner started to receive it, the recipient would get portion of a cheque each month for their share (CHANGED NOW)
    - NOW: Very few pension plan where you determine what is the matrimonial portion (lots of plans that do not allow for the division of pensions btw CL couples)
        - What portion was accumulated during the marriage and then half of this belongs to the non-pension spouse → options:
            - Once determined that usually this is transferred out of the pension to a locked in retirement account in the name of other person (same restrictions as pension).
            - Sometimes bigger companies may say X amount of pension belongs to another party that is set up a new pension through the company with their portion.
            - People may equalize if they are under the same pension (ie. teachers)

Common law division for pensions: depends on the pension plan - many do not allow for a division of pension amounts between common law spouses

- New section in Family Property Act that addresses this → s. 7(6):
    - 7(6) Nothing in this Act enables
        - (a) a transfer from a pension plan of a benefit under the plan,
        - (b) a payout of contributions to a pension plan, or
        - (c) a transfer of money in a retirement account

      where requirements in legislation applicable to the pension plan or retirement account have not been met, or to a person who is not eligible to receive a share of the benefit, contributions or retirement account under legislation applicable to the pension plan or retirement account, but the Court shall distribute the value of the benefit, contributions or retirement account in accordance with this Act when making a family property order.

        - Stating If the pension says you cannot divide between common law, nothing in this act can overturn this and nothing in the act grants a court this power.
        - BUT THE COURT will distribute this when making a family property order.
            - Can determine the portion accumulated when together. Court may order X money to be transferred from pension to locked in retirement account but will also account that portion acquired while parties were living together, then the non-pension spouse is entitled to half of this and this would then go onto the property statement
    - If you are dealing with a pension that allow for division for non-married parties you would use from time started living together
    - If you are dealing with a pension that doesn't allow for division for non-married parties, you can divide the pension itself, you can transfer money into a locked in retirement account for the matrimonial portion, you then will have to take into account the portion acquired from when the parties were together when putting together your property statement
        - If you are dealing with a pension that doesn't allow for division for non-married parties s.7(6) says you need to take into account that value.
            - So if you are dealing with party that wasn't married or a portion that was acquired when they were together but before marriage, then portion that is acquired when together, if the pension plan doesn't allow for the division of it then determine what portion was acquired during this time together and this becomes an asset on the column and do a notional tax deduction because it must be accounted for even if the pension doesn't allow division
                - Per Lori: s.7(6) is problematic because the pension says no you cannot divide and s.7(6) is saying too bad, find a way

- 2 ways to divide pension:
    - 1) want to keep pension (do not want to share)
        - Determining value (Pension valuation required): get an actuary to do a valuation and give an idea of what an after tax value is of the matrimonial portion of the pension if they retire at 50, 60, etc.
            - If you want to keep pension, there is often not enough in assets to offset a pension → ie. it is 1 million, and you want to keep the pension, you will need to come up with 500k to pay them off
        - Keep the pension = need valuation, put onto their side of the property statements (this is an after tax value because it's from the valuation). Put this into assets because taxes already accounted
    - 2) More common is that the parties will divide the pension
        - Almost all pensions have a process where you do an order and this is the period of approval (date of marriage to todays date [or whatever the parties agree to])
            - If it comes out of pension, needs to go into a pension like asset
        - How much will they get out of a pension? (see formula is in matrimonial property documents below)
            - take # of years of marriage OVER the number of years worked AND THEN MULTIPLY BY the value of pension (usually get it from pension statement each year) = matrimonial portion of the pension AND THEN half of this is then rolled into an account for the non-pension party
        - Doesn't go onto statement; separate order!

Remember: if you are keeping the pension goes on matrimonial property assessment; if not keeping it and are going to divide by way of order and there is no portion that cant be divided by way of order then you do not put it on and instead do separate order

Family Law Part 2

MCALLISTER FORMULA

$$\frac{\#\ OF\ YEARS\ OF\ MARRIAGE}{\#\ OF\ YEARS\ OF\ SERVICE}\ X\ VALUE\ OF\ PENSION\ =\ \text{DIVISIBLE PORTION OF PENSION}$$

Workers Compensation Benefits

Hughes v Hughes (Court of Appeal)

- Fact: H got benefits under workers comp and received these as a result of injury at work. Used funds in account at farm, some traceable to construction of a riding area, and he claimed this as an exemption. Husband argued the workers comp benefits are akin to 7(2)(d) in Family Property Act which talks about an award in damages in tort AND that any monies received WCB benefits the same as damages in tort and should be exempt.
    - 7(2)(d): an award or settlement for damages in tort in favour of a spouse or adult interdependent partner, unless the award or settlement is compensation for a loss to both spouses or adult interdependent partners
- COURT: monies under WCB are not pursuant to a tort but it is pursuant to a statute and legislation. Tort there is fault, WCB there is no fault. Monies received under WCB are NOT exempt and are not the same as an injury in tort

Debts: Should these be shared

Abbott v Abbott, 2006 ABCA 204

- Facts: H's mother had given lots of money to run the farm. These were loans, H doesn't pay mom back, and the mom sues him. He doesn't defend this and she gets judgment against him for ~700k. Says this is a matrimonial debt and wife should be on hook for half. By the time they got to trial debt was almost ~819k. He claims this as a matrimonial debt because it was incurred during the marriage
- Held → TJ (upheld at CoA): not all of this is matrimonial (upheld at CoA)
    - Decision:
        - Wife: Some of this was not a true debt; there was never a plan to repay this amount. She said as soon as the debt was divided, the mom was going to tell the husband to forget about it while the wife pays the other half back. This was designed to reduce her share of the property
            - TJ: agreed partially
                - Some of the debt incurred before the marriage and this is not sharable and shouldnt be a matrimonial debt.
                - Some of the debt was meant to reduce her share of the property and some was him just borrowing money to increase the debt she would need to pay and reduce her share.
                - Court says only 211k is matrimonial so she was on the hook for 105k
            - Note: Courts will look at the reason why a debt was incurred

Per Lori: Courts will look at the reason why a debt was incurred → see next case that also addresses this

Busenius v Busenius, 2006 ABQB 162

- Issue: post separation debt (debt incurred after they separated)
- Court: "preferable to treat this as matrimonial debt at least on the face" because we are valuing it at the time of trial. However where the debt increased, did not create an asset, and was not justified as a consequence of the marriage or its breakdown, then it is "just and reasonable to divide unequally"

- Held here: The person who incurred the debt after was solely responsible for it.
- Take away: Look at the purpose of the debt, especially post separation -- must distinguish between someone living a boujee lifestyle (not creating an asset, was not from which both parties benefited, and therefore should not be shareable between the parties) AND building a debt up to support themselves (credit card debt for buying a new condo or furniture)
    - Ex. 10k CC debt from buying new home and everything -- more likely to be sharable and be on the property statement
    - Ex. 10 cc debt from ballin out buying personal items (ie. clothes, tools, shoes, etc.) - less likely to be sharable and should not be on the statement (not dividing this)

General rule: look at the purpose and if it was during the time parties are together then it is considered family debt.

- Ex. Sparrow - debt to the taxman - they benefited from not paying taxes because they both had a certain lifestyle and should both be on the hook
- If it is not a debt that someone knew about, could be dissipation or unequal division of debt -- Focus will be on the purpose of it: did the other person know? was it for the benefit of the family? When was it incurred?
    - After separation: what was the purpose
    - Pre-separation: this goes both ways in the cases, but if you bring it in and it still exists then chances are it is not shareable
- If you are sharing it, it goes on the statement; if you are arguing you shouldn't be responsible it doesn't go on statement

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REQUIRED READING:

Gardiner v Gardiner, (1996) 191 AR 139

Facts: Husband receives stock options from his employer

Issues: Are the stock options income or property?

Held:

Reasons: The Court says that the stock options are property and not income

- It might not be a right that can be exercise immediately, but still income
- The options that have been allocated should fall in the same category as a pension plan. He must simply wait until they are exercised
- Hence, he holds them in trust and at the time they are exercised, the wife is entitled to half of the after-tax value.

REQUIRED READING:

MacDonald v MacDonald, (1997) 209 AR 178

Issues: How do you characterize stock options, bonuses and a severance package

Reasons: The wife was saying that everything should be included in income for the purposes of support

- He says that they are property and should not be divided
- In this case, all of the property had already been divided
- The chambers judge says that it is property, and the Court of Appeal reverses because there is no longer a matrimonial property action before the Court, hence it is all income
- They looked at the bonuses. If someone gets a bonus and puts it into a mutual fund or a GIC, then it is going to be property. If you spend it, it is going to be income
- There are two components of a severance package. One is recognition of past services, and the other is recognition of lack of future income. For the recognition of past services, that is distributed as matrimonial property is the services are provided during the marriage. The second part is not connected to the

marriage. However, the problem is that there is no severance package that distinguishes these two components.

REQUIRED READING:

DCB v RMW, 2004 ABQB 945

Facts: Husband owed 39% of the common shares in a company. The wife had 1%. There was another major shareholder who had about the same, and then a whole bunch of minority shareholders. They all agreed that they would have to hold on to the shares to get any value. It was all very speculative about what the value of the shares were. So the parties agree that they hold onto the shares. Wife says that husband should transfer shares so that they each have 20%. He says he wants to hold them on trust because he does not want to dispute the corporation.
Issues: Who holds the shares
Reasons: The Court looked to the Unanimous Shareholders' Agreement which restricts transfers of shares by approval of the directors which included only the husband

- The Court was not in a position to override this agreement
    - As a result of this restriction, the legal interests in the shares will remain with the husband, and he will hold those in trust
    - However, he had to vote with those shares in consideration of the wife's interests
- There was also an issue here with respect to stock options
    - The wife argued that the husband was instrumental with him acquiring the stock options
    - The Court said the options were determined after the marriage and she had no role to play, so they were not going to divide the asset.

REQUIRED READING:

Hughes v Hughes, (1998) 232 AR 224

Facts: Husband receives a payout from WBC

- He put it into an account and used it to purchase a farm
- The husband is claiming that these are exempt funds because they are traceable and analogous to a settlement in tort
- The wife argues that WCB is pursuant to legislation and not by way of tort, therefore not an exemption

Issues: Whether the WCB benefits are exempt
Held: No.
Reasons: WCB benefits are not pursuant to tort, which requires fault

- WCB is a no-fault based program
- WCB payments are not exempt (even when in lump sum) because they are not like tort damages; more like a pension

REQUIRED READING:

Abbott v Abbott, 2006 ABCA 204

Facts: Wife brings an action for monies that the husband's mom gave him for running the farm. Son never paid Mom back. Mom sues him and gets a debt judgment for $750,000.
Issues: Whether the debt owed to the mother is matrimonial debt
Held: TJ holds that only a portion is matrimonial debt

- CA agrees that some of this debt was incurred to reduce the matrimonial property division available to the wife
- Only ¼ of the debt is to be attributed to the wife

Ratio: Matrimonial debt is generally understood to be that debt which is incurred during a marriage

- To the extent that the debt relates to s 7(4) property, acquired during the marriage, the presumption is a 50% division of the net equity in the property

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REQUIRED READING:

Busenius v Busenius, 2006 ABQB 162

Facts: Contest over property accumulated during the marriage

Issues: How do you deal with post-separation debt?

Reasons:

- Because the law in AB is that valuation of matrimonial property is done at the date of trial, the proper treatment of debts incurred after separation becomes relevant
- Where the increase in debt does not create an asset, or you cannot tie it to the marriage, then it is just and reasonable to not divide the debt equally. You must look at the purposes of the debt and see if it was incurred to the breakdown of the marriage or if it can be tied to an asset.

Dec 1, 2020

Note: After distribution, s. 36 argument?

- If you are going to make s. 36 argument, that s. 7 should be divided equally (because it was in joint names, etc.) then make s. 36 here

Occupation rent

- Common law attribute of joint tenancy
- The rights to occupation rent or to receive rent if you are not occupying a piece of property that is in joint tenancy
- In Family Law context, its always something you can put in your pleadings
    - If your not sure, check off the box that says it
- Normally, one person stays in jointly owned home (they're paying the mortgage) and the other person moves out and pays rent. The person paying the mortgage says I've paid it down, and increased your equity. The other person says you had enjoyment and I had to pay rent elsewhere.
    - Usually the person who is out of the home wont get occupation rent.
    - Usually occupation rent comes in a situation where the person is staying in the family home, the home is unincumbered (no mortgage) and the other person is out paying rent.
        - Most likely circumstance where there will be an argument about occupation rent. "you stayed in the house and I had to go pay rent or another mortgage, you owe me occupation rent"
            - Not the only time occupation rent comes up, but mostly when the issue arises
                - In most cases, the one person is paying off the mortgage and the other is paying rnet – called a wash – the court says they cancel out themselves
- What do we need to know about occupation rent?
    - Justice Slatter in *Kasmeri case* – seminal case for occupation rent
        - Gives a list about what we should know for occupation rent, he states:

Family Law Part 2

- 1. Spouse who is not in possession (i.e. the spouse living away) generally isn't entitled to occupation rent if the other spouse is living at the home with the kids and isn't claiming support or wanting expense contributions towards the house.
- 2. IF the occupying spouse does make a claim for contribution to expenses, and the claim for occupation rent, and child/spousal support should be considered together.
    - What he is getting at is this: If for instance the person in the house is paying for spousal/child support and they want other side to contribute to the expenses of the house in addition, and the person outside of the house has applied for occupation rent, the judge says they should all be heard at the same time, because if the person in the house is paying occupation rent, that is an expense, which is considered in spousal support. And if occupation rent is received, that's income for the purpose of child support.
- 3. Most cases it is easier to eliminate the occupation rent concept from the equation and just talk about child and spousal support.
    - Most do this – deal with child and spousal support first and then if there is a claim for occupation rent and is dealt with not as purpose of income, but for division of property.
        - I.e. "should've been paying me occupation rent for 1.5 years, this should be taken into account for division of property"
- 4. The person occupying the house generally isn't entitled to a credit for the mortgage and taxes paid by them. The only possible exception is with respect to payment that goes to reduce the principle.
    - What he means is this; Mortgage payment (some goes to principle, some goes to interest)
        - unless you got a small mortgate left most of the money goes to interest and very little to actual principle
    - Per Lori: if the other spouse is out paying rent else where – court will call it a wash and not deal with the issues of occupation rent
- 5. There may be cases where the family unit cannot afford to maintain the family home, and if one spouse insists on staying in the house, and wants to take the financial sacrifice, than fairness may require that occupation rent be included in the overall equation
    - What he is saying is that in some cases, one person staying in the house it is clear that they cannot qualify for mortgage to buy the other person out and vice versa – neither can afford to keep the house, but if the one in the house is insisting, the court then says fairness says you should take into account occupation rent.
- 6. Rarely if ever should one spouse be able to claim in a capitalized form, years later in a property action
    - What used to happen is that people did pleadings, than 2 weeks before trial they realize they haven't claimed occupation rent and they'd try to amend their pleadings or would just argue it at trial without notice to the other side.
        - Not really an issue anymore, because when you fill out the SOC, in SOC in division of family property, there is a box for occupation rent.
            - Per Lori: If uncertain, claim anyways.
- In most cases, it comes up that someone is living in an unencumbered house and the other spouse is living else where. The spouse paying rent elsewhere claims occupation rent. If the court agrees the question becomes what amount is the value of the occupation rent?
    - Do you look at okay have you rented out the home, you would get XXX and I am entitled to half of that?
        - One approach but keep In mind if they rented out the house, the rent received would have to be claimed on taxes, so take into account notional taxes on that.
    - Or, another way to look at occupation rent is that the person who moved out of the home, look at their rent, the other person doesn't have a mortgage, the cost of both of

them is XXX, then half that and the occupying spouse owes the other spouse this amount for each month they're outside the home.

- One of the ways is to avoid a fight about occupation rent, is in the situation, you may have a situation that the only property the parties have is the jointly owned home – one person may move out and the other person in the home cannot afford to buy out the home, or the other person doesn't want to. The person in the home may refuse to deal with it (doesn't want to move out, doesn't want to sell the home) and this is really the only property the parties have and it cannot be offset from a shared debt or pension or something, then you can under the Law Property Act bring an application to sever joint tenancy or bring an interim application under Family Property Act to put the home up for sale.
    - You would say in your documents, neither one of us can afford to purchase the other's interest in this home, this is the only property we have that has equity, the other person refuses to deal with it, and put in a suggested price or a price suggested by the listing agent. "I suggest we list the house for $600k, I propose we accept any offer between $550-600k".
        - If you think the situation is going to get very messy, can get an order that says to dispense with necessity for them to sign with listing agreement and/or dispense with them having to sign the acceptance of the offer.
            - Usually this has to be very bad for these dispenses to be allowed.
        - If the person is going to stay their while the house is being sold, have provisions that say the person living their must take care of the home, maintain the mortgage, not remove anything from the home, etc.

Dower Interest

- Keep in mind that if people are married and one of them has lived in a property, it is subject to the Dower Act.
    - This normally comes up in 2 situations
        - (1) if you're dividing the property and the parties aren't yet separated, but you've agreed that one party will transfer their interest to the other party, you have to transfer land and release Dower rights if you are still married
        - (2) the parties separate, one remains in the home, the other party moves out and it's a fairly long separation, they decide their going to buy a home
            - usually borrow money from a parent and have them on title. If they decide to subsequently sell that new home and are still legally married, have to get a Dower release from the other side even though no matrimonial money didn't go into it, the other party doesn't live there, doesn't matter – have to get Dower release, if the other side doesn't agree, have to make an application to court to have necessity of Dower release waived.

Bankruptcy

- What do you do when one or the other parties has declared bankruptcy – can screw up property division like crazy.
    - If one party declares bankruptcy and the other doesn't, the one who doesn't may end up having to repay the family debts.
        - May be able to get judgment that says the bankrupt owes XXX about of money, but bank still wants to be paid.
    - If your client comes to you and says they think they may need to declare bankruptcy and its legitimate
        - must be legitimate bankruptcy, cannot just claim bankruptcy if you don't like a child support order or something.
        - must give some notice to the other side, have to let opposing counsel now, try to settle things as much as possible before the party declares bankruptcy (professional responsibility to inform other side).

- IF you are acting for someone who is an undischarged bankrupt (i.e. having been discharged form their bankruptcy), they cannot make the final decision on division of property, if they are still under a bankruptcy you have to get the trustee has to sign off on division of property.
  - Because trustee has taken control of the property, so they make the decisions not your client.
- Case law about overturning bankruptcies etc.
  - It can be problematic, so the sooner you know the better and you may have to consult a bankruptcy lawyer.
  - Be aware it can be problematic, and if acting for undischarged bankrupt, trustee signs off not client.

Lottery

- May run into situation where someone wins the lottery and if they win the lottery when the parties are together, going to be family property, going to be s. 7, 4 property and presumption of equality applies.
- Issue comes in when the parties are separated, and one of the other win's lottery.
  - Question is, you bought that ticket with the joint account, my paycheck is still going to joint account, so you used that money to buy the ticket so I am entitled to half.
    - Good luck tracing where the money came from.
  - Question becomes is this income or is this property? Similar to stock options.
    - Not a lot of case law about this.
    - Rule of thumb: In general, the longer that you're separated (if someone wins lotto 2 months after separation, more likely to be divided equally, 2.5 years later, less likely to be divided).

Points/Rewards

- Be aware of things like airmiles, airline points, Costco points, AMEX points
  - Sometimes people have accumulated large amounts of these, they go to divide property, this becomes an issue – can be worth a lot of money, especially if been saving for long periods
- What do you do with these?
  - If they're accumulated the time that the parties are together, presumption of equality in s.7(4) s. 7(5) property
    - Usually what happens, especially if attached to a credit card (usually in one person's name), so that named person has points in their name alone
  - When you go to divide, some plans allow the estranged partner to set up their own account and split the points into two accounts.
  - Some plans will allow you to transfer to separate cards
  - Other plans do not allow for the above so you have to determine another way of doing it
    - One way is determine the value and one party pay half the value to the other and the paying party keeps airmiles
      - Usually by agreement
    - Other way is setting out the agreement saying:
      - Party A has 1 million airmiles, the other person is entitled to 500k airmiles, and this agreement shall constitute Party A's consent for Party B to use up to 500k airmiles, so that they don't have to keep going back for their consent. Or, people want notice, so Party B gives Party A notice to use the airmiles, and some restrictions say Party A may not infringe on the 500k that belongs to Party B.
        - Not much you can do but sue on the agreement is Party B uses all 1 million.

Family Law Part 2

Property & Agreements

- The vast majority of people don't go to trial and very seldom go to interim application with regards to property.
    - Vast amount of property division (may be application for exclusive possession or freeing order) done by way of written agreement.
        - Normally if legally married, called minutes of settlement. If not married, division of property agreement.
            - It is a written agreement.
- Part 1 of the Act
    - s. 7, 8 – sets out type of property and how to be divided, gives principles of division of property.
    - S. 37 and 38 of the Act allow the parties to enter into agreements between themselves despite what s. 7 & s. 8 say.
        - If you look at the act, s. 37 allows agreements (ability to enter into agreements)
            - 37(1) Part 1 does not apply to property that is owned by either or both spouses or adult interdependent partners or that may be acquired by either or both spouses or adult interdependent partners, if, in respect of that property, the spouses or adult interdependent partners have entered into a subsisting written agreement with each other that is enforceable under section 38 and that provides for the status, ownership and division of that property.
                - Note: S. 37(1) gives ability to enter into agreement that if it meets specifics of s. 38 and if there's no reason to question it, allows parties to divide property however they want (how most people do it)
                    - applies to agreements done after the parties separate, agreements done prior to the parties cohabitating or getting married (Cohab or prenup agreement covered by s. 37).
            - 37(2) An agreement under subsection (1) that is entered into by 2 persons before marriage is unenforceable after the marriage unless it is clear in the agreement that the parties intended the agreement to apply or continue to apply after the marriage.
                - Referring to people moving in together, planning on getting married, call their agreement prenup agreement, and then they never get married just live together, and then they separate and one of the parties want to rely on the prenup agreement, and because it says it was being done in contemplation of marriage and they never got married, it never took effect (of no force or effect).
                - Idea is that if someone comes to you and says they may get married, plan on it, were going to live together, and the possibility of marriage is there, make it clear that the agreement takes effect immediately and at that any subsequent marriage doesn't vitiate the agreement.
                    - Make it clear when it starts to take effect, and if unclear if their going to get married, call it a Cohab and Prenup agreement. S. 37 gives ability to enter into agreements, s. 38 gives formalities of the agreement. S. 38 requires an acknowledgement that says parties aware of nature and effect of agreement, aware of possible future claims they may have under the act and intend to give up those claims to give effect to an agreement, and they are signing freely without compulsion from the other party.
        - If you look at the act, s. 38 formal requirements for agreement
            - 38(1) An agreement referred to in section 37 is enforceable if each party to the agreement has acknowledged, in writing, apart from the other party

- (a) that the party is aware of the nature and the effect of the agreement,
- (b) that the party is aware of the possible future claims to property the party may have under this Act and that the party intends to give up these claims to the extent necessary to give effect to the agreement, and
- (c) that the party is executing the agreement freely and voluntarily without any compulsion on the part of the other party.
- Note: The wording in s. 38(1)(a-c) is the same wording that everyone uses for Family Property Act acknowledgment.
    - Your client signs that acknowledgment – I know whats in this agreement, I know what im entitled to under the act, im waiving these entitlements, and im doing so freely.

- 38(2) The acknowledgement referred to in subsection (1) shall be made before a lawyer other than the lawyer acting for the other party or before whom the acknowledgement is made by the other party.
    - Note: This means, they do an acknowledgement, then lawyers do certificate of acknowledgment
        - so the lawyer says that the person acknowledged to you and then you replicate the wording in s. 38(1).
        - What it means, if you divide property by consent only, each have to have ILA (independent legal advice) and sign acknowledgement under presence of lawyer – if not, not binding under Family Property Act.
            - You want the certificate of ILA because it says that heres a lawyer saying I explained it, they acknowledged they understood, so if they come back and say they didn't understand or were under duress, hard to get over the certificate. Not required but many lawyers wont sign for the agreement without one.
                - Agreements are as binding as judgment of the court.

- Recall: section 37 allows us to do the agreement and section 38 is the formal requirements that must be met

- Specifics of agreements
    - What you want when drafting agreements is for them to be as binding as a court judgment, don't take the agreements lightly.
        - If it's a pre-relationship agreement or post-relationship agreement, parties may come to you and do an anti-nuptial agreement or whatever, want to stay married/together but cannot run finances together so want to do division of property agreement but stay together.
            - In all other these, don't rely on templates just around the office, each agreement must be specific to each client, some provisions may be the same. <u>Have a good template that covers many circumstances and adapt to the circumstances.</u>
                - Going to be many more of these because of change from Matrimonial Property Act to Family Property Act.
                    - Lot of people living together who made the decision to not get married and now realize the property act applies to them, there are going to be a lot of people looking for cohab agreements

Family Law Part 2

- important agreements, don't go them on the fly, take seriously because someone always wants to set aside the agreement, so want to be as binding and tamperproof as possible.

- How set aside agreement:
  - one of the arguments that can be made if you want to set aside an agreement, have done minutes of settlement, done division of property agreement - one of the reasons would be doesn't meet formalities of s. 38
    - if does not meet formalities of s. 38 it means the agreement is probably no longer binding, just evidence of parties' intent, doesn't mean their bound.
  - Lack of complete disclosure can be another reason.
    - Disclosure has always been an issue – see now a doc we use regularly is the notice to disclose, and it sets out 16 different categories of discloser that people have to comply with, or can be compelled to comply with to provide the other side
      - (Tax returns, NOAs, 3 years of corporate FS, budget, bank account statements, CC statements, exemptions claiming and exemption documents, sworn statement of assets and liabilities (Schedule A)).
    - Lots of times people will come and say they just want to divide the property, we all know what each other have, don't need to disclose
      - If you say yes ill sign theh agreement with you be prepared you will be sued if you sign disclosure without them down the road.
      - There has to be disclosure.
        - People cant make informed decisions if they don't know what property is.
          - At the very least, sworn statement of assets and liabilities, should get full disclosure, but this is the bare minimum.
    - If no disclosure, someone will come back and say the other side had this property that they purchased when we were together, property in the Bahamas, or shares, and depending on the agreement, may say that if they're undisclosed assets it doesn't rid of the whole agreement, just have to divide them, or court may say no, if there wasn't full disclosure, start over, and doesn't matter what's been divided, throws out whole thing and start over.
      - NEED DISCLOSURE

      If other side doesn't want to disclose anything else, they can be forced too and be held in contempt. If someone wants you to sign disclosure, and no disclosure or unsatisfactory disclosure, dont sign it - will get sued and reported to LS.
    - Everyone must know what is available before they can waive entitlement to it. Clients that dont want to disclose, not going to like you advice, because wont get division of property. Do go through the process if not going to be worth it.
  - Lack of disclosure or lack of compliance with formalities are two reasons court will look at overthrowing an agreement
- there are other things that parties will claim as reasons to overturn agreement: Mistake unconscionable agreement, duress, undue influence
  - mistake (someone signing document thinking document had one character and effect when it had another, Truly believed it said something else or meant something else, difficult to prove, especially if you got ILA),
  - duress (common - either didn't understand, under some pressure),
    - def: threat of death or serious physical jury, meant to coerce someone into singing, vitiates consent. Intimidation, application of illegitimate pressure.
  - undue influence (counts as abuse of power more subtle that actual duress, depends on Sufficiency of person's consent - some relationships bring about undue influence

Family Law Part 2

- no presumption of undue influence for spouse or AIP for purposes of FPA
    - have to show one person had ability to dominate the other (domination, manipulation, etc)
        - usually look at past relationship to see if there can be established pattern of dominance such that undue influence can be shown and it was so bad that it vitiated consent that the other side had
        - Per Lori: you will see one party will hire lawyer to draft agreement, and then that person then gets spouse you must sign the agreement, the other spouse takes them to the lawyers, etc. and claims they'll do something like take away child custody or something)
    - Note: Idea behind these agreements and why you have to sign separate and apart from spouse, the reason you have to sign acknowledgment in front of a lawyer because lawyer is going to, if they think coercion or undue influence, not sign them with them. Do not sign if you have suspicion.
- if you each have ILA, full disclosure, had to say that you have undue influence or duress or mistake - hard to overturn on those basis (because have lawyer explain it to you)
- unconscionability
    - court has to find that there is inequality between the parties, preying of one party upon the other and that preying combined with improvidence (unfair division), then onus on the party to act with scrupulous care for welfare for the other.
    - 2 prong test:
        - objective: agreement grossly unfair, improvident, for our purposes, deviates significantly from the FPA. The objective portion is to say how far does it deviate from division that would've been given under the Act
        - subjective: in negotiating the agreement, did the stronger party prey on or take advantage of weakness of other party
            - Courts have discussed the climate of negotiation – acknowledge that when people are negotiating division of property, often upset, can become volatile, can give appearance of one party taking advantage of another, in that kind of environment, put more emphasis on objective portion of the test when looking aat agreements
                - How far does it deviate from what division property would be under the the Act (our case FPA)
    - Those kind of allegations are hard to prove these allegations if met formalities, ILA, acknowledgments signed, may have unequal division of property, but not necessarily unconscionability.
        - You can deviate from the act, but hard to overturn agreement if you have all the other things.
- Note: you will here it all the time "I was under duress"… first thing to do if claiming duress, look at signature page for certificate of ILA, acknowledgment signed, and full disclosure
    - if they just want to come in and sign, not retain you, if you are going to sign with them, have to read through agreement and when you get them in their, say want to see disclosure that you got, did you exchange full disclosure? go through entirely, can't just sign with them. At least confirm for yourself somewhat within the realm of possibility that would happen under the Act.
        - Hard if you're not in negotiations to then sign the ILA certificate.
            - Go through agreement, make sure they understand it .

Family Law Part 2

- SCC Decision - ***Rick v Brandsema***
    - Issues: the negotiation environments for family law issues, issue of full disclosure, issue of unconscionability
    - turned to *Miglin* decision for Spousal Support
        - test they set out in *Miglin* is the test for unconscionability
            - 1. was one party weaker, and the stronger took advantage? (subjective)
            - 2. did it comply with the Dviorce Act provisions? (objective)
    - <u>Use Miglin standard for division of property.</u>
    - Court said the following:
        - [39] While Miglin dealt with spousal support agreements in the context of a divorce, it nonetheless offers guidance for the conduct of negotiations for separation agreements generally, including negotiations for the division of matrimonial assets.
        - [40] There is no doubt that separation agreements are negotiated between spouses on the fault line of one of the most emotionally charged junctures of their relationship — when it unravels (acknowledgment of negotiation environment).
        - The majority in Miglin concluded that because of the uniqueness of this negotiating environment, bargains entered into between spouses on marriage breakdown are not, and should not be seen to be, subject to the same rules as those applicable to commercial contracts negotiated between two parties of equal strength:
            - "The test should ultimately recognize the particular ways in which separation agreements generally and spousal support arrangements specifically are vulnerable to a risk of inequitable sharing at the time of negotiation and in the future. . .Negotiations in the family law context of separation or divorce are conducted in a unique environment . . . [at] a time of intense personal and emotional turmoil, in which one or both of the parties may be particularly vulnerable. [paras. 73-74]"
                - Per Lori: So, because of that environment, even though no presumption of undue influence, it is even more important to have full disclosure so that people can make reasonable decisions
                    - ultimately what Brandsema talks about, <u>absolute importance of full disclosure</u>
    - Say a number of things that are important to know:
        - In my view, it flows from the observations and principles set out in Miglin that a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances (because of the environment when negotiating in family law context, to protect integrity of those results, full disclosure necessary).
        - The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation.
        - Such a duty in matrimonial negotiations (i.e. full disclosure) anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain. It also helps protect the possibility of finality in agreements. An agreement based on full and honest disclosure is an agreement that, prima facie, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. Where, on the other hand, an agreement is based on misinformation, it cannot be said to be a true bargain which is entitled to judicial deference.
            - So, full disclosure, people can make reasonable decisions, and its much less likely to be interfered with by judges down the road.
        - Whether a court will, in fact, intervene will clearly depend on the circumstances of each case, including the extent of the defective disclosure and the degree to which it is found to have been deliberately generated (if someone forgot to disclosure something, is the

disclosure such that it would make such a difference the other person would sign, was it an honest mistake?).

- It will also depend on the extent to which the resulting negotiated terms are at variance from the goals of the relevant legislation (i.e how far does the agreement deviate from FPA). As Miglin confirmed, the more an agreement complies with the statutory objectives, the less the risk that it will be interfered with. Imposing a duty on separating spouses to provide full and honest disclosure of all assets, therefore, helps ensure that each spouse is able to assess the extent to which his or her bargain is consistent with the equitable goals in modern matrimonial legislation, as well as the extent to which he or she may be genuinely prepared to deviate from them.
    - So agreement does not have to have exactly the same thing as the legislation does.
        - Example: Many people agree between themselves to have date of separation as liabilities and assets. They enter into minutes of settlement with that date in their property agreement- nothing wrong with that if parties agree to it, may not be what the court would do, but not wrong. Deviation from s. 7 & s.8 but must be deviation based on informed consent (cannot be undermined by undue influence, duress, has to be based on full and honest disclosure). Also based on full and frank disclosure →More disclosure = less likely court will intervene.
        - When discuss varying from the existing leg, what they are talking about there are things where people give up all rights for $10k but may be entitled to $1million… a court may be like stop you deserve more.
    - Idea is to try to get people to settle things (stay out of courts) so courts not going to intervene unless the situation is one where there has been some sort of effective enough disclosure that it prevents someone from entering into an agreement, or a negotiating environment fraught with emotion
- Courts are sticklers about disclosure
    - people have to know what they're entitled to if they're signing off their rights
    - ways to force people to disclose

- Cohab and Prenup agreements
    - When people separate their property ends up in an agreement you can do the agreements before a relationship (prenup, cohab)
    - what goes into those agreements?
        - same sort of analysis that you would do for separation
            - s. 7(2)(3)(4) - how do we divide it
            - ask all of those same questions
        - each of them lists assets and liabilities
            - usually attached as Schedule to agreement
        - this is the stuff you have now, what if you sell it and buy something else, does that still belong to you? (s. 2)
        - what happens if you decide you want to change something into joint names?
            - do they automatically get 50%? say how it gets divided, say what happens to income of exempt property, replacements of exempt propertty.
        - Address in the agreement
            - what happens with inheritances? third party gifts?
        - look to what happens for s. 7(3) property? increase in value? gifts between parties?
            - How do you deal with? Should one party get inheritance? Etc.
        - what happens to property they acquire jointly when their together?
            - under act, presumption of equality, is that what they're going to do here- what if one party put 25% and the other put 75% in? do they get that in ownership?

Family Law Part 2

        - ends up being longer than division of property agreements at end of relationship – need to address everything
            - Bring everything into it
- Per Lori: don't just rely on templates - case by case basis
    - especially with these
        - for example: alot of people will say these dont want to pay spousal support or child support - can put them in, but not binding regardless if the agreement is binding; if found local parentis you are on the hook
        - spousal support waiver at beginning of relationship - evidence of intent at the time, highly unlikely people will respect that if the partner gets sick and cant work or something
        - child support is the right of the child - so the parent doesn't have the right to waive - can say the intention is not to pay, but not binding
        - if people want these clauses, sign letter saying they understand they are included only as evidence of party's intent