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LAW 524: Family Law

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* Canadian family law concentrates on the rights of individuals whose family relationships have become dysfunctional; it deals primarily with the pathology of family breakdown and its legal consequences.

# Jurisdiction over Family Law Matters

* Legislative power over family law matters is fragmented.
  + s. 91(26) gives Parliament jurisdiction over "Marriage and Divorce."
    - Allows Parliament to control who can and cannot marry (see *Civil Marriage Act* and *Marriage (Prohibited Degrees) Act*) and to assume exclusive jurisdiction over divorce (see *Divorce Act*).
    - Where a claim for support or custody arises in divorce proceedings, the dispute is governed by federal divorce legislation as an ancillary to Parliament's divorce jurisdiction (*Reference re Adoption Act*).
  + s. 92(12) gives the provinces jurisdiction over the "solemnization of marriage"
    - Allows provincial legislatures to control marriage procedure.
  + s. 92(13) gives the provinces jurisdiction over "property and civil rights in the province."
    - Allows provincial legislatures to legislate regarding family property division (see *Family Property Act*).
    - Where a claim for support or custody arises independently of divorce, it is governed by provincial legislation (*Reference re Adoption Act*).
  + s. 92(14) gives the provinces jurisdiction over the "administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."
* Judicial jurisdiction over family law matters is also fragmented.
  + In most Canadian provinces, two levels of court share the responsibility for resolving family disputes, namely, courts presided over by federally-appointed judges and courts presided over by provincially-appointed judges.
  + In Alberta, the Provincial Court cannot grant a divorce, divide family property, give exclusive possession of a home or household goods to one person, grant a Declaration of Parentage, grant a Declaration of Irreconcilability, or give direction regarding money in trust or dealing with real property; it can deal with all other family law issues.

# State Recognition of the Family Unit

* The term "family" does not have a precise legal definition.
  + Traditionally, the family was defined by its *form*: a heterosexual married couple with biological children.
  + Now, family is defined more by its *function*, and can take many diverse shapes.
    - The traditional nuclear family is now a minority group in terms of contemporary family structures.
    - Family relationships can exist where there is neither marriage nor a parent–child or ancestral relationship, and same-sex relationships are now recognized by statute.
      * As of 2016, about 1/5 couples in Canada were living in common law relationships, up from only 6.3% in 1981.
    - The reasons for changes in family forms include: s. 15 of the Charter, reproductive technologies, ascension of child rights, people having less children, and people getting married later in life.

## Traditional Marriage

### Definition of Marriage

* In 1866, the English case *Hyde v Hyde* defined marriage as a voluntary union for the life of one man and one woman, to the exclusion of all others.
* In 2003, in *Halpern v Canada (AG)*, the ONCA held that the common law definition of marriage from *Hyde v Hyde* violated s. 15 of the Charter. The Court thus removed from the definition the requirement that the spouses be of the same sex.
  + Similar cases have been similarly decided in other provinces, and these decisions have been upheld by the SCC.
* In 2005, to codify the legitimacy of same-sex marriage, Parliament enacted the *Civil Marriage Act*; the Act outlines the requirements of a valid marriage.
  + s. 2 defines marriage are the "lawful union of two persons to the exclusion of all others," while s. 4 further clarifies that a marriage is not void or voidable by reason only that the spouses are of the same sex.

### Requirements of a Valid Marriage

* While the intention of parties to contract marriage is all-important, their motive for doing so is irrelevant.
  + Canadian and English authorities have held that marriages are not invalidated by reason only that it was entered into solely as a device to evade immigration regulations (an immigration "marriage of convenience").
* A void marriage is a marriage that is invalid from the beginning; a voidable marriage can be cancelled at the option of one of the parties through annulment, or can exist notwithstanding a flaw if the parties choose to treat it as valid.
* Matters pertaining to the essential validity of marriage, which include the capacity to marry and consent to marriage, are governed by the law of the domicile of the parties at the time of their marriage, or possibly the law of their intended matrimonial domicile.

#### Capacity

* 1. Age requirements
     + s. 2.2 of the *Civil Marriages Act* provides that no person under 16 can marry.
     + s. 17 of the *Marriage Act* provides that no person shall issue a marriage license or solemnize the marriage of anyone under the age of 16.
  2. Consent
     + s. 2.1 of the *Civil Marriages Act* requires the free and enlightened consent of two persons to be spouses.
       - Judicial decisions have differed on whether the lack of consent renders a marriage void or only voidable at the option of the non-disabled or innocent party.
     + Consent can be vitiated by:
       - Duress (i.e., pressure or coercion inducing fear)
         * Mere reluctance or the sensing of pressure is not enough; duress must be of such a nature as to completely overbear the will to consent.
         * Does not require the use of physical force, or even fear for oneself (i.e., it could be fear for some other person).
         * Coercion sufficient to undermine consent may arise from external sources (e.g., the fear of political oppression in one's homeland).
         * The duress inquiry focuses on the parties' emotional state at the time of the marriage ceremony.
         * Where duress is present, the marriage is voidable at the option of the coerced party.
       - Mistake (about nature of ceremony or core identity of the other spouse).
         * Mere mistakes about the character or attributes of a spouse do not invalidate a marriage, nor do fraudulent misrepresentations that induce a person to marry.
       - Excessive alcohol and drug intoxication
         * The degree of intoxication must be such that the afflicted person, at the time the marriage was solemnized, was incapable of understanding the ceremony of marriage and the duties and responsibilities that flow from marriage (*Barrett Estate v Dexter*).
  3. Unmarried
     + s. 2.3 of the *Civil Marriages Act* provides that no one may marry until every previous marriage has been dissolved by death or divorce or proved null by a court order.
  4. Consanguinity
     + s. 2(2) of the *Marriage (Prohibited Degrees) Act* holds that no person shall marry another person if they are related lineally, or as brother or sister, half-brother or half-sister, including by adoption.
       - Under s. 3(2), if such a marriage does occur, it is void *ab initio*.
  5. Mental capacity
     + Both parties to a marriage must understand the nature and duties of a marriage contract (*Ross-Scott v Potvin*); this is a very low bar.
       - Reduced cognitive capacity alone will not prevent one from marrying, provided they are capable of managing their own affairs.
     + People are presumed to have the capacity to marry; the onus is on the person making a claim of incapacity to show that there is lack of capacity.
       - If incapacity is proven, then the marriage is declared void at the outset.

#### Compliance with formalities

* + - The provincial *Marriage Act* sets out formalities of a marriage ceremony in Alberta.
  1. s. 3 provides that no one may solemnize a marriage except a member of the clergy (registered under the Act) or a marriage commissioner appointed under the Act.
  2. s. 8(2) provides the statements that the parties must declare during the marriage ceremony.
  3. s. 9 provides that no one shall solemnize a marriage except within 3 months after the date of the issue of a marriage license.
  4. s. 10(1) provides that no one can solemnize a marriage without the presence of the parties and at least 2 credible, adult witnesses.
  5. s. 10(2) provides that no one can solemnize a marriage when one or more of the parties do not understand the language in which the ceremony is conducted (unless an interpreter is present).
  6. ss. 13 and 19 sets out the rules and procedure for applying for a marriage license.
  7. s. 17 provides that no person shall issue a marriage license or solemnize the marriage of anyone under the age of 16.
  8. s. 19 provides that the consent of each guardian is required for the marriage of anyone under 18, though s. 20 allows for those under 18 to apply to dispense with parental consent.
  9. s. 21 allows a spouse to apply to get QB to make a decree of presumption of death when they have reasonable grounds to believe that their spouse is dead.
  10. s. 23 provides that a marriage is not invalidated by reason only of a contravention by the person who solemnized the marriage or issued the marriage license.
      + If this is the case, the QB can declare that the marriage was lawful notwithstanding the contravention.
      + However, non-compliance with the Act may result in penalties (see ss. 25 and 26).
  11. s. 27 relates to capacity issues.
      + s. 27(1) and (2) provide that a person cannot issue a marriage license when they know or have reason to believe that a spouse has a guardianship or trusteeship order. A license cannot be issued until notice has been given to the spouse's trustee or guardian and they do not object.
      + s. 27(3) provides that no one shall issue a marriage license or solemnize a marriage of a person who they know or have reason to believe is under the influence or alcohol or drugs.
* ss. 3 and 3.1 of *Civil Marriage Act* recognize that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.
  1. This saves the *Civil Marriage Act* from Charter litigation under s. 2(a).

#### Consummation

* + - Impotence renders a marriage voidable (*Fyith v Sleiman*), but a wilful refusal to do so does *not*.
  1. Impotence is *not* merely an inability to have children; it signifies an incapacity to engage in normal, physical sexual intercourse.
     + Impotence may arise from either physical incapacity or an unsurmountable repugnance or aversion to sexual intercourse.
     + Impotence must exist at the time of the marriage and throughout the marriage, and it must be incurable.
       - It will be regarded as incurable when the condition can be remedied only by an operation attended by danger or when the spouse under the disability persistently refuses to undergo treatment that carries no significant risk.
  2. A marriage is consummated on the first occasion when the spouses engage in *postmarital* sexual intercourse; once consummated, always consummated.
  3. However, as between same-sex spouses s. 4 of the *Civil Marriages Act* says that, for greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.
     + Either or both parties to a marriage that has not been consummated can petition the courts for annulment (though divorce would probably be easier).

## "Common Law" or Cohabitational Relationships

### Marriage Valid at Common Law

* A marriage valid at common law is a distinct type of relationship from what is colloquially referred to as a "common law" relationship.
  + A marriage valid at common law lacks the legal formalities of compliance with statutory requirements; it results in an informal ceremony in which the parties agree to take each other as husband and wife (*Keddie v Currie*).
  + A marriage valid at common law is treated as a marriage for all purposes (*Keddie v Currie*).

### Cohabitational Relationships

* While the cases below demonstrate some uncertainty regarding the protection of cohabiting couples by s. 15(1), numerous statutes that confer benefits on married persons have been amended to include within their ambit unmarried cohabitants.
  + e.g., in 2020, Alberta renamed the *Matrimonial Property Act* the *Family Property Act*, extending property sharing on relationship breakdown to unmarried cohabitants.

#### *Miron v Trudel*, [1995] 2 SCR 418

Facts:

* The appellants, Miron and Valliere, lived together with their children. While they were not married, their family functioned as an economic unit. After Miron was injured in an automobile accident, he made a claim for accident benefits against Valliere's insurance policy. The policy, the terms of which were prescribed by the *Insurance Act*, extended accident benefits to the "spouse" of the policy holder. The insurer denied his claim on the ground that Miron was not legally married to Valliere and hence not her "spouse."

Issue and holding:

* Is the statutory interpretation of the word "spouse" limited to married couples? **YES** (*reasons omitted*)
* If yes, does the denial of accident benefits to unmarried cohabitants violate s. 15(1) of the Charter? **YES**
* If yes, is the denial of accident benefits justified under s. 1? **NO**

Rationale:

* The exclusion of unmarried partners from accident benefits available to married partners under the policy violates s. 15(1).
  + Denial of equal benefit on the basis of marital status is established in this case.
  + The denial of equal benefit constitutes discrimination.
    - *Marital status is an analogous ground of discrimination* for purposes of s. 15(1).
      * Discrimination on that basis touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination.
      * Persons involved in unmarried relationships constitute a historically disadvantaged group.
      * Marriage is an immutable characteristic; while in theory, the individual is free to choose whether to marry or not to marry, in practice, the reality may be otherwise.
    - The unequal treatment violates dignity and freedom, perpetuates an historical group disadvantage, and is based on stereotypical group‑based decision‑making.
* The state has failed to demonstrate that the exclusion of unmarried couples from motor vehicle accident benefits is demonstrably justified.
  + The goal of the legislation at issue, which is to sustain families when one of their members is injured in an automobile accident, is of pressing and substantial importance.
  + The legislative goal is not rationally connected to the discriminatory distinction.
    - Marital status is not a reasonably relevant marker of individuals who should receive benefits in the event of injury to a family member in an automobile accident.
    - *Cohabitational relationships serve the same function in society as married relationships*.
  + The law impairs s. 15(1) rights more than reasonably necessary to achieve that goal.
    - On the issue of defining who should receive benefits on a basis that is relevant to the goals underlying the legislation, alternatives substantially less invasive of Charter rights exist.

#### *Nova Scotia (AG) v Walsh*, 2002 SCC 83

Facts:

* Walsh and Bona lived in a cohabiting relationship for 10 years, during which they had two children. After separation, Walsh claimed support for herself and her two children. As their relationship was common law, the onus was on Walsh, by way of constructive trust, to prove the extent to which she might be entitled to a share in property held in Bona's name. She therefore sought a declaration that Nova Scotia's *Matrimonial Property Act* was discriminatory (and hence unconstitutional) in failing to furnish her with the presumption, applicable only to *married* spouses, of an equal division of matrimonial property.

Issue and holding:

* Does the *Matrimonial Property Act* discriminate against heterosexual unmarried cohabitants contrary to s. 15(1) of the Charter? **NO**

Rationale: (Bastarache J)

* The *MPA* does *not* perpetuate the view that unmarried couples are less deserving of recognition and respect because its distinction between married and unmarried, cohabiting couples reflects and corresponds to the differences between married and unmarried relationships and respects the fundamental personal autonomy and dignity of the individual.
  + In a married relationship, the spouses can be said to freely accept mutual rights and obligations. The same cannot be said of the decision to live together.
    - Marriage is an economic partnership that imposes significant benefits and obligations on the spouses (e.g., obligation to share marital property on marriage breakdown). Many cohabitants have specifically chosen not to marry to *not* take on such obligations, and instead wish to maintain their respective proprietary interests. To ignore this nullifies the individual's freedom to choose alternative family forms.
      * If cohabitants have chosen not to marry, it is not the state's task to impose a marriage-like regime on them retroactively.
  + Unmarried cohabitants are free to marry, enter into domestic contracts, and own property jointly so that they are able to access all of the benefits extended to married couples under the *MPA*.
    - Situations like Walsh's can also be addressed through remedies like the constructive trust.
  + Unlike in *Miron v Trudel*, the relationship at issue is between the parties to the marriage itself and not the relationship between the couple and third parties.

Dissent: (L'Heureux-Dubé)

* + Since the purpose of the *MPA* is to alleviate the need for the redistribution of economic resources upon relationship breakdown, limiting the recognition to married cohabitants implies that the needs of unmarried cohabitants are not worthy of the same recognition solely because the people in need have not married.
    - Heterosexual unmarried cohabitants experience similar needs as their married counterparts when the relationship comes to an end. In this sense, the relationships are functionally equivalent.
  + The *MPA* has nothing to do with choice or consensus, and everything to do with recognizing the needs of spouses at the end of the relationship. Initial intentions are, therefore, of little consequence.
    - Matrimonial property legislation imposes a wealth distribution regime on marriage dissolution *without regard* for the wishes of married cohabitants at the outset of their relationship.
    - Even so, marriage is not really a type of arrangement people enter into with the legal consequences of its demise taken into account; people are not lawyers, and are often not aware of the state of the law.
  + Many unmarried cohabitants cohabit not out of choice but out of necessity. To deny someone a remedy because their partner chose to avoid certain consequences creates a situation of exploitation.
  + The *MPA* cannot survive a s. 15(1) scrutiny because of the availability of alternative remedies, as these remedies are inadequate relative to those accorded spouses under the *MPA*.

Notes:

* With *Walsh*, family law practitioners believed that the SCC would follow the same reasoning as was laid down in *Miron*.

#### *Adult Interdependent Relationships Act*, SA 2002, c A-4.5

* With the term "adult interdependent partner" ("AIP") appearing in other provincial statutes, this statute defines who is and is not an AIP.
* A person is the AIP of another if:
  1. They've lived with the other person in a *relationship of interdependence* for a continuous period of not less than 3 years (or if there is a child of the relationship, a period of some permanence), or
     + A "relationship of interdependence" is a relationship outside of marriage in which two persons share one another's lives, are emotionally committed to one another, and function as an economic and domestic unit [s. 1(1)(f)].
       - In determining whether 2 persons function as an economic and domestic unit, all the circumstances must be taken into account, including [s. 1(2)]:
         1. whether or not the persons have a conjugal relationship;
         2. the exclusivity of the relationship;
         3. the conduct of the persons in respect of household activities and living arrangements;
         4. the degree to which the persons hold themselves out to others as an economic and domestic unit;
         5. the degree to which the persons formalize their legal responsibilities toward one another;
         6. the extent to which contributions have been made by either person to the other or to their mutual well‑being;
         7. the degree of financial dependence or interdependence;
         8. the care and support of children;
         9. the ownership, use and acquisition of property.
       - A relationship of interdependence does not exist where one person provides the other with domestic support for consideration or on behalf of another person or organization.
  2. The person has entered into an AIP agreement with the other person [s. 3(1)].
     + An AIP agreement is invalid if induced by fraud, duress, or undue influence, if one of the parties lacked the capacity to understand the nature of the agreement, or if the parties were not intending to live together in a relationship of interdependence when the agreement was entered into [s. 8(1)].
     + A person cannot enter an AIP agreement is they are a party to an existing one, if they are married, or if they are a minor (unless they are 16 or older and have parental consent) [s. 7(2)].
  3. Persons related by blood or adoption can become AIPs, but only by entering into an adult interdependent partner agreement [s. 3(2)].
  4. Minors can become AIPs unless the other partner is related to them by blood or adoption [ss. 4(1), 6].
  5. A person cannot at any one time have more than one AIP [s. 5(1)].
  6. A married person can have an AIP, but only if they are no longer living with their spouse [s. 5(2)].
  7. A person who alleges that they are or was in an adult interdependent relationship has the onus of proving the existence of the relationship [s. 11].
* One ceases to be the AIP of another person if [s. 10(1)]:
  1. The AIPs enter into a written agreement providing evidence that they intend to live separate and apart without the possibility of reconciliation.
  2. The AIPs live separate and apart for more than one year and one or both of them intend that the relationship not continue.
     + The period of living separate and apart is not considered to be interrupted if the AIPs have resumed living together for a period of 90 days or less in an attempt to reconcile [s. 10(2)].
  3. The AIPs marry each other or one of them marries a third party.
  4. The AIP enters into an AIP agreement with a third party.
  5. One or both of the AIPs have obtained a declaration of irreconcilability under the *Family Law Act*.
  6. Once AIPs become former AIPs, their AIP agreement expires.

## Same-Sex Unions

* In the 1980s, alongside jurisprudential developments extending the doctrine of unjust enrichment to unmarried cohabitants, many provincial statutes provided an extended definition of "spouse" to establish spousal support rights between cohabiting persons of the opposite sex who lived together for a designated period of time or had a child together.
  + *M v H* extended similar support rights and obligations between cohabiting persons of the same sex.

### *M v H*, [1999] 2 SCR 3

Facts:

* M and H cohabited in a same-sex relationship from 1982 to 1992. H was in a financially stronger position than M. The parties lived in a house owned by H. The parties started an advertising business in the house, which H contributed more to. M devoted more of her time to domestic tasks than to the business. When the business failed, H was able to find a job but M was not. After the breakup of their relationship, M, who was unemployed, commenced an action against H, claiming support pursuant to Ontario's *Family Law Act* (FLA). However, s. 29 of the Act excluded same-sex couples from the definition of "spouse." Thus, M asserted that this exclusion was unconstitutional and sought to have s. 29 extended to include same-sex couples.

Issue and holding:

* Does the exclusion of same-sex couples from s. 29 of the FLA violate s. 15? **YES**
* If yes, is it saved by s. 1? **NO**
  + Definition of "spouse" of no force or effect, with a temporary suspension of the declaration for 6 months.

Rationale: (Cory and Iacobucci JJ)

* The definition of spouse results in differential treatment by withholding a benefit on the basis of sexual orientation, a prohibited ground for discrimination.
* This differential treatment amounts to discrimination; regarding the four contextual factors from *Law*:
  1. There is a significant pre-existing disadvantage and vulnerability and these circumstances are exacerbated by the impugned legislation, which prevents persons in same-sex relationships from gaining access to the spousal support system.
  2. The legislation fails to take into account the claimant's actual situation.
     + Being in a same-sex relationship does not mean that it is an impermanent or a nonconjugal relationship.
  3. While the legislation may be meant to ameliorate the conditions of women in married or opposite-sex relationships, its allegedly ameliorative purpose does nothing to lessen the charge of discrimination in this case.
  4. The nature of the interest affected by s. 29 is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship of intimacy and economic dependence.
     + This makes it all the more troublesome that same-sex couples are ignored by the statute.
  + The exclusion of same-sex partners from s. 29 promotes the view that people in same-sex relationships are generally less worthy of recognition and protection.
* The exclusion of same-sex couples from s. 29 of the FLA is not a justifiable limitation on s. 15.
  + The objectives of the legislation are:
    - Equitably resolving economic disputes that arise when intimate relationships between economically interdependent individuals break down
    - Alleviating a burden on the public purse by shifting the obligation to provide support for needy persons to those who have the capacity to provide support for them.
  + The exclusion of same-sex couples is not rationally connected to the objectives of the legislation.
    - If anything, the goals of the legislation are undermined by the exclusion of same-sex couples.

Dissent: (Gonthier J)

* The legislation imposes differential treatment based on sexual orientation which results in the withholding of a benefit.
* However, this differential treatment does not amount to discrimination; a reasonable person can see that the legislation take into account accurate differences in a manner that respects the claimant's dignity.
  + Focusing on the correspondence factor of the *Law* test, the legislation corresponded to actual differences in needs and circumstances, and did not violate human dignity.
    - Women are often vulnerable in long-term opposite-sex relationships, and the legislature is entitled to respond to this distinct dynamic of dependence, one that does not arise as frequently as in same-sex relationships.
  + Same-sex couples do not suffer from a pre-existing disadvantage in the area of family law, because they same-sex relationships do not carry the same burden of unequal social roles, systemic dependence, and structural wage differentials that frequently characterize opposite-sex relationships.
  + The legislation has an ameliorative purpose in assisting women.
  + The consequences of the exclusion were not severe, as same-sex couples were relieved of the burden of support obligations and were free to formulate contracts to impose support obligations on themselves.

Notes:

* As stated, in 2005, Parliament enacted the *Civil Marriage Act*.
  + s. 2 defines marriage are the "lawful union of two persons to the exclusion of all others."
  + s. 4 further clarifies that a marriage is not void or voidable by reason only that the spouses are of the same sex.

# Breakdown of Family Unions

* Divorces require more than what is usually required in our adversarial process, because the people going through it are often experiencing emotional trauma.
  + Further divorce often brings about financial setbacks, and collateral parenting disputes can disrupt bonding between parent and child.
  + The devastating effects of divorce can be especially acute for those long-term homemaking spouses who is ill-equipped for gainful employment.
* Most legal divorces in Canada are uncontested; only 3% of divorces ever go to trial.
  + Issues relating to marriage breakdown are usually resolved by negotiation between the spouses.

## Options for Dispute Resolution

* There are two ways to resolve a family law issue:
  1. The parties can make their own agreement.
  2. The parties can let the court decide

### Making an Agreement

* The emergence of new statutory provisions, regulations, and rules of court show that litigation should be regarded as a last resort in the resolution of all family disputes.
* Section 7.7 of the *Divorce Act* imposes on lawyers a duty to encourage their client to resolve their matter through a dispute resolution process (unless it would clearly be inappropriate to do so) and to draw their client's attention to family justice services available to them.

#### Marriage and Family Counselling

* Mostly helps families understand how they will be affected by separation or divorce and how they can deal with the emotional, economic, and parenting consequences of relationship breakdown.
  + In other instances, though, family counsellors can assist with reconciliation.

#### Collaborative Family Law

* In the adversarial process, ambitious lawyers and emotionally fragile spouses can wreak havoc on each other and their children.
* Collaborative family law differs from the traditional approach to family law in that its practitioners focus on settlement to the exclusion of litigation.
  + It allows spouses to craft their own separation agreement with the support of highly trained professionals in a manner that is mutually agreeable for all parties.
  + Outside experts are often brought into the process to help the parties with particular aspects of the negotiation and settlement process.
  + If no settlement is reached, the lawyers involved in the effort to achieve settlement must withdraw from the case and cannot participate in any subsequent litigation.

#### Negotiation

* Separated partners normally settle their differences by negotiation.
  + If the parties are represented by lawyers, each party instructs their lawyer, and the lawyers negotiate on the parties' behalf.
* Negotiation is cost-effective, time saving, and leaves the decision-making authority with the disputants.

#### Mediation

* Aimed at facilitating the consensual resolution of the economic and parenting consequences of marriage breakdown.
  + While it is not necessarily cheaper than negotiation, it is much cheaper than litigation.
  + A byproduct of mediation may be improving communication or reducing tensions between litigants.
* Allows partners to determine the consequences of their separation with the aid of an impartial third party.
  + The mediator is tasked with diffusing family conflict to a level where the parties can communicate with each other.
  + The mediator will also help the parties look at their options and apply objective standards with a view to negotiating a fair settlement.
* Full disclosure is a prerequisite to effective mediation.
  + Parties are free to elect for an "open" or "closed" mediation.
* Mediation may not be appropriate if there is an imbalance of power between the parties that cannot be redressed.
* The final outcome of mediation is a formal written settlement executed in accordance with established legal requirements.
  + Once the agreement is reached, it should always be reviewed by independent lawyers for each of the disputants.

##### *Stewart v Stewart*, 2008 ABQB 348

Facts:

* The parties separated in 2006. To resolve their issues, they commenced mediation and signed an Agreement to Mediate stating that the contents of the mediation would be confidential and requiring that any mediation agreement be put into writing. No mediation agreement was signed at the end of mediation, but there was an email exchange between the mediator and the parties. In an application for summary judgment, the plaintiff appended some of the emails and made statements in an affidavit about discussions in the mediation. The defendant seeks to have everything in the materials that refers to the mediation discussions expunged.

Issue and holding:

* Is everything said in the mediation between the parties and the mediator, whether in writing or verbally, confidential? **YES**

Rationale: (Moen J)

* In the formal Agreement to Mediate, the parties agreed that mediation discussions were to remain confidential.
* Further, courts treat discussions in mediation as confidential because, as a matter of policy, the courts encourage parties to settle matters without going to court.
  + The benefits of mediation include:
    - Parties are usually more satisfied when they can achieve settlement rather than having a court tell them what to do.
    - Settlements between parties are often more creative and designed to satisfy both parties.
    - Settlements costs the courts and the parties much less in financial terms and the parties in emotional terms.
  + There is an exception to the privilege of mediation discussions where the negotiations result in a consensual agreement and the existence or interpretation of the agreement is an issue in later litigation.
    - However, there was no agreement between the parties.

#### Arbitration

* A couple may appoint an independent arbiter of their choosing to determine their rights and obligations and may agree to accept that outcome.
  + It is generally conceded that spousal and parental disputes can be referred to binding arbitration.
* Some benefits of arbitration include:
  + Allows people to choose adjudicators with particular expertise.
  + An arbitration hearing can be as formal or informal as the parties want, which can make a resolution more attractive to people.
  + Since arbitration does not normally involve formal pleadings, productions, and discoveries, it reduces delay common in the trial process.
  + Arbitrations can be made private, whereas courts are open to the public.
  + The parties themselves must pay for the services of the arbitrator (whereas courts are publicly funded), but this additional cost is usually offset by the time and expense saved by avoiding the courts.
* Critics of arbitration claim that it is not governed by "due process of law," and that arbitrators are too willing to "split the difference."

#### Med-Arb

* In this process, a fixed time will be set for mediation, with the understanding that, if no consensus is reached, the mediator will then act as an arbitrator who will give a final and binding decision.
  + This may push parties to reach a consensus in the final stages of mediation.

### Going to Court

* If Provincial Court has jurisdiction, the applicant files a claim in Provincial Court, upon which the clerk will schedule a court date.
  + Before this date, the parties may have to attend a caseflow conference to make sure each party is ready for court.
  + Then, the respondent is given a short time to file a response and serve a copy on the applicant.
  + If the parties cannot resolve the issues between them, then a judge will make a final decision at a trial.
* If the Court of Queen's Bench has jurisdiction, a family law action is started by filing a Notice to Attend Family Docket, upon which the clerk will schedule a hearing in Family Docket Court.
  + The Notice must be served on the opposing parties at least 5 days before the court date.
  + At Family Docket Court, a judge will give directions to the parties on what to do next; the judge may:
    - Encourage the parties to agree on certain things and put them in a consent order.
    - Order the parties to attend a Parenting After Separation course by a specific date.
    - Order the parties to try other dispute resolution processes to resolve their issues, such as mediation or case conferences.
    - Refer the parties to resolution counsel, who are lawyers employed to help the parties reach an agreement or prepare a litigation plan for court.
    - Schedule the issue for a more formal court process (e.g., an application).
  + If the Family Docket Court judge directs a party to file a claim, they must file a Statement of Claim, and must then serve it on the other party.
    - The defendant is required to file a Statement of Defence and serve it on the plaintiff within 20 days of receiving the Statement of Claim.
    - After filing a Statement of Claim, the plaintiff must file a family application form and appear before a judge in court on the scheduled date.
      * The plaintiff must serve the other party with the application form at least 5 days before the court date.
      * The defendant must file a response to the family application and serve it on the plaintiff before the court date.
    - Then, the parties share information with each other and may question each other to make sure everyone knows what evidence will go in front of the judge.
      * The parties may also participate in settlement meetings, such as Judicial Dispute Resolution Conferences.
      * Any issues that the parties cannot agree on go before a judge at a trial.
    - A party may make an application to the court (e.g., for interim support). A judge may make an interim order.

## Violence in Relationships

* Legal responses to family violence include charging the perpetrator with an offence under the *Criminal Code*, initiating a tort action for damages, applying for a restraining order, or seeking a peace bond.

### Assessing Family Violence

* Abuse in the family may be:
  + *Physical* (hitting, choking, restraining, pulling hair, etc.)
  + *Emotional* (name calling, yelling, bribing, putting you down, etc.)
  + *Financial* (selling your items, putting bills in your name, keeping you from getting a job)
  + *Sexual* (forced intercourse, sexual name calling, making you do sexual things you're not comfortable with, etc.)
  + *Property* (threatening to destroy property, harming pets, destroying clothes, etc.)
  + *Spiritual* (criticizing or not allowing you to practice your faith, using a holy text to control you, etc.)
  + *Stalking* (following you, monitoring your whereabouts, unwanted contact, etc.)
  + *Intimidation* (causing fear by looks, actions, voice, gestures, etc.)
  + *Using male privilege* (treating you like a servant, preventing you from making decisions, etc.)
  + *Using children* (making you feel guilty about children, using children to send messages, denying your right to see children, etc.)
  + *Isolation* (controlling what you do, who you see, where you go, denying access to phone/friends/family/kids, etc.)

### Protection Orders

#### *Protection Against Family Violence Act*, RSA 2000, c P-27

* An EPO may be granted by a Prov Ct judge or a justice of the peace, on application and without notice to the respondent, if they determine that (1) *family violence* has occurred, (2) the claimant has reason to believe it will continue, and (3) by reason of seriousness or urgency, the order should be granted to protect the claimant and other family members that reside with the claimant [s. 2(1)].
  + "Family violence" includes, but is not limited to, (1) intentional or reckless acts that cause injury or property damage and that intimidate or harm a family member, (2) acts or threatened acts that intimidate a family member by creating a reasonable fear of property damage or injury to a family member, (3) forced confinement, (4) sexual abuse, and (5) stalking [s. 1(1)(e)].
    - "Family members" include [s. 1(1)(d)]:
      * Married spouses, AIPS, or people who are residing together in an intimate relationship.
      * Persons who are the parents of one or more children, regardless of their marital status or whether they have lived together.
      * Persons who are related to each other by blood, marriage, adoption or an AIP.
      * Any children in the care and custody of a person referred to above.
      * Persons who reside together where one has custody over the other per a court order.
  + The application may be made by the victim of family violence or by someone on behalf of a victim of family violence [s. 6(1)].
    - Someone can even make an application on behalf of a victim *without* the victim's consent, so long as they have the leave of a judge [s. 6(1)(c)].
  + In determining whether an order should be granted, the judge may consider such things as [s. 2(2)]:
    - The history of family violence by the respondent toward the claimant.
    - Whether there is or has been controlling behaviour by the respondent towards the claimant.
    - Whether the family violence is repetitive or escalating.
    - The existence of any immediate danger to persons or property.
    - The vulnerability of elderly claimants.
    - The effect of exposure to family violence on any child of the claimant.
    - The best interests of the claimant and any child of the claimant.
    - The claimant’s need for a safe environment to arrange for long‑term protection from family violence.
  + The order may [s. 2(3)]:
    - Restrain the respondent from attending at or near or entering any specified place that is attended regularly by the claimant or other family members.
    - Restrain the respondent from contacting the claimant and other specified persons.
    - Grant the claimant and other family members exclusive occupation of the residence for a period, regardless of whether the residence is jointly owned or solely owned by either of the parties.
    - Direct a peace officer to remove the respondent from the residence.
    - Direct a peace officer to accompany a specified person to the residence to supervise the removal of personal belongings.
    - Seize and store weapons where the weapons have been used or have been threatened to be used to commit family violence.
    - Any other provision that the judge considers necessary to protect the claimant.
* If an EPO is granted, the granting judge or justice must schedule a hearing at QB not later than 9 days after the granting of the order [s. 2(6)] and must forward a copy of the EPO and all supporting documents to QB [s. 3(1)].
  + At the hearing, QB may revoke the order, direct that an oral hearing be held, confirm the order (in which case it becomes a QB order), or revoke the order and grant a QB protection order [s. 3(4)].
  + A QB order may contain any of the terms as an EPO, but can also [s. 4(2)]:
    - Require the respondent to reimburse the claimant for monetary losses suffered by the claimant and any child as a direct result of the family violence (e.g., loss of earnings, medical expenses, moving expenses, legal expenses).
    - Grant either party temporary possession of personal property (e.g., vehicle, bank cards, children’s clothing, documents, keys, personal effects)
    - Restrain either party from taking, converting, or damaging property that the other party may have an interest in.
    - Require the respondent to post any bond that the Court considers appropriate for securing the respondent’s compliance with the terms of the order.
    - Require the respondent to receive counselling.
    - Authorize counselling for a child.
* A provision of an order is only effective if the respondent has actual notice of it [s. 5(1)], and it only lasts for one year unless extended by a further order on application [s. 7(3)].
* The judge or justice granting an order must keep secret the claimant's location unless the claimant says otherwise [s. 8(1)].

#### *Lenz v Sculptorneau*, 2016 ABCA 111

Facts:

* The appellant and respondent began dating in the summer of 2012. For the first 6 to 8 months of the relationship, the respondent was living with her spouse. The appellant and respondent have no children together and maintained separate residences. They did not share expenses or bank accounts or pay each other's bills. In June 2015, their relationship broke down, and the respondent called the RCMP to report that the appellant threatened her and her property. Shortly thereafter, she obtained an EPO under the *Protection Against Family Violence Act* ("*PAFVA*"). The EPO was then confirmed by QB. The appellant claimed that the chambers judge erred when he concluded that the appellant and respondent were "family members" under the Act.

Issue and holding:

* Are the appellant and respondent captured under the definition of "family members" in the *PAFVA*? **NO**
  + The EPO is therefore revoked, though the revocation is stayed until 30 days after the respondent is given notice so that she may apply for any other order she may think appropriate.

Analysis:

* The legislature intended EPOs to be an *extraordinary* remedy reserved for situations of imminent familial violence, as they can result in major disruptions in the life of the respondent with no notice and no opportunity to respond to the allegations.
  + For this reason, the legislature chose only to protect claimants from violence and threats by "family members," which constitutes one subset of abusive relationships.
    - "Family members" is defined by the *PAFVA* to only include, *inter alia*, adult interdependent partners ("AIPs") and people who are residing together in an intimate relationship.

Rationale: (The Court)

* The appellant and respondent are not AIPs within the meaning of the *Adult Interdependent Relationships Act* ("*AIR Act*").
  + There is no evidence that they functioned as an economic and domestic unit for a continuous period of 3 years.
  + Further, s. 5(2) of the *AIR Act* holds that a married person living with their spouse (as the respondent was for the first 6-8 months of her relationship with the appellant) cannot simultaneously be the AIP of someone else.
* The appellant and the respondent also did not *reside together* in an intimate relationship.
  + Based on the plain meaning of "residing together," it requires that the parties lived together in the same home that was their common, jointly intended place of cohabitation, which the parties never did.
* While an EPO is not available to assist the respondent, she may still rely on a common law restraining order.

### Restraining Orders and Peace Bonds

* Under s. 127 of the *Criminal Code*, everyone who, without lawful excuse, disobeys a lawful order made by a court or by a person or body authorized by *any* Act to make the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of
  1. an indictable offence and liable to imprisonment for a term not exceeding two years; or
  2. an offence punishable on summary conviction.

#### Restraining Orders

* You can get a civil restraining order against any person who has made you afraid for your safety.
  + Actions that may provide grounds for granting a civil restraining order include:
    - Personal injury, property damage, or intimidation
    - Threats that cause reasonable fear of injury or property damage
    - Force confinement
    - Forced sexual contact
    - Stalking or harassment
      * A court is entitled to grant a no-contact restraining order when it is satisfied that the respondent has repeatedly communicated with the applicant, knowing that such communication was unwelcome, or recklessly without ascertaining the wishes of the person with whom communication is made (*Boychuk v Boychuk*).
  + If a civil restraining order is granted, it must be registered with the police so that they have an accurate record of it on their system and can act quickly to respond if the order is breached or disobeyed.

#### Peace Bonds

* Under s. 810.2 of the *Criminal Code*, any person who fears on reasonable grounds that another person will seriously injure them may, with the consent of the AG, lay such information before a provincial court judge.
  + The judge may call a hearing, and if he/she is satisfied that the informant has reasonable grounds for the fear, they may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for up to 12 months (or if they have previously been convicted of a serious personal injury offence, up to two years).
  + If the defendant fails or refuses to enter into the recognizance, the judge may commit the defendant to prison for a term not exceeding 12 months.
  + The judge may add any reasonable conditions to the recognizance that they think is needed to secure the good conduct of the defendant, including conditions that require the defendant:
    - To participate in a treatment program.
    - To wear an electronic monitoring device.
    - To remain within an area unless written permission to leave is obtained from the judge.
    - To return to and remain at his or her place of residence at specified times.
    - To abstain from the consumption of drugs except in accordance with a medical prescription.
    - To provide a sample of a bodily substance at specified, regular intervals if a condition of the recognizance requires the defendant to abstain from consuming intoxicating substances.
    - To prohibit the defendant from possessing weapons.
    - To require the defendant to report to a correctional authority or an appropriate police authority.

## Divorce

* Revolutionary changes to family law occurred in Canada with the passing of the federal *Divorce Act* in 1968.
  + Before 1968, adultery constituted the sole ground for divorce; with the *Divorce Act*, "no-fault" divorce grounds were introduced in addition to an extended list of "offence" grounds.
  + Before 1968, provincial and territorial statutes imposed a unilateral obligation on a guilty husband to maintain his innocent wife in the event of a breakdown of their marriage; the *Divorce Act* established equal rights to spousal support for men and women.
    - The governing consideration was no longer sex but turned on the financial needs of the claimant and the ability of his or her spouse to pay.
    - Each spouse was, however, expected to strive for financial self-sufficiency and did not have a presumed right to lifelong financial support from the other spouse.

### Jurisdiction under the *Divorce Act*

* Divorce actions brought under the Act must proceed before the ABQB [s. 2(1)].
* A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been habitually resident in the province for at least one year immediately preceding the commencement of the proceeding [s. 3(1)].
  + If divorce proceedings are pending in two courts that would otherwise have jurisdiction, the court in which a divorce proceeding was commenced first has exclusive jurisdiction [s. 3(2)].
  + If divorce proceedings are pending in two courts that would otherwise have jurisdiction and were commenced on the same day, the Federal Court shall, on application by either or both spouses, determine which court retains jurisdiction by applying the following rules [s. 3(3)]:
    1. if at least one of the proceedings includes an application for a parenting order, the court that retains jurisdiction is the court in the province in which the child is habitually resident;
    2. if neither of the proceedings includes an application for a parenting order, the court that retains jurisdiction is the court in the province in which the spouses last maintained a habitual residence in common if one of the spouses is habitually resident in that province; and
    3. in any other case, the court that retains jurisdiction is the court that the FC determines to be the most appropriate.
* A court has jurisdiction to hear a *corollary relief* or *variation proceeding* if either spouse is habitually resident in the province at the commencement of the proceeding *or* both former spouses accept the court’s jurisdiction [ss. 4(1), 5(1)].
  + If proceedings are pending in two courts that would otherwise have jurisdiction, the court in which a proceeding was first commenced has jurisdiction [ss. 4(2), 5(2)].
  + If proceedings are pending in two courts that would otherwise have jurisdiction and were commenced on different days, the Federal Court shall, on application by either or both spouses, determine which court retains jurisdiction by applying the following rules [ss. 4(3), 5(3)]:
    1. If at least one of the proceedings includes an application for corollary relief or a variation order in respect of a parenting order, the court that retains jurisdiction is the court in the province in which the child is habitually resident;
    2. If neither of the proceedings includes an application for corollary relief or a variation order in respect of a parenting order, the court that retains jurisdiction is the court in the province in which the former spouses last maintained a habitual residence in common if one of the former spouses is habitually resident in that province.
    3. In any other case, the court that retains jurisdiction is the court that the Federal Court determines to be the most appropriate.
* The jurisdiction conferred on a court by the Act to grant a divorce shall be exercised by a judge without a jury [s. 7].

#### *Quigley v Willmore*, 2008 NSCA 33

Facts:

* The parties were married in 1999. The respondent Willmore worked in Texas, while the appellant Quigley maintained a law practice in Nova Scotia. Willmore would travel to see Quigley and Ryan (their son) in Nova Scotia on work leave and, on occasion, Quigley and Ryan would visit Willmore in Texas. In August 2005, Quigley intended to live with Ryan in Texas for his kindergarten school year to see if they could live there as a family. In Texas, she registered Ryan in school, moved her horses (and the person who looked after them) to Texas, took steps to begin a riding school, took mediation courses, and looked into possibly starting a law practice. She travelled back to NS for brief periods to deal with her reduced law practice. She maintained her law practice and residence in NS, continued to use bank, insurance, and other financial arrangements NS, and intended to return to NS if things did not work out in Texas. By June 2006, Quigley was an ordinary resident of NS again. On November 7, 2006, Quigley filed a petition for divorce in Nova Scotia. On November 9, Willmore filed a petition for divorce in Texas. In August 2007, Willmore moved to strike Quigley's petition on jurisdictional grounds.

Procedural history:

* Wilson J set aside Quigley's petition for divorce and declared that all orders and judgments in the proceeding were void on the grounds that Quigley had not been an ordinary resident in NS for at least one year immediately preceding the filing of her petition, as is required by s. 3(1) of the *Divorce Act*.

Issues and holding:

* Did the lower court commit a palpable and overriding error in determining that Ms. Quigley was not ordinarily resident in the province of Nova Scotia for one year prior to filing the petition for divorce? **NO**

Analysis:

* From a review of the relevant law, several themes emerge:
  + The determination of ordinary residence is highly fact-specific and a matter of degree.
  + Ordinary residence is in contrast to casual, intermittent, special, temporary, occasional or exceptional residence, which is accompanied by a sense of transitoriness or return.
  + Residence is distinguished from a stay or visit.
  + A person’s ordinary residence is where he/she is settled-in and maintains her ordinary mode of living with its accessories, relationships, and conveniences, or where he/she lives as an inhabitant as opposed to a visitor.
  + An ordinary residence may be limited in time from the outset or it may be indefinite or unlimited.
    - It is not the length of the visit or stay that determines the question of ordinary residence, but rather the nature of the time spent.
  + Ordinary residence is established when a person goes to a new locality with the intention of making a home there for an indefinite period.

Rationale: (The Court)

* Although Quigley maintained her home in Nova Scotia and intended to return to there at some point, she established and moved into a home purchased by the couple on a farm in Texas, registered Ryan for school, transported 10 horses from Nova Scotia to Texas and had the person who looked after them in Nova Scotia move with her to Texas, took steps to begin a riding school, attended courses in mediation and looked into the possibility of working as a lawyer there.

Notes:

* According to Justice Canada, there is no practical difference between "ordinarily resident" and "habitually resident," which is the term now used in the *Divorce Act*.
* Quigley wanted to make NS the jurisdiction because she wanted NS divorce laws to apply.
* Parties cannot consent to jurisdiction; they need to meet the residency requirements.
  + e.g., if Quigley and Willmore both lived in Texas, and they wanted NS law to apply to them, then one of them would have to move back to NS and live there for one year.

### Duties under the *Divorce Act*

* + The statutory duties of the parties to the proceeding, all of which are brand new, are:
    - A person to whom parenting time, decision-making responsibility, or contact has been allocated in respect of a child must exercise that time, responsibility, or contact in a manner consistent with the child’s best interests [s. 7.1].
    - A party to a divorce must, to the best of their ability, protect any child of the marriage from conflict arising from the proceeding [s. 7.2].
    - If appropriate, parties should try to resolve their issues through a family dispute resolution process [s. 7.3]**.**
    - A party to a divorce must provide complete, accurate and up-to-date information if required [s. 7.4].
    - A person who is subject to an order made under the Act must comply with it until it is no longer in effect [s. 7.5].
    - Every document that formally commences a divorce proceeding, or that responds to such a document, must contain a statement by the party certifying that they are aware of their duties under sections 7.1 to 7.5 [s. 7.6].
  + The statutory duties of a legal adviser are:
    - Unless clearly inappropriate, a legal adviser in a divorce proceeding must discuss the possibility of reconciliation with their client. They must also inform their client of counselling or guidance facilities known to them [s. 7.7(1)].
    - Unless clearly inappropriate, a legal adviser must encourage their client to try to resolve their issues through a family dispute resolution process [s. 7.7(2)(a)].
    - A legal adviser must inform their client of the family justice services they know that might assist them in resolving their issues and complying with a decision made under the Act [s. 7.7(2)(b)].
    - A legal adviser must inform their client of the parties’ duties under the Act [s. 7.7(2)(c)].
    - Every document that formally commences a divorce proceeding, or that responds to such a document, that is filed by a legal adviser shall contain a statement by the legal adviser certifying that they have complied with this s. 7.7.
  + The statutory duties of the court are:
    - In a corollary relief proceeding, the court must consider if any of the following are pending or in effect unless clearly inappropriate: a civil protection order, a child protection order, or an order to a criminal matter [s. 7.8(2)].
    - Unless clearly inappropriate, a court must satisfy itself that there is no possibility of reconciliation [s. 10(1)].
      * If at any point in the proceedings it becomes apparent that a possibility of reconciliation exists, the court must adjourn and nominate someone to provide marriage counselling or guidance services [s. 10(2)].
        + Where the adjournment has lasted 14 days, the court shall resume the proceeding on application by either spouse [s. 10(3)].

### Grounds for Divorce and Bars to Relief

* The *Divorce Act* provides that a court of competent jurisdiction may, on application by either or both spouses, may grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage [s. 8(1)].
  + A breakdown of a marriage is established only if [s. 8(2)]:
    1. The spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce and were doing so at the commencement of the proceedings (the "no-fault" ground),
       - Spouses are deemed to have lived separate and apart for any period during which they lived apart *and* either of them had the intention to live separate and apart [s. 8(3)(a)].
       - The period during which spouses have lived separate and apart is not interrupted by reason only that [s. 8(3)(b)]:
         * Either spouse has become incapable of forming an intention to live separate and apart (if it appears that the separation would probably have continued if the spouse had not become so incapable), or
         * The spouses have resumed cohabitation during a period of not more than 90 days with reconciliation as its primary purpose.
    2. The spouse against whom the divorce proceeding is brought has committed adultery, or
    3. The spouse against whom the divorce proceeding is brought has treated the other spouse with such physical or mental cruelty as to render intolerable continued cohabitation.
* The majority of divorces proceed on the basis of the couples living separate and apart.
  + Even where there are grounds for a fault-based divorce, a contested fault-based divorce will likely take up to a year anyway, at which point living separate and apart will already be established.
  + While a fault-based divorce may be uncontested, few spouses are willing to admit their marital offence in an affidavit, at which point it forms part of the court record.

#### Living Separate and Apart

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

Facts:

* Enman filed a petition for divorce on May 15, 2008. The date of separation in the petition was noted to be May 6, 2008. Following this date, Enman continued to reside with her husband, McCafferty, for about seven months because she couldn't afford to move out. Enman said that the couple had unsuccessful discussions concerning reconciliation. During this time, McCafferty thought that his marriage was still intact. He and Enman continued to have sex, sleep in the same bed, eat meals together, plan vacations, take trips, attending social events together, and discussing fixing up the deck. Enman left the matrimonial home in late January or early February 2009. The trial record was filed November 12, 2009 (11 months after Enman's departure from the marital home).

Issue and holding:

* In the language of s. 8 of the *Divorce Act*, did Enman live separately and apart from McCafferty from May 2008 to late January or early February 2009? **NO**
  + Since the time spent cohabiting exceeded 90 days, this negates the separation date alleged in the petition for divorce. This has the effect that, at the time of filing the trial record in November 2009, the parties were not separated for 1 year immediately preceding the determination of their divorce. As a result, the petition for divorce fails.

Analysis:

* While it is possible for spouses to live separately and apart under the same roof, there must be a finding based on clear, irrefutable evidence that they were separated.
  + There must be a complete withdrawal from the performance of matrimonial duties and obligations, with the intent of terminating the matrimonial relationship.
  + Factors relevant to living separate and apart include whether the spouses (1) occupy separate bedrooms, (2) have sex, (3) communicate very often, (4) perform domestic services for each other, (5) eat meals separately, or (6) attend social activities together.

Rationale: (Baird J)

* Enman may have formed an intention to live separately and apart in May 2008, but she continued to cohabit with her husband until late January or early February 2009.
  + The evidence suggests that the parties continued their lives together on the same basis, sharing meals, engaging in social activities together, having regular sex, and performing duties for the benefit of each other.

#### Adultery & Cruelty

* Adultery does not require penetration; it includes all sexual activity of an intimate nature between a spouse and another party.
* A party cannot use their own adultery as grounds for divorce.
* Under the *Alberta Evidence Act*, no witness in an action (whether a party to it or not) is liable to be asked a question tending to show that they have been guilty of adultery unless they have already given evidence in the same action in disproof of the alleged adultery [s. 7(1)].

##### *Burbage v Burbage* (1985), 46 RFL (2d) 33 (ONSC)

Facts:

* The parties were married in 1958. The wife filed a petition for divorce based on cruelty. She claimed that the husband was not supportive of their son or her when their son was charged with crimes resulting in his incarceration. She also alleged that the husband was cruel to their dog in that he kicked him on at least one occasion. She also alleged that the husband complained about her habit of reading a lot and of her attendance at Tough Love meetings.
* Prior to their separation, the wife developed a relationship with another man based on many shared interests. They spent a lot of time together. According to witnesses, they even spent a lot of time at each other's apartments. The wife admitted that they slept over twice, but only because her own apartment was too cold. She insisted that no sexual intercourse took place. In fact, the other man claimed that he was impotent due to a back surgery and a very bad marriage terminated years ago. No evidence was called to establish the nature of his impotence.

Issue and holding:

* Has the wife's claim of cruelty been established? **NO**
* Has the husband's claim of adultery been established? **YES**

Analysis:

* While the test for cruelty is subjective, the cruelty alleged must be of such a nature and kind as to render such conduct intolerable to a reasonable person.
  + Cruelty does not have to be intentional; it may exist even though the conduct of the offending spouse was unconscious.
  + The conduct relied upon to establish cruelty must not be trivial but of a "grave and weighty" nature; it must not be a mere manifestation of incompatibility of temperament between the spouses.
* Once intimacy and opportunity for adultery are established on a balance of probabilities, there is an evidentiary burden on the alleged adulterer to call evidence in rebuttal sufficient to dislodge the preponderant evidence.

Rationale: (Stortini J)

* Regarding cruelty, the wife's claims clearly show incompatibility, not cruelty.
* The evidence shows some intimacy between the wife and the other man; it also depicts that those parties had the opportunity to commit adultery.
  + The parties have not provided any evidence to support their assertion that the other man is impotent; thus, the facts of this case support an adverse inference.

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

Facts:

* IA (17) and SD (25) were married on May 25, 2008. They were separated by March 14, 2009. IA commenced a divorce action on April 17, 2009 on the grounds of mental and physical cruelty. SD denied having treated IA with cruelty. IA gave evidence of several instances which she alleged collectively amounted to mental cruelty. She said SD got mad at her for not wearing a bikini and broke her camera, abandoned her when she complained of pain, called her names (e.g., stupid), became angry when IA found their sex painful, expected her to do housework and serve his friends, and discouraged her from having friends over. She also alleged instances of physical cruelty, saying that SD slapped, grabbed, and hit her on several occasions. Some of these allegations were verified by a cousin of IA's. SD acknowledged that the couple argued a lot, but denied ever physically abusing her. While he admitted physical contact, he alleged that it was always trivial.

Issue and holding:

* Can IA obtain a divorce on grounds of cruelty? **NO**

Analysis:

* Cruelty is a question of fact and the plaintiff bears the onus of proof on a balance of probabilities.
* A finding of cruelty bears a stigma and, as such, it should not be a short-cut to a divorce that should be based on separation.
  + A court should not grant a divorce on evidence of conduct that is merely distasteful or irritating.
  + To be cruel, the court must be satisfied that conduct is capable of causing "grave and weighty" physical or mental hurt.
* Ultimately, whether cruelty is established depends upon the parties and the history of the marriage.
  + An important question is the *subjective* effect of the conduct complained of upon the affected spouse.

Rationale: (Burrows J)

* I accept SD's evidence that he did not physically abuse IA.
  + SD was a more convincing witness than IA. He gave his evidence calmly and maturely. IA was agitated, animated, and angry in giving her evidence. IA's testimony seemed to be more of a reflection of her anger for SD than an accurate account of the incidents of which she spoke.
  + The physical contact that was admitted by SD was not abusive.
  + While IA may have subjectively considered SD's actions to be cruel, that is not sufficient to constitute grounds for divorce.
* I am satisfied that SD was not mentally cruel to IA.
  + The incidents to which she referred, even cumulatively, were not grave and weighty. They merely constitute evidence that the parties were incompatible.

Notes:

* The bar for cruelty is high; it must be amount to the merciless, wanton, and unnecessary infliction of pain and suffering.
* Burrows J said that IA's alleged incidences of mental cruelty constitute evidence that she was insufficiently mature to be married and that her expectations for married life were gravely disappointed.

#### Bars to Relief

* If there has been collusion in an application for divorce, the court must dismiss the application [s. 11(1)(a)].
  + **Collusion**: a conspiracy to which an applicant for a divorce is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court [s. 11(4)].
* Where a divorce is sought on grounds of adultery, the court must dismiss the application if the spouse applying for divorce has condoned or connived at the conduct complained of, unless the public interest would be better served by granting the divorce [s. 11(1)(c)].
  + Condonation would be present where someone commits adultery, their partner forgives them, and then tries to get a divorce a year later on grounds of adultery.
    - A continuation or resumption of cohabitation for a period or periods not totalling more than 90 days with reconciliation as its primary purpose does not constitute condonation [s. 11(3)].
  + Connivance would be present where a spouse encouraged their partner to sleep with someone else so as to get a divorce on grounds of adultery.
* The court must satisfy itself that reasonable arrangements have been made to support any children of the marriage. If not, the court must stay the granting of the divorce until such arrangements are made [s. 11(1)(b)].

##### *Orellana v Merino* (1998), 40 RFL (4th) 129 (ONSC)

Facts:

* The parties were married and had two girls. They separated in July 1990. Pursuant to an order of December 12, 1990, the mother (applicant) has custody over the girls, and the dad (respondent) is required to pay $50 per month per child in child support. The respondent has since been in arrears on child support. Although he appears to be employed, there is no current information regarding his ability to pay child support. Notwithstanding this, the applicant seeks to have the court exercise discretion and grant the divorce, stating that her new fiancé is prepared to support her girls.

Issue and holding:

* Notwithstanding s. 11(1)(b) of the *Divorce Act*, may the court grant the divorce? **NO**

Rationale: (Campbell J)

* To grant the divorce would represent a direct contravention of the intent and principles of s. 11(1) of the *Divorce Act* and the *Federal Child Support Guidelines*.
  + Although the applicant’s fiancé is willing to "help," the primary financial obligation for the children remains with the natural parents.

#### Barriers to Religious Marriage

* A get is a document in Jewish religious law, given by a man to his wife, that effectuates a divorce between the couple and allows the wife to remarry.
* In proceedings under the *Divorce Act*, a spouse may file an affidavit indicating whether there are any barriers to their remarriage in their religion, the removal of which is in the other spouse's control [s. 21.1(2)].
  + When this happens, and the other spouse does remove the barriers, the court may dismiss any application filed by them under the *Divorce Act* (e.g., child support, spousal support, etc.) [s. 11(3)].
    - However, the court may refuse to exercise this power when the other spouse has genuine religious or conscientious grounds for refusing to remove the barriers [s. 11(4)].
  + These rules do not apply where the power to remove the barrier to religious remarriage lies with a religious body or official [s. 11(4)].

#### Recognition of Foreign Divorce

* A divorce granted by a competent authority shall be recognized for the purpose of determining the marital status in Canada of any person, if either former spouse was habitually resident in the jurisdiction of the competent authority for at least one year immediately preceding the commencement of the divorce proceedings [s. 22(1)].

### After the Divorce

#### When Divorce Takes Effect

* A divorce takes effect on the 31st day after the day on which the judgment granting the divorce is rendered [s. 12(1)].
  + However, where the court believes that, by reason of special circumstances, the divorce should take effect earlier, and the spouses undertake not to appeal from the judgment, then the court may order that the divorce takes effect from an earlier time [s. 12(2)].
    - The time may be shortened if someone wants to get married before a baby comes, before a loved one dies, etc. Shortening the time just so one of the spouses can remarry on their planned date would likely not amount to special circumstances.
  + A divorce in respect of which an appeal is pending at the expiration of the 30 days (unless voided on appeal) takes effect on the expiration of the time fixed by law for instituting an appeal from the decision on that appeal or any subsequent appeal, if no appeal has been instituted within that time [s. 12(3)].
    - If an appeal goes to the SCC, the appeal takes effect on the day on which the judgment on that appeal is rendered, unless the divorce is voided [s. 12(6)].
* When a divorce takes effect, an officer of the court that granted the divorce (or, where that judgment has been appealed, of the appellate court that rendered the judgment on the final appeal) shall, on request, issue to any person a certificate that a divorce dissolved the marriage of the specified persons [s. 12(7)].
  + Such a certificate is conclusive proof of the facts so certified [s. 12(8)].

#### Appeals

* An appeal lies to the appellate court from any judgment or order rendered or made by a court under the *Divorce Act* [s. 21(1)].
  + No appeal lies from a judgment granting a divorce after the day the divorce takes effect [s. 21(2)].
  + No appeal lies from an order made under the Act more than 30 days after it was made [s. 21(3)].
  + An appellate court may, on special grounds, either before or after the expiration of the time fixed by subsection (3) for instituting an appeal, by order extend that time [s. 21(4)].
* Under the *Divorce Act*, an appellate court may dismiss an appeal or allow the appeal and (1) make the judgment or order that ought to have been made or (2) order a new hearing [s. 21(5)].

##### *Hickey v Hickey*, [1999] 2 SCR 518

Facts:

* Patricia (appellant) and Walter (respondent) Hickey married in 1971. They had two kids, Susan (1977) and Walter (1980). The couple separated in 1986 and entered a separation agreement in July of that year. The agreement gave the appellant sole custody of the kids and provided for spousal support of $1000 per month and child support of $750 per month. The parties divorced in January 1987 and the agreement was incorporated into an order for corollary relief. After the divorce, the respondent's financial position increased much faster than that of the appellant.
* When Susan ceased living with the appellant, the respondent brought a motion to vary the order for corollary relief under s. 17 of the *Divorce Act* by deleting support for Susan*.* The appellant consented to this, but applied for an increase in spousal support and in the amount of child support for Walter.

Procedural history:

* The MBQB maintained child support at $1500 for the younger child and raised the amount of spousal support to $1300 per month. Kennedy J justified higher spousal support on the grounds that the respondent's post-divorce financial position improved more than the appellant’s did. He justified keeping child support at $1500 on the grounds that (1) the amount had not been changed throughout the life of the agreement, and children's needs increase as they get older and (2) the children should get to share in their dad's success. Kennedy J also cited higher cost of living for his support decisions. The respondent appealed to the MBCA.
* The MBCA disagreed with Kennedy J's 100% increase of child support for Walter, and reduced it to $900. It restored spousal support to $1000 because the appellant received an equitable share of the parties assets and she was of an age where she was capable of earning an income.

Issues and holding:

* Did the Court of Appeal err in reducing child support from $1500 per month to $900 per month and in reducing spousal support from $1300 per month to $1000 per month? **YES**

Analysis:

* Because of its facts-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
  + An appellate court is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.
  + Appeal courts should not overturn support orders *unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong*.
    - Recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly.
    - Avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence.
    - Promotes finality in family law litigation.
* To vary child support orders:
  + Under s. 17(4) of the *Divorce Act*, the court must first satisfy itself that there has been a change in the condition, means, needs, or other circumstances of either spouse or any child of the marriage.
    - This change must be material and not trivial or insignificant.
  + Under s. 17(6.1), if such a change has occurred, the court shall vary a child support order having regard to the applicable guidelines.
* To vary spousal support orders:
  + Under s. 17(4.1) of the *Divorce Act*, the court must first satisfy itself that there has been a material change in the condition, means, needs, or other circumstances of either spouse that is neither trivial nor insignificant.
  + If such a change has occurred, s. 17(7) provides the following factors to consider to determine what will be contained in a variation order:
    - Any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown.
    - The financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage.
    - Any economic hardship of the former spouses arising from the breakdown of the marriage.
    - How to promote the economic self-sufficiency of each former spouse.

Rationale: (L'Heureux-Dubé)

* The factors considered by Kennedy J in varying child support do not demonstrate an error of law.
  + It was appropriate that the variation order was based on the effects of inflation, the improvement in the financial resources of the parents, and the fact that the cost of raising children generally increases as they become older.
* The factors considered by Kennedy J in varying spousal support do not demonstrate an error of law.
  + Increases in the cost of living may constitute a material change justifying a variation in spousal support.
  + The appellant suffered financial disadvantage from the marriage because of her leaving the workforce to care for Susan and Walter; there was no error in compensating for this disadvantage.

## Annulment

* Annulment is different than divorce because, with an annulment, the marriage is treated as if it never existed. A divorce, on the other hand, ends an otherwise valid marriage.
* When a marriage is annulled, it ends immediately.

### *Jomha v Jomaa*, 2010 ABQB 135

Facts:

* Ms. Jomha met Mr. Jomaa online. A Kitbe-Al-Kitab marriage ceremony was held on March 23, 2008. The Imam who conducted the ceremony registered the marriage certificate after the ceremony. Ms. Jomha had a sincere belief that she could not consummate the marriage until after the wedding banquet that traditionally follows the Kitbe-Al-Kitab. After the marriage, things quickly deteriorated. In December 2008, the parties went before a religious leader and had the Islamic bond between them severed. As such, the wedding banquet never occurred and neither did consummation. The parties now seek to annul the marriage.

Issue and holding:

* Are there sufficient grounds to grant an annulment? **YES**

Analysis:

* To support an application for an annulment the law requires proof that one of the parties is unable to engage in intercourse (i.e., proof of impotence).
  + In law, impotence can arise from physical inability or a psychological incapacity; mere refusal of marital intercourse due to caprice is not a sufficient ground to warrant annulment.
  + An annulment may be granted where the marriage is not consummated by reason of an invincible repugnance or impossibility in the mind of at least one of the parties to engaging in sex with their partner.

Rationale: (Strekaf J)

* In Ms. Jomha's mind, it was impossible for the marriage to be consummated before the wedding banquet took place. Her belief about the impossibility of consummation is akin to an invincible repugnance or psychological abhorrence to the act of consummation.

# Child Support

* There is no common law right to divorce or support upon divorce. Support is a creation of statute.
  + This means that standing to apply for support, entitlement to support, and form, duration and amount of support are all governed by the enabling support legislation.
  + The *Divorce Act* provides that a court may make an order requiring a spouse to pay for the support of or any children of the marriage [s. 15.1(1)].
* Both the federal and provincial governments have jurisdiction over support.
  + The *Divorce Act* applies to parents who are divorcing or are changing a child support order that was part of a divorce action.
    - Most support proceedings proceed under the *Divorce Act* as corollary relief.
    - You must go to QB if you proceed under the *Divorce Act*.
  + Alberta's *Family Law Act* applies to unmarried people and to married people who are *not* getting a divorce.
    - QB has jurisdiction over all matters under the Act, but
    - Child welfare is dealt with under the *Child, Youth, and Family Enhancement Act*, but we are not dealing with that in this course.

## Who is a Parent? Who is a Child?

### *Family Law Act*

#### Who is a Parent?

* Under the *Family Law Act*, there are four ways that one may be the parent of a child for the purposes of child support: (1) birth, (2) *in loco parentis*, (3) adoption, or (4) assisted reproduction.
  + If there is a dispute about who is or is not the parent of a child, certain persons may apply to the court for a declaration respecting parentage [s. 9].
    - On request of any party, the court may make an order granting permission to obtain blood tests, DNA tests, etc., but no such test shall be performed on a person without their consent [s. 15].

##### Biological Parent

* The birth mother and biological father are deemed to be the parents of a child (unless the child was born as a result of assisted reproduction or was adopted) [s. 7(2)].
  + A donor of reproductive material or an embryo is not, by reason only of the donation, a parent of a child born as a result [s. 7(4)].
  + Unless the contrary is proven on a balance of probabilities, and unless more than one male person might be the father, a male person is presumed to be the father of a child if [s. 8]:
    - He was married to the birth mother at the time of the child's birth.
    - He was married to the birth mother by a marriage that ended within 300 days of the birth of the child (whether by death, annulment, or divorce).
    - He married the birth mother and acknowledged that he is the father.
    - He lived with the birth mother for at least 12 consecutive months during which the child was born and he has acknowledged he is the father.
    - He lived with the birth mother for at least 12 consecutive months and the period of cohabitation ended less than 300 days before birth of the child.
    - He is registered as a parent of the child at the request of himself and the birth mother under the *Vital Statistics Act*.
    - He has been found by a court to be a father of the child for any purpose.

##### *In Loco Parentis*

* A person is standing in the place of a parent if (1) the person is the spouse of a parent of the child or is or was in a relationship of interdependence of some permanence with a parent of the child, and (2) has demonstrated a settled intention to treat the child as the person’s own child [s. 48(1)].
* In determining whether a person has demonstrated a settled intention to treat the child as the persons own child, the court may consider:
  + The child’s age.
  + The duration of the child’s relationship with the person.
  + The nature of the child’s relationship with the person, including:
    - The child’s perception of the person as a parental figure,
    - The extent to which the person is involved in the child’s care, discipline, education and recreational activities, and
    - Any continuing contact or attempts at contact between the person and the child if the person is living separate and apart from the child’s other parent;
  + Whether the person has considered applying for guardianship, adopting the child, or changing the child's surname to that person's own.
  + Whether the person has provided financial support for the child.
  + The nature of the child’s relationship with any other parent of the child.
  + Any other factor that the court considers relevant.

##### Adoptive Parent

* A person specified as a parent of a child in an adoption order or recognized under the *Child, Youth and Family Enhancement Act* is deemed to be the parent of that child [s. 7(2)(c)].

##### Parent via Assisted Reproduction

* See ss. 8.1 and 8.2 respecting assisted reproduction and surrogacy.

#### Who is a Child?

* Under the *Family Law Act*, a child is [s. 46(b)]:
  1. A person under 18, or
  2. A person 18 or over who is unable by reason of illness, disability, being a full-time student, or other cause to withdraw from his or her parents' charge or to obtain the necessaries of life.
     + That said, such persons are expected to make a reasonable contribute to their own education [s. 49(4)].
* However, the obligation to provide child support does *not* extend to a child who [s. 49(2)]:
  1. Is a spouse or AIP, or
  2. Is under 18 but has voluntarily withdrawn from his/her parent's charge and is living an independent lifestyle.
     + However, if a child returns to a parent's charge, they can revive the support obligation [s. 49(3)].

### *Divorce Act*

* Under the *Divorce Act*, a "child of the marriage" includes a child of two spouses or former spouses who, at the material time, is [s. 2(1)]:
  1. Under 18 and has not withdrawn from their charge, or
  2. Is 18 or older and under their charge but unable to withdraw from their charge or obtain the necessaries of life by reason of illness, disability, etc.
  + In this definition, a child of two spouses or former spouses includes [s. 2(2)]:
    1. Any child for whom they both stand in the place of parents, and
    2. Any child of whom one is the parent and for whom the other stands in the place of a parent.

#### *In Loco Parentis*

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

Facts:

* The parties had a child, Jeena, in 1990 and got married in 1991. The wife already had a child, Jessica, from a previous relationship. The husband was a father-figure for Jessica, but did not adopt her. The parties permanently separated in September 1992. In 1994, under Manitoba's *Family Maintenance Act*, the husband acknowledged both Jessica and Jeena as children of the marriage and was granted access to them. In 1995, the wife commenced divorce proceedings and requested a declaration that the husband stood in the place of a parent to Jessica. The husband contested this claim. An interim order of April 1995 ordered the husband to pay child support for Jessica. In a report in October 1995, the husband expressed a desire to sever his relationship with Jessica.

Procedural history:

* At trial, Davies J found that the husband repudiated his parental relationship with Jessica. The Court of Appeal dismissed the wife's appeal on the issue of support for Jessica, holding that modern marriages are often fragile and time-limited and that support obligations should not follow a former spouse around from relationship to relationship. In its view, it would not be logical for a spouse who takes on obligations with respect to a spouse's children to be saddled with this obligation indefinitely while a step parent who takes on no such obligation is entitled to walk away from the relationship scot-free.

Issues and holding:

1. Is the determination of whether the husband is in the place of a parent pursuant to s. 2 of the *Divorce Act* made at the time of the commencement of the proceedings? **NO**
2. Did the husband stand in the place of a parent towards Jessica during the time their family functioned as a family unit? **YES**
3. Can the husband, who has been in the place of a parent under s. 2 of the *Divorce Act*, withdraw from that position? **NO**

Analysis:

* Whether a person stands in the place of a parent must take into account all factors relevant to that determination (including intention), viewed objectively; such factors include, but are not limited to:
  1. Whether the child participates in the extended family in the same way as would a biological child.
  2. Whether the person provides financially for the child (depending on ability to pay).
  3. Whether the person disciplines the child as a parent.
  4. Whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child.
     + The manifestation of the intention of the step-parent cannot be qualified as to duration, or be otherwise made conditional, even if this intention is manifested expressly. Once it is shown that the child is considered a child of the marriage, the step-parent has obligations towards them.

1. The nature or existence of the child's relationship with the absent biological parent.

* Whether a person stands in the place of a parent should *not* be determined exclusively from the perspective of the child.
  + In many cases, a child will be very young and it will be difficult to determine whether that child considers the person as a parental figure.
  + An older child may resent his or her step-parent and reject their authority even though, objectively, that person effectively provides for the child and stands in the place of a parent.
  + While the opinion of a child important, it constitutes only one of the many factors to be considered.

Rationale: (Bastarache J)

1. The existence of the parental relationship must be determined as of the time the family functioned as a unit, not from the time of the commencement of divorce proceedings.
   * If the "material time" referred to in s. 2(1) of the *Divorce Act* were interpreted as from the time of the commencement of the proceedings, it would be difficult to find a parental relationship in situations where the step-parent has little contact with the child between the separation and the divorce.
2. The husband stood in the place of a parent towards Jessica.
   * He represented to Jessica and to the world that he assumed full parental responsibility for her.
   * He is the only father that Jessica has known owing to the fact that the parties led her to believe that the respondent was in fact Jessica’s biological father.
   * He even considered adopting Jessica and the parties had Jessica's birth registration amended to change Jessica's name to correspond to the husband's.
     + This was done by falsely submitting an application stating that the respondent was Jessica’s natural father.
   * After the separation, the husband continued to have visits with Jessica.
3. Once someone has made at least a permanent or indefinite unconditional commitment to stand in the place of a parent, the jurisdiction of the courts to award support under the *Divorce Act* is triggered and that jurisdiction is not lost by a subsequent disavowal of the child by the parent.
   * The view that one can repudiate the *in loco parentis* role at will disregards the primary regard which the courts must surely have for the interests of dependant children, which is one of the primary objectives of the *Divorce Act*.
   * It takes a properly informed and deliberate intention to assume parental obligations for support of a child, on an ongoing basis, which makes it tough to conclude that this status is meaningless or can be negated at whim.
   * If one can unilaterally terminate a relationship where a person stands in the place of a parent to a child, why define such a relationship as giving rise to obligations under the *Divorce Act*?
   * While it may be argued that this proposition will disincentivize step-parents from being generous toward children for fear that their generosity will give rise to parental obligations, people do not enter parental relationships with the view that they will be terminated.

Notes:

* A criticism of this decision is that it disincentivizes step-parents from forming a parent–child relationship with step-children.
* Represented a shift from the subjective intent of the step-parent to the objective indicia of the type of relationship these provisions are intending to capture.
* The policy reasons underlying this decision were to promote generosity towards children and remove any financial incentive from severing one's relationship with the step-child.
  + However, should a person standing in the place of a parent for a short time have lifelong obligations to that child?

#### Adult Children

##### *KNH v JPB*, 2019 ABQB 511

Facts:

* KNH (the mother) applied for retroactive and ongoing child support for two adult children pursuing post-secondary studies or training. JPB (the father) opposes on the bases that one child (a son) has no need of support (in light of RESP funding, scholarships, student loans, future earnings, etc.) and that the other child (a daughter) is pursuing training (non-academic ballet) unlikely to lead to a career and, in any case, is estranged from the father without justification.

Issue and holding:

* Is the son a "child of the marriage"? **NO**
* Is the daughter a "child of the marriage"? **YES**
  + The mother is thus entitled to child support for her daughter while she continues her ballet training.

Analysis:

* The ABCA in *Farden* held that an adult child pursuing post-secondary studies *may* be a "child of the marriage."
  + That is, an adult child actively pursuing post-secondary education or training constitutes "other cause" within the meaning of s. 2 of the *Divorce Act*.
  + The core objective of this is to boost the "launch prospects" of adult children.
* Determining whether an adult pursuing post-secondary study is a "child of the marriage" requires an examination of all of the circumstances; several *Farden* factors relevant in this determination are:
  1. Whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies.
  2. The ability of the child to contribute to his own support through part-time employment, student loans, scholarships, or other financial assistance.
  3. The career plans of the child, i.e., whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do.
     + i.e., will completion of the current course of studies lead to gainful and self-supporting employment, in light of the child's aptitude and past achievements?
     + Relevant to whether the child's goals are realistic and appropriate is:
       1. Whether there is a reasonable likelihood that successful completion of the course of studies will lead to gainful and self-supporting employment.
       2. Whether the adult child is demonstrating success in the chosen course of studies or has an aptitude that is reasonably likely to lead to academic success (could be demonstrated by past academic performance).
       3. Whether the child is pursuing the course of studies with diligence.
     + When dealing with children engaged in sporting or cultural activities in the hope of making it a career, the court should have regard to the aptitude of the child and the probability, if any, of the child attaining that goal.
       - If the child’s goal is realistic, there is no reason why courts should distinguish between a sporting or cultural career and a business career or a career in a learned profession.
       - If, however, the child wishes to pursue a career not directly connected to their sport or cultural activity (e.g., studying music but wishing to be a police officer), this would militate against support.
  4. The age of the child (a factor in determining dependency).
  5. What plans the parents made for the education of their children, particularly where those plans were made during cohabitation.
     + In cases where parents have made provision for their children's future education, the Courts have tended to enforce that obligation.
  6. Whether the child has unilaterally terminated the relationship with the parent from whom support is sought.
     + Occurs when the children have refused a relationship with a parent for reasons that are not directly attributable to the parent's own actions.
     + However, in the opinion of Lema J, it should not be a factor for denying support.
       - It creates a disincentive for the shut-out parent to rebuild the relationship.
       - A parent living with an adult child should not lose a right to support because of the actions or “neglect” of the child vis-à-vis the other parent.
       - The objective of boosting the prospects of the adult child exists whether the parent and child are close or estranged.
       - Normally, a waiver of a legal right someone requires knowledge of the existence of the right and an unequivocal and conscious decision to waive it. This is often not the case when a child unilaterally terminates their relationship with a parent.
       - In the spousal support context, the strength of the parties continuing relationship is not a factor.
       - It is too transactional to be appropriate to the family context ("if you want support, you’d better stay in touch").
       - The strength of a parent-child connection plays no role in setting support for children under 18.
* Beyond *Farden*, some other relevant factors for determining whether an adult child pursuing post-secondary studies is a "child of the marriage" include:
  1. Duration of the program.
  2. "Accredited" character of program.
     + A program may be accredited formally (i.e., formally recognized as a credible learning institute with a track record of graduating classes fully equipped for their chosen fields) or informally.
  3. Availability of adequate alternative programs.
     + Are adequate alternatives available that are closer to home or otherwise less expensive?
* The party seeking support bears the onus of proving that an adult pursuing post-secondary study is a "child of the marriage."

Rationale: (Lema J)

1. The son is not a "child of the marriage" for support purposes.
   * He is enrolled in full-time studies; he completed a BSc in April 2019 and is aiming for medical school in fall 2019 (the usual duration for which is four years).
     + As such, the parties agree he has a reasonable and appropriate career plan.
   * He will be amply supported in his university studies.
     + While an injury prevented recent part-time work, no evidence showed that he is generally unable to work part-time during the university year or at least during the summer.
     + He is presumably eligible to apply for student loans, as no evidence suggested otherwise.
     + Since his siblings are apparently not going to be able to draw from the $50,000 RESP balance, those monies are fully available to him to fund his continuing university studies.
     + He is a very strong student and has received various scholarships.
   * At 23, he is age appropriate for where he sits on his respective training track.
   * There is no evidence that he terminated his relationship with his parents.
2. The daughter is a "child of the marriage" for support purposes.
   * She was enrolled in full-time studies at the Washington School of Ballet ("WSB")
   * She will not be as readily able to support herself in her post-secondary studies.
     + The WSB is not an accredited institution for the purpose of Alberta or Canada student loans or RESP distributions.
     + According to her mother, the demanding nature of the WSB program precludes part-time employment during school and event the summer.
   * She has a reasonable and appropriate career plan, as the WSB will enhance her prospects of achieving a ballet-dance career.
     + Her clear objective and pursuit of it via full-time dance studies are distinguishable from other cases featuring nebulous or non-existent career plans.
     + She has an aptitude for ballet dancing, having pursued it since she was 3 and achieving success in her studies and dance competitions (i.e., she received dance awards, invitations to train with distinguished dance academics, and a reference letter).
     + Both parties supported her participation in dance throughout the years, though the father's support waned when she began attending the WSB.
     + Based on readily-accessible online information, the WSB is an internationally recognized ballet-training program led by internationally recognized instructors.
   * At 19, she is age appropriate for where she sits on her respective training track.
   * While unilateral termination of a relationship with father should not be grounds for denying support, in any event, the facts reveal that her decision to close off contact is not "unilateral termination."
     + The father made certain infidelity-related disclosures to her and the mother, which made it difficult for her to maintain a positive relationship.
   * It appears that the WSB offers a different approach to ballet training that is not available elsewhere. The father did not provide evidence of other, similar ballet-training programs closer to home.

Notes:

* As this case suggests, a payor parent's disapproval of the course of studies chosen by their child does not relieve the payor parent from his or her support obligations.
  + In addition, residing with one's parents is not a prerequisite to being a "child of the marriage."

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

Facts:

* The parties were married in 1993 and separated in 2010. They have 4 children: G (22), P (19), F (17), and L (14). In 2012, they agreed to share parenting of the children, and IWR agreed to pay KMR child support of $7000 per month. IWR now seeks a reduction of child support obligations from $7000 to $5000 per month.
* After high school, G took a year off before attending the UofA from September 2016 to April 2017. After his first year, he did not return to university. Since August 2017, he has lived primarily with KMR. He did not find employment after university and has not worked since. KMR says that G cannot secure employment because of his mental health issues. He has never been diagnosed mental illness, but he has seen a psychologist.
* P graduated high school in June 2017, at which point she began working in Remedy Café. She turned 18 on January 8, 2018. She worked for Pomme (another café) in the summer of 2018, and then left for university in BC in August 2019 with plans of becoming a psychologist.

Issue and holding:

* Have any of the children ceased to be children of the marriage? **YES (G and P)**

Analysis:

* A claim that an adult child is unable to withdraw from a parent’s charge due to a mental illness requires a medical diagnosis and medical evidence that his/her illness significantly impairs his/her ability to support themselves.
* Current social and economic conditions may support an order of child support for a *reasonable transitionary period* for an adult child who is not in school full-time, or who has ceased their post-secondary education or training.
  + The transitional periods of child support ordered in the reported case law between completing school and entering the workforce appear to be, on average, 3 months.

Rationale: (Jerke J)

* F and L are clearly still children of the marriage, as they are under the age of 18.
* G ceased to be a child of the marriage in August 2017 when he abandoned university.
  + There is no medical evidence of mental illness sufficient to establish that G is unable to withdraw from his parent's charge.
  + There is no evidence that the current social and economic conditions are depressed to such an extent that G could not have obtained full-time employment during the last two years (i.e., there is a lack of evidence to explain why a transition period is justified).
    - The conditions could justify a reasonable transitionary period of child support after G ceased attending university full-time. But, it is clear that G has made no efforts to find employment since he finished his first year of university in April 2017.
* P has ceased to be a child of the marriage when she turned 18.
  + Neither parent provided any evidence to allow a consideration of whether P was or was not, from January 2018 onward, unable to withdraw from their charge or obtain the necessaries of life.

## Federal Child Support Guidelines

* + The *Federal Child Support Guidelines* are a regulation under the *Divorce Act*.
    - The *Alberta Child Support Guidelines* are a regulation under the *Family Law Act*; these guidelines are very similar to the federal guidelines.
    - For exam purposes, we are to assume that we are proceeding under the *federal* guidelines.
  + The *Divorce Act* specifies that where a court making a child support order shall do so in accordance with the applicable guidelines [s. 15.1(3)].
    - A key purpose of the *Guidelines* is to reduce conflict between spouses by making the calculation of child support more objective, thereby improving the efficiency of the legal process and encouraging settlement [s. 1].
      * Before the *Guidelines*, child support awards were inconsistent and unpredictable, which led to frequent and expensive litigation.
    - Another purpose is to establish support for children that ensures that they continue to benefit from the financial means of both spouses after separation [s. 1].
  + Unless otherwise provided, the amount of child support under the *Guidelines* is (1) the amount set out in the applicable table and (2) any special or extraordinary expenses [s. 3(1)].
    - The applicable table is determined by the income of the parent against whom support is sought and the number of children.
    - The applicable table is the table for the province in which the spouse against whom the order is sought habitually resides at the time the application for child support is made [s. 3(3)(a)(i)].
    - The court is not required to order the amounts set out s. 3 in cases of:
      * Step-parents [s. 5]
        + Where a spouse seeks child support from someone who stands in the place of a parent for a child, the amount of a child support order is such amount as the court considers appropriate, having regard to these Guidelines and any other parent’s legal duty to support the child.

If a step-parent *and* a biological parent are paying support, this may be a reason for reducing the support required of each.

* + - * Split parenting time [s. 8]
        + If there are two or more children, and each spouse has the majority of parenting time with one or more of those children, the amount of support is the difference between the amount that each spouse would pay if a child support were sought against each spouse.
      * Children over the age of majority [s. 3(2)] (*see below*)
      * Shared custody [s. 9] (*see below*)
      * Undue hardship [s. 10] (*see below*)
      * High income earners [s. 4] (*see below*)
  + Under the *Guidelines*, the norm is periodic payments, reflecting the fact that the needs and circumstances of the parties may change over time requiring more or less support.
  + Since the *Guidelines* have come into force, child support has been made tax neutral.
    - The payor does not get a tax credit for paying it, and the payee does not have to include it in their taxable income.

### Adult Children

* Unless otherwise provided under the guidelines, if one of the children is 18 or over, the amount of child support is [s. 3(2)]:
  1. The amount determined by applying the guidelines as if the child were under 18, or
  2. If that amount is not appropriate, the amount that the court considers appropriate having regards to the means and needs of the child and the financial ability of each spouse to contribute to support.
     + The onus is on the party seeking to deviate from the Table amount.

#### *Wahl v Wahl*, 2000 ABQB 10

Facts:

* Carole and Edmund Wahl divorced in 1990 after a 16-year marriage, during which they had one child (Leah). Carole got custody of Leah and Edmund was ordered to pay child support until she ceased to be a child of the marriage. Leah moved out of Carole's house and completed high school in 1998. In September 1998, Leah received RESP money from Edmund, which she spent mostly on a trip to Egypt and living expenses. After receiving those funds, she sent Edmund a letter indicating that their relationship was over. Apparently sparked by the letter, Edmund ceased making child support payments when Leah turned 18. Leah was subsequently was accepted at the prestigious music program at Sheridan College, which is in Ontario and away from the parents. According to Leah, the program boasts on of the highest success rates in the industry. Given its demands, Leah deposed that she would be unable to work during the school term. Leah also applied and was approved for a student loan in the amount of $7,100. Leah brought an application for reinstatement of child support, but in 1999, Smith J amended the style of cause to show that Carole was bringing the application on behalf of Leah.

Issues and holding:

1. Does Leah have standing to apply for maintenance? **NO**
2. Is Leah still a "child of the marriage" entitled to child support? **YES**
3. Should Leah have to account for that portion of her RESP's that she spent on non-educational purposes? **YES**
4. What is the appropriate quantum of child support? **$1,188.52**

Analysis:

* A child's attendance at school is an "other cause", within the meaning of "child of the marriage," which limits an adult child's ability to provide necessaries for himself or herself or to withdraw from parental control.
  + Just attending school is insufficient to justify support. An applicant must prove that, as a result of attending school, the particular child is unable to maintain themselves and that the course of studies is reasonable in the circumstances, having regard to the child's abilities and the job market.
  + A child who wants to attend school away from home must justify the extra cost involved by explaining why the local program is inadequate them and that, given the family resources, it is not unreasonable to attend school away from home.

Rationale: (Johnstone J)

1. Although there is no clear statutory prohibition against such applications, the case law appears settled that non-spouses do not have standing and are precluded from bringing an application.
   * Also, the *FCSGs* refer to "spouse" in relation to the applicant and the respondent, never the child.
   * However, given the amendments to the style of cause, this is a valid application by Leah's mother.
2. Leah is still a "child of the marriage" for the purposes of the *Divorce Act*.
   * She has an aptitude for music, has exhibited a desire and intent find employment in the entertainment industry, and there appears to be a reasonable likelihood of employability.
   * Her course demands are high, and she is not able to work during the school term.
   * At 19, she has not already passed through the "transition period" to self-sufficiency.
   * Edmund's investment into an RESP shows that he intended that she should continue to be supported throughout her post-secondary education.
   * While Leah clearly sought to unilaterally renounce her relationship with her father, this element is not controlling in this analysis.
     + *Note*: unilateral termination of the relationship may be relevant, though, in determining the amount of child support to be paid.
3. A child is expected to responsibly use money which has been saved on his or her behalf for the purposes of pursuing an education.
4. This amount represents Leah's average monthly expenses during the school year, less money saved during the summer.
   * During the summer, Edmund will not be responsible for Leah's expenses.
   * Leah is expected to work during the summer and save a modest amount of $250 per month.
   * The award of $7,100 in student loans does not factor into this amount.
     + If she had been receiving child support, she would not have qualified for at least a major portion of this financing.
     + Edmund acquiesced to some of the RESP funds (which Leah has to account for) being used for non-educational purposes.
   * Leah must apply for student loans, scholarships, and any bursaries or other funding for which she may be eligible.

### Shared Parenting

* If each spouse exercises not less than 40% of parenting time with a child over the course of a year ["shared parenting"], the amount of the child support order must be determined by taking into account [s. 9]:
  1. The amounts set out in the applicable tables for each of the spouses.
  2. The increased costs of shared parenting time arrangements, and
  3. The conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
* The requirement of 40% of parenting time *over the course of a year* means that s. 9 is not triggered if, for a short period of time (e.g., a week, a month, etc.), the access parent has increased time with the child.
  + s. 9 is only triggered where the shared custody arrangement is a lasting one.
* Parenting time is not calculated using any fixed formula.
  + Some judges may count the days that the child is in the "care and control" of each parent.
    - One way of thinking of "care and control" is: Who would a school call if a child was injured?
  + Other judges may ask the parties to calculate the number of hours that they spent with the child.
    - However, Katherine does not believe that keeping track of exactly how many hours each spouse spends with the child does not satisfy the objective of reducing conflict between spouses.
* Section 9 may create added conflict between the parents.
  + The 40% threshold may prompt the access parent to pay close attention to the hours they are spending with a child, and the access parent may start refusing access to the child by the access parent.
  + This is because of the possibility of a "cliff effect" wherein even a small increase in parenting time by a non-custodial parent from below 40% to above 40% results in a reduction of child support for the custodial parent.
    - While the cliff effect would be significant using only a simple set-off approach, the effect is tempered by the approach taken in *Contino*.

#### *Contino v Leonelli-Contino*, 2005 SCC 63

Facts:

* The parties were married in 1982 and gave birth to their only child, Christopher, in 1986. After they separated, they entered an agreement in 1992 that provided for joint custody of Christopher. It further provided that the father would pay child support of $500. When the mother started taking night classes, the father took in Christopher for one more night per week. Thus, in September 2000, the father requested a reduction in child support based on the s. 9 shared custody provisions.

Procedural history:

* The motions judge reduced child support to $100 per month. She determined that the difference in the father's and mother's Table amounts was $128, half of which was $64, and then she grossed this up to $100. The ONSC increased child support to $688 per month, arguing that the motions judge erred in deviating from the s. 3 Guidelines amount. The ONCA reduced child support to about $400, holding that once s. 9 applies, the presumptive s. 3 Guideline amounts do not.

Issues and holding:

* What is the appropriate amount of child support? **$500**

Analysis:

* With shared parenting, ss. 3 and 8 of the *Guidelines* are not used. Section 9 represents an entirely different formula.
  + s. 3 provides that calculations under that provision will not apply where "otherwise provided." Such is "otherwise provided" in s. 9, and unlike in the other exception sections, like ss. 3(2) and 4, nowhere is it specified in s. 9 that the s. 3 Guidelines amounts will be presumptively applicable.
* There is no presumption in favour of reducing child support downward from the s. 3 Guidelines amount.
  + While s. 9 does entail a deviation from the *method used* to calculate child support under s. 3, it does not necessarily entail a deviation from the *amount* of support.
    - It is quite possible that after a careful review of all of the factors in s. 9, a trial judge will come to the conclusion that the Guidelines amount will remain the proper amount of child support.
* No formula is mandated by s. 9. Any attempt to apply strict formulae will fail to recognize the reality of various families.
  + In drafting s. 9, Parliament deliberately sought to promote the objectives of fairness and flexibility, even at the expense of predictability and consistency.
  + The three factors structure the exercise of discretion. All of them must be considered, but none should prevail.
    - Consideration should be given to the overall situation of shared custody and the costs related to the arrangement while paying attention to the needs, resources, and situation of parents and any child.
* The framework of s. 9 is as follows:
  1. Determine whether the 40% threshold has been met.
     + Each spouse must spend no more than 40% of parenting time with the child.
  2. Determine the appropriate amount of support, which involves:
     1. Determining the simple set-off amounts [s. 9(a)].
        + Requires that the court consider the financial situations of *both* parents instead of the sole income of the spouse against whom the order is sought, as in s. 3.
        + Under s. 9(a), calculating a simple set-off (i.e., the difference between the Table amounts which each parent would be entitled to it they were seeking support from one another) provides a starting point for a reasonable solution, which can be departed from if it is inappropriate under ss. 9(b) and (c).
          - From here, the court retains the discretion to modify the set-off amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as they move from one household to another, something which Parliament did not intend.
          - There is no presumption in favour of the set-off amount.
     2. Reviewing the child expense budgets [s. 9(b)].
        + A court must look at the parents' actual spending patterns and not just make assumptions about spending.
        + A court should look at *all* the expenses of *both* parents under s. 9(b): not just the additional expenses resulting from an increase in access, not just the variable or fixed expenses, and not just the expenses of the recipient parent.
          - Under s. 9(b), a court has two concerns: (i) the overall increased total costs of child-rearing for both parents, especially duplicated costs, and (ii) any disproportionate assumption of spending by one parent or the other.
        + These expenses should be apportioned between the parents in accordance with their respective incomes to assess any need for significant adjustments to the set-off amounts.
     3. Consider the ability of each parent to bear the increased costs of shared custody and the standard of living for the children of each household [s. 9(c)].
        + Allows examination of special or extraordinary expenses (including but not limited to those in s. 7) and a consideration of undue hardship.
        + In assessing each parent's ability to bear the increased costs of shared parenting, a court should look at the assets, liabilities, and incomes of each parent.
        + Children should not experience a significant variation in the standard of living as they move from one household to another.
          - The child's standard of living in each household is particularly useful for the exercise of discretion in a predictable manner.
     4. Distinguish between initial orders or agreements and variations.
        + An application that represents a variation of a prior support arrangement will usually raise different considerations from a s. 9 application where no prior order or agreement exists, as a recipient parent may have validly incurred expenses based on legitimate expectations about how much child support would be provided.

Rationale: (Bastarache J)

* The amount of child support must be set at $500 per month.
  + The Table amount for the father on an income of $87,315 is $688 per month. The Table amount for the mother on an income of $68,082 is $560. The set-off is $128.
  + An examination of the budgets of the parties suggests that the father should pay more than the set-off amount.
    - The father's budget reveals monthly expenditures attributable to the child of $1,814. The mother's child expense budget reveals monthly expenditures attributable to the child of $1,916.95.
      * These amounts establish that there is a large amount of duplication with regard to fixed costs.
    - Given that the ratio of income between the father and mother is 56:44, the father should be responsible for paying 56% of the total child-care expenses, $2,089.33, and the mother ought to be responsible for 44 percent of the total child-related expenditures, $1,641.62.
      * Since he is already contributing $1,814, the father would be required to pay the mother the sum of $275.33.
  + Each parent’s ability to bear increased costs/standards of living also suggest an increase in the set-off amount.
    - There is a $20,000 difference in gross incomes ($87,315–$68,082) and a $65,000 difference in net worth ($255,750–$190,651).
  + Significant is the fact that the mother moved to a new house in 2000 because she believed it was in the child's best interest, in the reasonable expectation that she would continue to receive $563 a month or more from the father.
    - Such a variation from a long-standing financial status quo upon which the mother incurred valid expenses on behalf of this child should result in higher support payments.

Notes:

* As D.A. Thompson argues, the home purchase by the mother skewed the whole analysis. Without it, the court presumably would have wound up somewhere between $128 and $275.
* As this decision shows, the court retains significant discretion to award the appropriate amount of child support under s. 9.
* This decision has been criticized for not providing predictability in child support in situations of shared parenting, which is what the *Guidelines* strive to provide.
  + The absence of an objective standard in s. 9 makes it harder to advise your client and to negotiate with the other side, thus increases the chances of expensive litigation.

### Undue Hardship

* Under the *Guidelines*, on application by *either* spouse, a court *may* award an amount of child support that is different from the amount determined under ss. 3–5, 8–9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer *undue hardship* [s. 10(1)].
  + While the language suggests that a payor or payee may claim undue hardship, it is not common for a payee to claim undue hardship because they are not receiving enough.
  + It is within the *absolute* discretion of the court to award a different amount on grounds of undue hardship.
  + This provision can be used in any parenting circumstance (shared parenting, split custody, standing in the place of a parent, etc.)
  + As stated in this provision, an undue hardship claim cannot be used to avoid paying s. 7 expenses, as s. 7 expenses are already discretionary.
  + Circumstances that may cause undue hardship include, but are not limited to [s. 10(2)]:
    1. The spouse has unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living.
       - The mere fact of bankruptcy does not relieve the payor
    2. The spouse has unusually high expenses in relation to exercising parenting time with a child.
    3. The spouse has a legal duty under a judgment, order or written separation agreement to support any person.
    4. The spouse has a legal duty to support a child, other than a child of the marriage.
       - A spouse cannot use the simple fact of having children of another marriage to prove undue hardship; there must be cogent evidence of such hardship.
         * When a spouse starts a new family, they are expected to arrange their affairs in such a way to honour their previous obligation to their prior family.
    5. The spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.
    - Proof that any one of these grounds of hardship may exist does not *necessarily* mean that it is undue; the applicant must show that the hardship is exceptional or disproportionate.
    - Katherine claims that she has not seen an undue hardship application that was *not* in relation to one of the enumerated grounds of undue hardship.
  + A claim of undue hardship *must* be denied by the court if the household of the spouse claiming it would, after determining child support, have a higher standard of living than the household of the other spouse [s. 10(3)].
    - Schedule II of the *Guidelines* includes a test to compare standards of living (see below).
  + If a court deviates from the *Guideline* amount on grounds of undue hardship, the court can specify that the deviation is time limited [s. 10(5)].

#### Hanmore v Hanmore, 2000 ABCA 57

Facts:

* The parties were divorced in 1986. They had two children (now 15 and 17) who have remained in the custody of the appellant since separation. At the time of divorce, the respondent was ordered to pay child support of $75 per month per child. The respondent's net annual income is $31,609, while the appellant's is $23,839. The respondent is now supporting his new wife and their two children, he lives in a $116,000 house, and has medical and dental benefits. The appellant lives with the parties' two kids in a rented basement suite, cooking family meals using a microwave and a hot plate. She works on a contract basis and does not have medical or dental benefits. She has heavy student loan debt. One of her kids requires tutoring at an annual cost of $650 and the other is a gifted vocalist gets choir lessons at a cost of $250 per year.
* In 1998, the appellant applied for an increase in child support, seeking the Table amount plus extraordinary expenses. The Court increased child support to $175 per month per child. The respondent applied for a reduction of the guideline amounts on grounds of undue hardship, claiming that he had to support two other kids on a limited income.

Issue and holding:

* Can the respondent successfully establish undue hardship? **NO**

Analysis:

* The applicant who seeks a reduction on grounds of undue hardship must satisfy a two-stage test:
  1. The applicant most prove specific facts establishing the undue hardship.
     + The applicant must establish a specific basis for a claim of undue hardship. s. 10(2) sets out a non-exhaustive list of circumstances that may give rise to such a claim.
     + The applicant must show that the hardship complained of is exceptional, excessive, or disproportionate in the circumstances.
       - The burden of establishing a claim of undue hardship is a heavy one, as the objectives of the *Guidelines* will not be met if courts too readily deviate from the established guidelines.
       - A general claim regarding an inability to pay or a generic reference to the overall expense of a new household will not suffice.
  2. If undue hardship is established, the applicant must show that his or her household would enjoy a lower standard of living than the household of the other parent should child support not be reduced.
* Even if the two-step test is satisfied, the court retains a residual discretion to refuse to reduce the guideline amount.

Rationale:

* The appellant identifies no specific hardship and fails to indicate why the statutory amount creates an undue hardship for him and his family rather than an inconvenience or difficulty.

Ratio:

* The presumption in s. 3 of the Guidelines should not be displaced in the absence of specific and cogent evidence why paying the Guideline amount would cause an undue hardship.
* The undue hardship provisions are designed not to be used so as to not undermine the objectives of the *Divorce Act*.

#### Comparison of Household Standards of Living

* As stated above, an application claiming undue hardship must be denied by the court if the household of the spouse claiming it would, after determining child support, have a higher standard of living than the household of the other spouse [s. 10(3)].
* The calculation for household standard of living, as provided in Schedule II, is as follows:
  1. Determine the annual income of each person in each household, after taxes.
     + Calculated as the person's income (determined under ss. 15 to 20 of the *Guidelines*) LESS taxes payable on that income.
  2. Adjust the annual income of each person in each household by…
     + Deducting (1) any amount relied on by the court as a factor in determining undue hardship, (2) the annual child support you would pay to the other parent if there were no claim for undue hardship, and (3) the amount of child and spousal support you and any other household member pay.
     + Adding (1) the amount you would receive from the parent if there were no undue hardship claim and (2) the amount you and any other household member receive for child support.
  3. Add all the amounts of adjusted incomes for all the people in the household to determine total household income for each household.
  4. Determine the "low-income measures" using the table.
  5. Divide the household income by the low-income measure amount to get a household ratio.
     + The house that has the higher ratio has the higher standard of living.

### Incomes over $150,000

* Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is either [s. 4]:
  1. the amount set out in the applicable table, or
  2. If the table amount is inappropriate:
     1. In respect of the first $150,000 of the spouse’s income, the amount set out in the applicable table,
     2. In respect of the remaining income, the amount that the court considers appropriate, having regard to the means and needs of the children and the financial ability of each spouse to contribute to them,
     3. Special or extraordinary expenses.
* In other words, the court has to order the *Guideline* amount for the first $150,000 of the payor's income; they have discretion about what amount to order with respect to the payor's income over $150,000.

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

Facts:

* The parties were married in 1979. At that time, the husband was a lawyer and the wife was a teacher. The parties had two children. They separated in 1985 and divorced in 1987. By that time, the husband was now a CEO making almost $1 million annually, and had a net worth of about $78 million. The wife earned only $63,000 annually. In 1988, the wife applied for an increase in child support to reflect the dramatic increase in the husband's fortunes after separation.

Procedural history:

* The trial judge concluded that the Table amount applicable to the husband's income was not inappropriate and ordered the husband to pay monthly child support in the amount of $10,034. The husband appealed, alleging that many of the alleged expenses were excessive.
* The ONCA upheld the trial judge's decision. Abella JA held that even if the husband was correct, a court cannot reduce the Table amount of support under s. 4. As such, she interpreted the word "inappropriate" under s. 4(b) as meaning "inadequate."

Issues and holding:

1. Did the ONCA err in its interpretation of "inappropriate" in s. 4? **YES**
2. Did the ONCA err in upholding the trial judge's discretion to maintain the Table amount of support? **NO**

Rationale: (Bastarache J)

1. "Inappropriate" means "unsuitable" rather than "inadequate." It speaks of a sum that either exceeds or falls short of the purpose at hand.
   * Under s. 4, any amount attributable to income above the $150,000 threshold can be reduced or increased by a court if the amount is inappropriate having regard to the condition, means, needs and other circumstances of the children, and the financial abilities of the spouses.
     + Nevertheless, based on the ordinary meaning of the provision, its context in the overall scheme, and the purposes of the Guidelines, there should be a presumption in favour of the Table amounts.
     + In determining the means, needs, and other circumstances of the children, the presiding judge has discretion to decide whether a childcare budget is necessary.
2. The onus is on a parent who alleges that the Table amount of support is "inappropriate" under s. 4 of the Guidelines to establish an "articulable reason" to displace the Guidelines figure.
   * That said, the husband has provided no such reason; he has not demonstrated that the wife's budgeted child expenses are so high as to exceed the generous ambit within which reasonable disagreement is possible.

Notes:

* The question often is: When is the *Guideline* amount so excessive in relation to the child's needs as to justify deviation from this amount?

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

Facts:

* Chris and Lauri Simon were married in 1992 and had a son named Mitchell. The parties separated in 1994 and entered into a separation agreement in which Chris would pay $2,200 per month in child support and Lauri would put $750 of this into a trust account for Mitchell. At that point, Chris was earning about US$180,000 as professional hockey player. The terms of the separation agreement were incorporated into a divorce judgment on June 22, 1995. In 1996, Chris entered a contract with the Washington Capitals that saw his salary jump to US$1,000,000 per year. As such, Lauri applied for a variation in child support from $2,200 to $9,215 per month (representing the Table amount for a supporting parent earning US$1,000,000). In doing so, she put forward a childcare budget claiming $10,000 a year for activities and expenses for Mitchell and $6,000 for clothes.

Procedural history:

* The trial judge increased child support payments to $5,000, considerably lower than the Table amount. In his view, Chris's sudden windfall was not guaranteed to persist, the large expenses that Lauri claimed for Mitchell were reasonable. The trial judge also ordered that Lauri put $1,000 of the monthly child support into the trust account.

Issue and holding:

1. Did the trial judge err by not increasing the monthly child support payment for Mitchell Simon from $2,200 to $9,215, the Table amount in the Guidelines? **YES**
2. Did the trial judge err when he increased the trust component of the monthly child support payment from $750 to $1000? **YES**

Analysis:

* In *Francis v Baker*, Bastarache J said that custodial parents are presumptively entitled to the Table amount unless the payor can demonstrate that the Table amount is inappropriate. It follows that custodial parents need not justify each and every budgeted expense.

Rationale: (MacPherson JA)

1. Chris Simon did not rebut the presumption in favour of the Table amounts.
   * The trial judge erred in placing a heavy burden on Lauri to justify her child care budget.
   * The sudden increase in Mr. Simon’s salary and the uncertainty of its continuation were irrelevant.
     + The Table amounts are determined by the present income of the paying spouse. If it changes in the future, he can apply to have the child support order varied. It should not be effectively varied in advance by a judge speculating about his future income.
   * Lauri's budget is a reasonable one.
     + Her application to vary the amount of child support comes at a time when their child is about to embark on school, sports, clubs, and other activities.
     + Chris makes more than $100,000 a month and has no other dependents. Supporting his son to the tune of less than 10% of his income is not unreasonable.
       - While Chris has submitted that he lives a "modest" lifestyle, this is irrelevant. What's important is the payor's income, not lifestyle.
2. The trial judge was incorrect in setting aside part of the child support for future use for two reasons:
   * Neither party asked for a variation of the trust provision of the separation agreement.
   * A court should not fetter a custodial parent's discretion as to how to spend child support unless the payor proves that there is a real risk of the payee's misuse of child support.
     + The court should presume that the custodial parent will do his or her best to provide for both the child's immediate needs and his or her future care and education.

Notes:

* This case shows that although a high-income payor may apply to reduce the Table amount of support under s. 4 of the Guidelines, he or she is unlikely to succeed.
  + A court is unlikely to infer that the Table amount is excessive solely on the basis of the sheer size of the award. *A payor has to prove that the Table amount is excessive, given the reasonable needs and expectations of the particular child in the case* (James G. McLeod).
    - A payor might do this by presenting what they think is a fair budget and compare this to the Table amount of support.
  + As James G. McLeod notes, while this promotes consistency and reduces litigation, it makes child support more or an automatic transfer from payor to payee regardless of need or ability to pay in most cases.
* James G. McLeod disagrees with the onus *Francis v Baker* placed on the payor to convince a court that the Table amount is excessive, as the payee has all the information about the child's actual and proposed lifestyle.

### Special Expenses

* s. 7 expenses are those that the recipient should not be expected to pay for out of the base amount of child support (which are for more routine expenses).
* Under the *Guidelines*, a court *may* provide for an amount to cover all or any portion *of the following expenses*, taking into account its *necessity* in relation to the child’s best interests and its *reasonableness* in relation to the means of the spouses and child and the family’s spending pattern pre-separation [s. 7(1)]:
  1. Childcare expenses incurred as a result of the employment, illness, disability, or education or training for the spouse who has the majority of parenting time.
     + e.g., daycare, nanny expenses.
     + Does not include childcare expenses for the non-custodial parent.
     + Does not cover childcare expenses incurred as a result of the non-custodial parent's hobbies (e.g., going out to the movies on a Friday night).
     + Childcare expenses will generally not be allotted for children over 12.
  2. The portion of the medical and dental insurance premiums attributable to the child.
  3. Health-related expenses that exceed insurance reimbursement by at least $100 annually.
     + e.g., if the child gets braces, the part of the cost that exceeds reimbursement is a s. 7 expense.
  4. Extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child’s particular needs.
     + Routine school fees, school supplies, transportation, etc. are expected to be paid for out of the base amount of support.
  5. Expenses for post-secondary education.
     + *Any* expense for post-secondary will be eligible; the section does not specify that it has to be "extraordinary."
  6. Extraordinary expenses for extracurricular activities.
     + e.g., costs associated with soccer registration may not be extraordinary for a middle-class family but will be extraordinary for a lower-class family.
* The term "extraordinary expenses" in subsection (d) and (f) means [s. 7(1.1)]:
  1. Expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, or
  2. Expenses that the court considers are extraordinary taking into account:
     + The amount of the expense in relation to the income of the spouse requesting the amount.
     + The nature and number of the educational programs and extracurricular activities.
     + Any special needs and talents of the child or children.
     + The overall cost of the programs and activities.
     + Any other similar factor that the court considers relevant.
* The guiding principle in determining the amount under s. 7(1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense the contribution, if any, from the child [s. 7(2)].
  1. e.g., if the father makes $60,000 and the mother makes $40,000, the father will be responsible for 60% of the s. 7 expenses and the mother will be responsible for 40%.
  2. This is a guiding principle; the judge has discretion to alter the spouses' share of s. 7 expenses as they deem fit.
     + However, Katherine says that the majority of s. 7 expenses are split in proportion to the spouse's income.
* In determining the amounts under s. 7(1), the court must consider any eligibility for subsidies, benefits, or income tax deductions relating to the expense, but must not take into account eligibility for any universal childcare benefit [s. 7(3)–(4)].
* The award of s. 7 expenses are always discretionary, as evidenced by the word "may" in s. 7(1).
* s. 7 is an exhaustive list; if an expense does not fit into one of the six categories listed under s. 7(1), then it is not a s. 7 expense.

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

Facts:

* The husband and wife divorced in 2007. There are two children of the marriage, a son (16) and a daughter (14). In May 2006, the parties entered into a separation agreement, which was incorporated into a consent order in August 2006. The order held that the parties would share the s. 7 expenses in proportion to their income. It also stated that neither party shall incur additional special expenses without the consent of the other party, but that such consent will not be reasonably withheld.
* The wife now seeks a variation of the order to force the husband's to pay for s. 7 expenses for extracurricular activities, namely the daughter's basketball and the son's tutoring.

Issue and holding:

* Does the husband have an obligation to pay the s. 7 expenses for the daughter's basketball and the son's tutoring? **YES**

Analysis:

* The expression "extraordinary" implies that the expenses must be exceptional or out of the ordinary, either in their nature or in their amount, when compared to the expenses ordinarily incurred by a typical household with a similar income.
  + "Extraordinary" in s. 7 means extraordinary *in relation to the average child*.
  + The expense must be necessary in relation to the child's best interests and as well reasonable having regard to the means of the spouses, the child, and the family's spending pattern.
  + Factors to be considered in whether an expense is extraordinary include:
    1. The combined income of the parties.
    2. The fact that two households must be maintained.
    3. The percentage of the combined income represented by the expense.
    4. Any debt of the parties.
    5. Any prospect for the decline or increase in the parties' means in the future.
    6. Whether that parent who had paid the expense in the past will be able to continue to do so without the contribution of the other parent.
    7. Whether the parent from whom the contribution was sought was consulted about the expense before it was incurred.
* In *CLE*, the court found that school fees and school supplies were not "extraordinary." The cost was modest, and they are expenses that most children normally incur.
  + The court also found that horse riding lessons and soccer (which cost a total of $1,104 per year) were not proper s. 7 expenses because the child in question did not need this much money spend on extracurricular activities.
* In *MacIntosh*, the court held that expenses for ballet and tae kwondo were not extraordinary given the parent's combined income of $148,000.
* In *Peleshaty*, the court concluded that school and bus expenses were not extraordinary because they were usual expenses associated with attending school.
  + It also found expenses associated with hockey to be extraordinary.
  + With regards to the sharing formula, the court determined that spousal support had to be deducted from the father's income and added to the mother's, with s. 7 then being shared in proportion to income.

Rationale: (Wittmann CJ)

* The husband shall pay the wife $100 per month so long as the son is obtaining tutoring and the daughter is in a paid basketball program.
  + If either should cease, the husband's s. 7 payment shall drop to $50. If both cease, his payment shall drop to $0.

Notes:

* Since s. 7 expenses are discretionary, the parties can agree to disproportionate sharing of these expenses. Judges have more freedom to deviate from proportionate sharing than they do under s. 3.

### Calculation of Income

* Income, for the purposes of child support, is determined according to the method set out in ss. 16 to 20 of the *Guidelines*.
  + Where the parties agree on the annual income of a spouse, the court can consider it to be the spouse's income, if appropriate [s. 15(2)].

#### Steps for Calculating Income

1. *Gather mandatory information pursuant to financial disclosure requirements.*

* Under s. 21(1) of the *Guidelines*, a spouse who applies for child support must include with the application:
  1. A copy of every personal income tax return filed by the spouse for the last three years.
  2. A copy of every notice of assessment for the last three years.
  3. Where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date.
  4. Where the spouse is self-employed, for the three most recent taxation years
     1. The financial statements of the spouse’s business, and
     2. A statement showing a breakdown of all payments to non-arm's length persons or corporations.
  5. Where the spouse is a partner, confirmation of the spouse’s income and draw from, and capital in, the partnership for its three most recent taxation years.
  6. Where the spouse controls a corporation, for its three most recent taxation years,
     1. The financial statements of the corporation and its subsidiaries, and
     2. A statement showing a breakdown of all payments to non-arm's length persons or corporations.
  7. Where the spouse is a beneficiary under a trust, a copy of the trust settlement agreement and the trust's three most recent financial statements, and
  8. Where the spouse receives income from EI, social assistance, a pension, workers compensation, disability payments, or any other source, the most recent statement of income.
     + If such a statement is not provided, a letter from the appropriate authority stating the required information will suffice.
* Similarly, a spouse served with an application for child support must, within 30 days after the application is served in Canada, provide the court and the other spouse with the documents set out in s. 21(1) [s. 21(2)].
* Where a spouse fails to comply with s. 21, the other spouse may apply (1) to have the application set down for a hearing or move for judgment or (2) for an order requiring the spouse to provide the required documents [s. 22].
  + When the court proceeds to a hearing, it may draw an adverse inference against the spouse who failed to comply [s. 23].

1. *Examine each source of income identified in the CRA T1 General Form, adjusted in accordance with Schedule III.*

* A spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 form issued by the CRA and is adjusted in accordance with Schedule III [s. 16].
  + The calculation of income becomes more difficult if the spouse receives income from sources other than employment (e.g., rental income, capital gains, commission income).
  + We generally do not use RRSP income in the calculation of guideline income, since RRSP's are usually treated as property during the division of matrimonial property.

1. *Assess the payor's historical pattern of income.*

* If the court believes that the spouse's annual income under s. 16 is not a fair determination of their income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair in light of any fluctuations in income [s. 17(1)].
  + It may be unfair to determine a spouse's *Guideline* income by looking at one year of their tax return if their income fluctuates widely each year (e.g., if they earn a lot of their money from commissions).

1. *If the payor is a shareholder, director, or officer of a corporation, determine whether any of the corporation's pre-tax income should be attributed to the payor personally for the purposes of child support.*

* Where a spouse is a shareholder, director, or officer of a corporation, and the court believes that their income under s. 16 does not accurately reflect the money available to them, it may include in their income [s. 18(1)]:
  1. Some or all of the pre-tax income of the corporation for the most recent taxation year, or
     + Allows the court to pierce the corporate veil to address a payor's potential diversion, manipulation, or sheltering of income through the use of a corporate structure to avoid paying child support (*Sweezey*).
       - i.e., other words, if a corporate spouse is leaving income in the corporation, rather than taking it out as personal income, he/she must justify why or face having that income imputed to them.
     + In determining a corporation's pre-tax income, payments made to non-arm's length parties (e.g., family members) must be added to the pre-tax income of the corporation unless the corporate spouse establishes that the payments were reasonable in the circumstances [s. 18(2)].
       - e.g., if the husband has a corporation and his new girlfriend is on the payroll, the husband will have to justify these payments.
  2. An amount commensurate with the services that the spouse provides to the corporation (provided it doesn't exceed the corporation's pre-tax income).

1. *Determine whether circumstances exist that justify imputing income to the payor for the purposes of child support.*

* The court may impute such an amount of income as it considers appropriate in the following circumstances [s. 19(1)]:
  1. the spouse is intentionally under-employed or unemployed, unless that is what is required by their reasonable educational or health needs or the needs of their children.
  2. The spouse is exempt from paying federal or provincial income tax.
  3. The spouse lives in a country where income tax is significantly lower than that in Canada.
  4. It appears income has been diverted which would affect the level of child support under the guidelines.
  5. The spouse’s property is not reasonably utilized to generate income;
  6. The spouse has failed to provide income information when under a legal obligation to do so.
  7. The spouse unreasonably deducts expenses from income.
     + To impute income under this provision, the court must determine whether the deduction was done for a legitimate business need or whether it was a deduction from which the payor derived a personal benefit (*Sweezey*).
     + Just because a deduction is permitted under the *Income Tax Act* does not mean it is reasonable under the *Guidelines* [s. 19(2)].
  8. The spouse derives a significant portion of income from dividends, capital gains, or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax.
  9. The spouse is a beneficiary under a trust and is or will be in receipt of income from the trust.
* Under ss. 17 and 18, the court determines what amount of existing income is fairly available to the payor for child support. In contrast, under s. 19, the court assigns income to the payor, regardless of whether or not he/she is actually earning that amount of money (i.e., it is an assessment of what the payor *should* be earning).

#### *Cunningham v Seveny*, 2017 ABCA 4

Facts:

* The appellant and respondent were in a 12-year common law relationship that ended in 2000. A 2001 order granted the appellant child support, spousal support, and section 7 expenses. In 2014, a consent order was granted terminating child support. Up until 2015, when he retired, the respondent had a law partnership based in Edmonton. In June 2016, the appellant brought an application for retroactive child support. In those proceedings, the appellant alleged that the respondent had not provided evidence to adequately justify expenses he had deducted from his corporate income as required under s. 18. The respondent submitted that there was no evidence that the expenses were not legitimate and that the onus is on the appellant to obtain an expert's opinion about the respondent’s corporate expenses if she is claiming they are unreasonable. Further, the respondent claimed that the expenses claimed have been approved for income tax purposes, and should thereby be found to be reasonable.

Issue and holding:

* Is the onus on the non-corporate spouse to show evidence that the corporate spouse’s deductions are unreasonable? **NO**
* Did the respondent fully comply with his disclosure obligations? **NO**
* Does the approval of deductions for income tax purposes support a finding that these deductions are reasonable? **NO**

Rationale: (Schutz JA)

1. The evidentiary and persuasive onus under ss. 18-21 of the federal or provincial Guidelines as to the reasonableness of expenses rests with the self-employed or corporate parent throughout and is the most effective means by which to serve the best interests of the child.
   * A parent challenging the reasonableness of corporate expenses is not required to first establish a *prima facie* case that such expenses are unreasonable before disclosure becomes necessary.
   * Information regarding corporate expenses is within the knowledge, possession, and control of the shareholder, director, or officer parent, not the challenging parent.
   * It is unreasonable to require the non-shareholder spouse to pay a lawyer to question the shareholder spouse, hire accountants, etc. in order to obtain information that is the possession of the shareholder spouse and is required to make a proper assessment of the income available for child support.
     + Such an approach utilizes financial resources that would otherwise be available for the children in the care of the recipient of child support and goes against the objectives of the guidelines.
2. The content of required disclosure must be sufficient to allow meaningful review by the recipient parent, and must be sufficiently complete that, if called upon, a court can readily discharge its duty to decide what amount of the disclosing parent’s annual income fairly reflects income for child support purposes.
   * To this end, the obligation to disclose includes not only a requirement to provide a statement of all payments or benefits, but also *a sufficient explanation* to facilitate the recipient’s assessment of the reasonableness of these payments or benefits.
   * There was no indication that the respondent provided a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the parent does not deal at arm’s length.
3. A parent’s legal obligation to pay child support that fairly reflects the parent's income is not to be limited by income tax statutes that may confer entitlements in relation to deductibility of business expenses.
   * As such, s. 19(2) provides that the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

#### *Sweezey v Sweezey*, 2016 ABQB 131

Facts:

* The parties were married in 2006 and separated in 2010. Ms. Sweezey filed for divorce. In September 2012, the court granted a child support order, imputing Mr. Sweezey's annual income at $110,000. Mr. Sweezey sought variation commencing on that date, saying that his imputed income was too high, as he only declared income between $50,000 and $55,000 in 2013 and 2014. Ms. Sweezey alleged that Mr. Sweezey never provided sufficient financial disclosure to enable a proper determination of his actual income. Mr. Sweezey alleges that the expenses indicated in the financial statements he provided were valid corporate expenses and maintains that Ms. Sweezey has the onus of proving that the corporate expenses were not valid.
* Mr. Sweezey is a truck driver operating through CTS Enterprises Ltd. He owns 40% of the corporation while his new partner owns 60%.

Issues and holding:

* Did Mr. Sweezey's annual income as determined under s. 16 fairly reflect all the money available to him for the payment of child support? **NO**

Analysis:

* In an analysis under s. 18, the court must consider if the annual income as determined under s. 16 fairly represents the amount of income available to pay child support. This analysis cannot be completed unless the court is provided with sufficient information.
  + As such, s. 21 of the guidelines imposes obligations on a shareholder spouse who controls a corporation to provide a breakdown of all payments to non-arm’s length persons or corporations.
    - Underlying this requirement is the assumption that the shareholder spouse may receive some personal benefit through payment of corporate expenses appearing in the financial statements.
* The requirement of a shareholder spouse under s. 21(1)(f) to provide a statement showing payments to non-arm's length parties extends to providing an *explanation* of all amounts paid (e.g., an indication that the amount paid provided no personal benefit).
  + The level of scrutiny regarding corporate deductions and the retention of pre-tax income in the corporation is directly related to the level of control the spouse exercises over the corporation.
  + As a general rule, the shareholder should provide at least:
    - A brief explanation concerning each payment category, including:
      1. The nature of the payment/expense,
      2. How it was calculated,
      3. Why it was a reasonable corporate expenditure.
         * This step does not necessarily require expert evidence. The court may apply common sense in conducting its analysis.
      4. Whether any amounts paid or owing in relation to that category provided or resulted in a personal benefit to the shareholder or other non-arm’s length person (e.g., vehicle, travel, promotion, phone, insurance, etc.). This would include an explanation for:
         * What portion of the total expense formed the personal or non-arm’s length benefit.
         * How this was calculated.
         * A description of any services performed for the corporation by a non-arm’s length person (e.g., a new partner/spouse of the shareholder), and information regarding whether the salary he/she was paid for them was commensurate with the market value of the services.
    - Documentation to support all of the above explanations, such as invoices and receipts regarding non-arm’s length payments.
  + Reasons for requiring an explanation from the shareholder spouse include:
    - It is in keeping with s. 23 of the *Guidelines* which allows for the making of an adverse inference.
    - It ensures that the other spouse and the court are provided with enough information to determine the corporation's pre-tax income.
    - It is reinforced by r. 1.2 of the *Alberta Rules of Court*, which requires the parties to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense.
    - It is inefficient and unreasonable for the shareholder spouse to identify non-arm’s length expenses, leaving the other spouse to pay for questioning and hire experts to complete a thorough s. 18 analysis.
      * After all, the shareholder spouse generally has control over the relevant information.
  + Under ss. 22–24, where a shareholder spouse fails to comply with the disclosure obligation, the court may strike pleadings, make a contempt order against the spouse, proceed to a hearing, draw an adverse inference and impute income to the spouse, and award costs in favour of the other party.
    - In terms of the amount a court may impute, the court may choose to use the other spouse’s calculations or may choose an amount based on the information available, even if incomplete.
      * The shareholder spouse who is dissatisfied with the result must have the matter returned to the court on an application to vary, having provided the required information.
* Factors which courts have considered in determining whether all or part of a corporation's pre-tax income should be included in a shareholder's income for child support purposes include:
  1. The nature of the corporation’s business.
  2. The historical spending patterns of the corporation.
  3. The role the shareholder spouse plays in the corporation.
  4. Whether the shareholder spouse is the sole shareholder.
  5. The degree of control the shareholder spouse exercises, including his/her relationship with the controlling shareholder.
  6. The benefits received by non-arm's length persons as a result of payment of corporate expenses.
  7. Whether payments to non-arm's length persons were for services for which the corporation would otherwise have had to obtain from a third party.
  8. Whether the company’s pre-tax income is required to manage the business and ensure its ongoing financial viability.

Rationale: (Yungwirth J)

* The court is not satisfied that Mr. Sweezey's annual income as determined under s. 16 fairly reflects all the money available to him for the payment of child support.
  + Mr. Sweezey has also not established that expenses related to advertising and promotion, amortization, travel, fuel, insurance, interest, office expenses, repairs and maintenance, telephone, and the salary paid to Mr. Sweezey's partner were reasonable business expenses. As such, a portion of these expenses should be included in the pre-tax (net) income of the corporation (*details omitted*).
* The result is pre-tax income for CTS of $71,943 in 2013 and $103,475 in 2014. *All* of the pre-tax income of CTS is found to be available for child support purposes.
  + Mr. Sweezey exercises considerable control over CTS and his interests align with those of the controlling shareholder, his new partner.
  + There was no suggestion that CTS needs to retain any monies beyond what it requires to pay its corporate expenses.
* Thus, Mr. Sweezey's income is found to be, in total, $122,192 for 2013 and $159,320 for 2014 (includes the pre-tax income of the corporation and the amounts of income Mr. Sweezey reported).
  + There is therefore no basis upon which to vary child support.

#### *Hunt v Smolis-Hunt*, 2001 ABCA 229

Facts:

* The parties were married in 1981 and separated in 1994. The husband filed for divorce in 1995, and the mother claimed spousal support, child support, and property division.

Procedural history:

* The trial judge found that the husband intentionally under-employed within the meaning of s. 19 of the *Federal Child Support Guidelines*. He/she said that he stubbornly adhere to a career path in the legal profession that did not permit him to earn enough to adequately support his children when he had capacity to earn more. The judge thus imputed an annual income of $55,000 to him, and ordered him to pay retrospective and prospective lump sum child support in the amount of $129,376.

Issues and holding:

* Did the trial judge err in awarding retroactive child support for a period of time pre-dating the institution of divorce proceedings? **NO**
* Did the trial judge err in finding that the husband was intentionally under-employed? **YES**

Analysis:

* s. 19(1)(a) should be interpreted to impute income where the obligor has pursued a deliberate course of conduct *for the purpose of evading child support obligations* (i.e., a payor can rely on a *bona fide* career change to reduce child support).
  + The section requires either proof of a specific intention to undermine or avoid support obligations, or circumstances which permit the court to infer that the intention of the obligor is to undermine or avoid his or her support obligations.
  + Recognizes that not every decision in a payor's life has to revolve around his/her support obligations.
  + In keeping with the objectives of the Guidelines, this interpretation helps prevent unpredictable, inconsistent exercises of discretion when unemployment or under-employment is alleged.
  + Restricting payors to those jobs that pay the maximum they are capable of earning fails to recognize the fundamental importance of work to a person's life and fails to value the freedom to choose work which fulfills needs and interests extending beyond the receipt of an income.

Rationale: (Berger and Wittmann JJA)

1. There is no principled reason, nor any statutory impediment, to fail to exercise the jurisdiction of the court to compel payment of child support.
   * If the actions of a parent warrant a retroactive order for the period following the initiation of divorce proceedings, such behaviour prior in time ought not to be insulated from jurisdictional scrutiny.
   * *Note*: James G. McLeod believes that the main justification for this decision was that children's needs should not be compromised by a parent's inaction in filing for divorce.
2. There was no finding or inference by the trial judge that the appellant intended to undermine or avoid his child support obligations by deliberately continuing to pursue his less than lucrative practice of law.

### Effect of Agreements

* Under the *Divorce Act*, a court may award an amount that is different from the *Guideline* amount if it is satisfied that special provisions in an agreement respecting the financial obligations of the spouses make special provisions for the benefit of a child and the application of the *Guidelines* would be inequitable given those provisions [s. 15.1(5)].
* Under the Act, a court may award an amount that is different from the guideline amount on consent of both spouses if satisfied that reasonable arrangements have been made for the support of the child [*Divorce Act*, s. 15.1(7)].
  + The *Guidelines* should be used to help determine reasonableness, but an amount is not considered unreasonable solely because it is different from the amount that would have been in accordance with the *Guidelines* [s. 15.1(8)].
* Child support is the right of the child, and parents cannot contract out of it outright.

### Retroactive Orders

#### *DBS v SRG*, 2006 SCC 37

Facts:

* This case deals with four appeals wherein recipient parents failed to apply for a court order for an increase in child support payments in a timely manner. They each involve children who lived prolonged periods without the support they were due. Two appeals involve claims for retroactive awards where no support payments had ever been paid by the other parent, while the other two ask for original awards to be increased.

Issues and holding:

1. Can a court make an order for retroactive child support? **YES**
2. If yes, in what circumstances is it appropriate to do so? (*see below*)
3. To which date can an award be retroactive? (*see below*)

Rationale: (Bastarache J)

1. The concern with retroactivity is that it is arbitrary and unfair. However, a retroactive child support order does not involve imposing an obligation on a payor that did not exist at the time for which support is claimed.
   * Under Canadian law, a payor always has an obligation to pay—and a dependent child always has the right to receive—child support in an amount that is commensurate to his/her income, independent of any agreement, statute, or court order.
     + Hence, where an order is imposed with retroactive effect, the obligation that formed the basis of the court's decision would *not* be imposed after the fact.
     + While payors have an interest in a degree of certainty in managing their affairs, this does not absolve them of the responsibility of paying an appropriate amount of support.
   * The fact that a parent's child support obligation will only be made enforceable once an application to a court has been made does not preclude courts from considering retroactive awards.
     + The fact that legislatures have not compelled payors to automatically disclose changes in income, so that the amount of child support they owe could be varied accordingly, says nothing about a courts jurisdiction to make retroactive awards once the parties are properly in front of it.
     + Support is the right of the child. Where one or both parents fail to vigilantly monitor child support payment amounts, the child should not be left to suffer without a remedy.
2. In determining whether to make a retroactive award, a court should strive for a holistic view of the matter and decide each case on the basis of its particular facts.
   * The payor's interest in certainty must be balanced with the need for fairness to the child and flexibility.
   * Where there has already been a court order for child support that needs to be varied, the court order should be considered presumptively valid, though it can be changed.
     + Similarly, agreements reached by parents should be given considerable weight, as they are often considered holistically by the parties.
   * Factors to consider before a court awards retrospective child support, none of which are decisive, are:
     1. Reasonable excuse for why support was not sought earlier.
        + Delay in seeking child support is not presumptively justifiable.
        + A reasonable excuse may exist where:
          - The recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family.
          - The recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice.
        + There are two reasons why a court should not award retroactive child support where there has been unreasonable delay by the recipient parent:
          - The payor parent has an interest in certainty.
          - A recipient parent should not be encouraged to delay seeking the appropriate amount of support for their children.

From a child's perspective, a retroactive award is a poor substitute for past obligations not met.

* + 1. Conduct of the payor parent.
       - Blameworthy conduct by the payor parent will militate in favour of a retroactive award.
         * Blameworthy conduct should be given an expensive definition, describing *anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support*.
         * Blameworthy conduct would include obscuring income increases, intimidating or misleading the recipient parent, or consciously choosing to ignore support obligations.
         * A payor who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour if they have a reasonable belief that they are meeting their support obligations.

However, the greater the difference between what a payor should be paying and what they are actually paying, the less reasonable that belief will be.

* + - * Conduct of a payor may also militate in against a retroactive award.
        + e.g., a payor who contributes for expenses beyond his/her statutory obligations.
    1. Circumstances of the child.
       - A child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need.
       - A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award.
         * On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her.
    2. Hardship occasioned by a retroactive award.
       - Retroactive awards disrupt payor parent’s management of their financial affairs in ways that prospective awards do not, as the quantum of retroactive awards is usually based on past income rather than present income. Courts should be attentive to this fact.
  + Courts do not have jurisdiction to order retroactive support if the child is not entitled to support under the statute.
    - Child support is for children of the marriage, not adults who used to have that status.

1. The date at which an award should be retroactive is the date when effective notice is given to the payor.
   * The date of effective notice should be used as the date because, once it has occurred, the payor can no longer assume that the *status quo* is fair, and his/her interest in certainty becomes less compelling.
     + "Effective notice" means *any indication by the recipient parent that child support should be paid*, or if it already is, that the current amount of child support needs to be renegotiated.
     + Even where effective notice is given, a prolonged period of inactivity afterwards may make such notice ineffective.
       - In general, it will usually be inappropriate to make a support award retroactive to a date more than *3 years* before formal notice was given to the payor parent.
     + The date when increased support should have been paid may be the more appropriate date *where the payor parent engages in blameworthy conduc*t by intimidating or lying to the recipient parent or withholding information.
   * The date of application to court and the date of formal notice should not be used as the date, as parents should be encouraged to only use the judicial system as a last resort.
   * The date on which support could have been claimed should not be used as the date, as this would erode the payor's interest in certainty too much.

Concurring: (Abella J)

* It is the payor parent's responsibility to ensure that a child benefits from a change in their income. A system of support that depends on when and how often the recipient parent takes the payor parents financial temperature is impractical and unrealistic.
  + As such, the presumptive starting point for the child’s entitlement to a change in support is when the change occurred, not when the change was disclosed or discovered.
    - Because the child’s right to support varies with the change, it cannot be contingent on whether the recipient parent has made an application on the child’s behalf or given notice of an intention to do so.
  + Blameworthy conduct and hardship are immaterial. The right to support belongs to the child regardless of the payor's hardship or how his or her parents behave.
  + Certainty and predictability of child support amounts do not justify a retreat from the primacy of a child’s rights to a fair amount of support.
    - Plus, in any event, certainty and predictability for payors are protected by the legal certainty that whenever their income changes materially, that is the moment their obligation changes automatically, even if enforcement of that increased obligation is not automatic.

Notes:

* Once a court decides that retroactive support is appropriate, it must determine the quantum of the award consistent with the statutory scheme under which it is operating.
* While the majority focused on balancing certainty and predictability with fairness and flexibility, the minority focused entirely on the needs of the child.
* As Philip Epstein notes, this decision gives notice to all child support recipients who are receiving support by way of agreement or court order that if they wish an increase, they must bring up the topic.
* Alberta actually requires that ex-spouses disclose their financial status every year in order to reduce reliance on retroactive awards.

#### *Lavergne v Lavergne*, 2007 ABCA 169

Facts:

* The parties had two children during their 6 1/2 year marriage. After they separated, the father was ordered to pay child support of $443 per month in 1999. He voluntarily increased his payments a couple times based on his previous year's income. The mother claimed that child support is to be based on the payor's *current* income if known, and if not known, or if the parties agree, on the payor's past year's income, with an adjustment for the difference between the actual and anticipated income at year's end. Based on these calculations, the mother claimed $10,500 in arrears.

Issue and holding:

* Are child support obligations to be calculated on the payor's current or past year's income? **Current**

Analysis:

* s. 16 of the *Guidelines* is silent on the period for which the determination of annual income is to be made and whether annual income is the income of the past taxation year, estimated annual income for the current year, or an estimate of likely future annual income.

Rationale: (The Court)

* Looking at the words of the *Guidelines* in context indicates that in most circumstances, the payor’s current income is to be used to determine the amount of child support.
  + s. 2(3) of the *Guidelines* specifies that where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, *the most current information must be used*.
* If current income is not ascertainable, the amount of child support is determined by an estimate of the payor's current income with an adjustment at year’s end once the actual income is known.
  + As a general principle, the *Guidelines* emphasize fairness in the determination of the payor's income, even at the expense of efficiency and certainty.
    - e.g., s. 17 anticipates that, where s. 16 is not a fair means to determine support, the court can look to the income over the past three years to determine an amount that is fair and reasonable in the circumstances.

### Variation of Child Support

* Under the *Divorce Act*, a court may vary, rescind, or suspend a support order or any provision of one, either retroactively or prospectively [s. 17(1)(a)].
  + The court may include in the variation order any provision that under this Act could have been included in the original order [s. 17(3)].
  + According to *Hickey v Hickey*, to vary child support orders:
    1. Under s. 17(4) of the *Act*, the court must first satisfy itself that there has been a change in the condition, means, needs, or other circumstances of either spouse or any child of the marriage.
       - This change must be material and not trivial or insignificant.
       - Under the *Guidelines*, the following constitute a change in circumstances [s. 14]:
         1. Where the amount of child support was made in accordance with the applicable table, any change in circumstances that would result in a different child support order.
         2. Where the amount of child support is not in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support.
    2. Under s. 17(6.1) of the *Act*, if such a change has occurred, the court shall vary a child support order having regard to the applicable guidelines.
       - The court may award an amount that is different from the guideline amount if the parties have come to an agreement that benefits the child and the application of the guidelines would be inequitable as a result [s. 17(6.2)].
       - The court may award an amount that is different from the guideline amount on consent if both spouses if it is satisfied that reasonable arrangements have been made for the support of the child [s. 17(6.4)].
       - When someone seeks to vary a child support order and a spousal support order, the court shall give priority to child support in determining the applications [s. 17(6.6)].

#### *Haisman v Haisman*, 1994 ABCA 249 (1 of 2)

Facts:

* After Rhiannon and Martin Haisman divorced, Mr. Haisman was ordered to pay the mother $200 per month for child support. He made very few payments, and seven years after the divorce Ms. Haisman took steps to enforce the order. Mr. Haisman applied under s. 17 to cancel all outstanding maintenance arrears, as he claimed to have been unable to make them and that Ms. Haisman agreed to this.

Procedural history:

* The chambers judge concluded that there had been no change in circumstances justifying a reduction in or rescission of the arrears. She calculated arrears of $20,544 and ordered Mr. Haisman to pay interest on them. She Mr. Haisman appealed.

Issues and holding:

1. Did the chambers judge err in finding that there had been no change of circumstances which would justify a reduction in, or the rescission of, the arrears of maintenance which Mr. Haisman owed to Mrs. Haisman? **NO**
2. Did the chambers judge err in refusing to eliminate or reduce the arrears of maintenance because Mrs. Haisman had not sought to enforce the maintenance orders in a timely fashion? **NO**

Rationale: (Hetherington J)

1. 1. There was evidence to support the chambers judge's finding that Mr. Haisman *could* have made the payments.
      * In any event, a present inability to pay past arrears does not alone justify a variation order, although it may justify a suspension of enforcement in relation to arrears for a limited time.
        + Variation should only be considered where the former spouse has established on a balance of probabilities that they cannot and will not be able to pay the arrears in the future.
   2. The chambers judge found that there was not at any time an agreement between the parties that Mr. Haisman did not have to make the child support payments he was ordered to make.
      * In any event, the father's belief that the mother had agreed that he need not make the payments, even if accepted, would not justify an order varying or rescinding the child support order.
2. It is not in the public interest or the child's interest to excuse Mr. Haisman from paying the arrears on account of Ms. Haisman's delay in claiming arrears.
   1. To hold otherwise would ensure non-custodial parents that if they can avoid making child support payments for a sufficient period, a court will vary the order for payment to reduce or eliminate any arrears.

#### *Haisman v Haisman*, 1994 ABCA 249 (2 of 2)

Facts:

* During the marriage of Rosalie and Brian Fehr, Brian physically abused Rosalie. After the parties divorced, Mr. Fehr was ordered to pay $200 per month for child support. They subsequently agreed in writing that the monthly payments could be reduced to $100. Rosalie agreed to this because she was afraid of Brian. Brian continued to pay $100 per month for the next ten years as well as paying $6,000 for clothing and other items for the child. At one point, the child moved into Brian's home and lived there for three months before returning to Rosalie's home. The father applied for an order rescinding all outstanding arrears and varying the ongoing maintenance obligation.

Procedural history:

* The chambers judge directed the parents to establish a trust fund for the child, or, alternatively, for Brian to pay $8,100 against the $14,100 that was outstanding (on account of the $6,000 that he had already spent on the child) and to increase his monthly support payments to $400. Brian appealed, and the mother cross-appealed, seeking full payment of arrears with interest.

Issue and holding:

* Did the chambers judge err in failing to rescind all arrears of child support and vary the ongoing support obligation? **NO**
* Did the chambers judge err in reducing the arrears from $14,100 to $8,100? **YES**
* Should arrears have been reduced to account for the period that the child lived with Brian? **YES**

Rationale: (Hetherington JA)

1. While there has been a change in the condition, means, needs and other circumstances of the parties and their child since the divorce, there were no special circumstances which justified an elimination or reduction in the arrears of maintenance.
   * The parties' written agreement regarding support did not qualify as a special circumstance.
     + An agreement between parties, particularly in relation to child support, does not bind the court.
     + A judge should give effect to an agreement where it provides for an appropriate level of support, but this agreement did not represent Brian's share of the joint obligation to support the child.
     + Moreover, given the circumstances under which Rosalie signed it, the chambers judge could not reasonably have given effect to the agreement.
2. When a mother has custody of a child and the court orders the father to make support payments, it is not open to the father to make payments directly to the child instead, nor is it open to the father to claim that amounts expended on the child should be deducted from the payments he has already been ordered to make to the mother.
3. The arrears should have been reduced by three months for the period that the child lived with Brian.

Notes:

* Hetherington JA held that Brian should continue to pay the monthly support payments of $400 until it was determined that the child was no longer a child of the marriage.

# Spousal Support

* Spousal support is a legal obligation that one spouse may have to pay money to the other spouse for their financial support following separation.
* There is no common law right to divorce or support upon divorce. Support is a creation of statute.
  + This means that standing to apply for support, entitlement to support, and form, duration and amount of support are all governed by the enabling support legislation.
* Spousal support and matrimonial property division are not mutually exclusive; just because a spouse is entitled to property post-separation does not preclude them from receiving spousal support.
  + That said, property division will be relevant to determining the means and needs of the parties in the context of a spousal support obligation.
  + While property is a presumptive statutory entitlement, while support is not (it is highly discretionary).
* You can pursue spousal support through both the *Divorce Act* and the *Family Law Act*.
  + You proceed under the *Divorce Act* if the couple is married and is seeking a divorce.
  + You proceed under the *Family Law Act* if you are unmarried or you are married but seek support.
* There are four steps in a spousal support application under the *Divorce Act*:
  1. Is the applicant entitled to spousal support?
     + Spousal support is not a given; the party seeking support must prove they are entitled to it.
  2. Is it a periodic or lump sum payment of spousal support?
     + Lump sum spousal support is less common, but it is more common for spousal support than child support.
  3. What is the appropriate quantum of spousal support?
     + Given the variety of family forms, there are no bright-line rules regarding the quantum of spousal support.
  4. What is the duration of the spousal support order?

## Factors in Awarding Spousal Support

* The *Divorce Act* provides that a court may make an order requiring a spouse to secure and/or pay such lump sums and/or periodic sums as the court thinks reasonable for the support of the other spouse [s. 15.2(1)].
  + The court may make an order for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions, or restrictions as it thinks fit and just [s. 15.2(3)].
    - If there is concern that the payor will not make spousal support payments, the court does have the power to order security for those payments.
    - e.g., if the payor is elderly, for example, the court may order them to take out a life insurance policy so that they can provide for the recipient after their death.
* In considering a spousal support order, the court *must*:
  + Consider the condition, means, needs, and other circumstances of each spouse [s. 15.2(4)].
    - This requirement signals that spousal support is discretionary, relying on a consideration of a vast array of interrelated factors.
      * "Condition" includes age, illness or disability, dependents, training, or work history, etc.
      * "Means" refers to the financial resources available to each spouse; this includes any asset or income stream (e.g., employment income, inheritance, property settlements, debts).
        + An assessment of means also requires a consideration of how easily an asset can be liquidated.
      * "Needs" includes the amount of money required to meet their expenses.
        + Needs is defined in relative terms; i.e., a spouse's need is assessed in relation to their pre-separation standard of living.
      * "Other circumstances" includes any other factors that does not fit into any of the others.
        + e.g., the chances of remarriage, prospects of re-employment.
    - In considering the circumstances of each spouse, the court must consider the following [15.2(4)]:
      1. The length of time the spouses cohabited.
         * The longer a couple lives together, the more economically integrated they become.
      2. The functions performed by each spouse during cohabitation.
         * Did both parties work? Was there a stay-at-home spouse and a breadwinner?
      3. Any order, agreement, or arrangement relating to support of either spouse.
  + *Not* take into consideration any misconduct of a spouse in relation to the marriage [s. 15.2(5)].
* The often-overlapping objectives of a spousal support order under the *Divorce Act* are [s. 15.2(6)]:
  1. Recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown.
     + e.g., one spouse paying for the other spouse's post-secondary education, taking on a disproportionate share of unpaid household labour, etc.
  2. Apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage.
     + While child support payments cover the day-to-day needs of children, they do not account for sacrifices made by the spouses to support the children during the marriage (e.g., taking a lower paying job).
  3. Relieve any economic hardship of the spouses arising from the breakdown of the marriage, and
     + The focus on is post-separation need in relation to the pre-separation standard of living.
  4. In so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
     + Parliament's intent with this is that, generally, spousal support should not be an excuse for a payee to not try to support themselves if it is possible for them to do so.
     + The practicality of demanding self-sufficiency is fact-specific (e.g., an older spouse is going to have a hard time becoming self-sufficient).
* Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support [s. 15.3(1)].

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

Facts:

* The parties were married in Poland in the mid-1950s and moved to Manitoba in 1960. There were three children born of the marriage. Mrs. Moge had a Grade 8 education. During the marriage, Mrs. Moge was responsible for the day-to-day care of the children and did the laundry, housework, shopping, cooking, etc. She was also employed in the evenings cleaning offices. The parties separated in 1974. The MBQB gave Mrs. Moge custody of the children and ordered Mr. Moge to pay $150 per month in child and spousal support. Mrs. Moge continued to clean in the evenings. Mr. Moge filed for divorce in 1980. In January 1987, when Mrs. Moge was making $795 per month, she got laid off and her income was reduced to $593 per month in EI benefits. Meanwhile, Mr. Moge was earning about $2000 per month. In October 1987, Ms. Moge successfully got a variation order requiring Mr. Moge to pay $200 per month in child support and $200 in spousal support. Ms. Moge was able to secure part-time and intermittent cleaning work in December 1987, earning about $800 per month until June 1989. Meanwhile, Mr. Moge was earning about $2,200 per month. In May 1989, Mr. Moge applied to terminate both the child and spousal support orders.

Procedural history:

* Mullally J granted Mr. Moge's request to terminate support in September 1989 on the grounds that (1) Mrs. Moge was earning more by 1989 than she was in January 1987 and (2) Mr. Moge could not be expected to support her forever. Mrs. Moge appealed on the issue of spousal support only. The MBCA allowed Mrs. Moge's appeal and ordered spousal support in the amount of $150 per month for an indefinite period, noting that while economic self-sufficiency for support recipients is to be promoted, it would not be appropriate for a wife who lacked the same opportunities as her husband. Mr. Moge appealed that decision.

Issues and holding:

* Did the MBCA wrongfully substitute its own discretion for that of the trial judge? **NO**
* Is the wife entitled to ongoing support from the husband for an indefinite period? **YES**

Analysis:

* While s. 21(5) of the *Divorce Act* allows for an appellate court to substitute its judgment for that of the trial judge, the common law limits appellate review to where trial judge made a significant misapprehension of the evidence, erred in principle, or made an award that was *clearly* wrong.
* The economic self-sufficiency model of spousal support—which allows support only until the recipient becomes or ought to become self-sufficient—is not consonant with the proper interpretation of the Act.
  + There is nothing in the Act to suggest that any one objective—including economic self-sufficiency—should be given priority.
    - Rather, all of the four objectives defined in s. 15.2(6) must be considered when spousal support is claimed or an order is sought to be varied.
  + The social context also suggests that Parliament did not intent to prioritize the self-sufficiency model to child support.
    - The feminization of poverty has become an entrenched social phenomenon, and many Canadian commentators have drawn direct links between female poverty and the financial consequences of the dissolution of marriage.
* The *Divorce Act* gives courts a broad scope to ensure a fair and equitable distribution of the economic consequences of marriage breakdown that recognizes and accounts for the economic disadvantages or advantages flowing from the role adopted by the spouses in the marriage.
  + There are no easy formulas on which to rely in the calculation of spousal support. In the exercise of their discretion, courts must be alert to a wide variety of factors and decisions made in the family during the marriage which disadvantage one spouse or benefit the other upon its dissolution.
    - Oftentimes, one spouse makes substantial non-monetary contributions to the household, impairing their ability to pursue economic goals (i.e., earn wages, gain seniority, get promotions, obtain fringe benefits, get job-retraining and skills upgrading, etc.) while freeing up the other spouse to do just that, leading to inequity after marriage dissolution that should be addressed.
      * Even spouses who continue to work outside the home during the marriage may find that their career advancement has been reduced by the effort they devoted to their family.
      * Conversely, spouses may choose to divide household responsibilities equally and pursue economic goals to the fullest, in which case support may be less appropriate.
    - If one spouse takes care of the children, and childcare responsibilities continue past the dissolution of marriage, this could exacerbate existing disadvantages because of the need to integrate those responsibilities with the demands of paid employment.
      * These disadvantages would not be reflected in child support payments.
    - Although spousal support does not guarantee equal standards of living, this consideration is not irrelevant.
      * As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.
      * Further, a difference in the standards of living of the spouses post-separation may be indicative of a disadvantage suffered by one spouse because of the marriage.
    - When assessing a spousal support claim, the court should not put too much weigh on the notions of modern and traditional marriages; each marriage must be looked at on its own facts.
    - Judicial notice should be taken of the general impact of divorce on women in particular.
  + The promotion of self-sufficiency remains relevant. After divorce, spouses still have an obligation to contribute to their own support in a manner commensurate with their abilities.
    - But just because a spouse is self-sufficient, this does not resolve the question of entitlement; you still have to assess whether the recipient is still entitled to compensatory support.

Rationale: (L'Heureux-Dubé J)

1. As explained below, Mullally J committed an error in principle. His analysis was premised on a model of spousal support which is not sustainable on the wording of the Act.
2. While there has been a change in the circumstances, means, needs, and other circumstances of Mrs. Moge, the trial judge erred in terminating support by failing to take adequate account of the following:
   1. Mrs. Moge sustained a substantial economic disadvantage from the marriage and its breakdown within the meaning of s. 15.2(6)(a).
   2. Mrs. Moge’s long-term responsibility for the upbringing of the children of the marriage after the separation has had an impact on her ability to earn an income so as to trigger the application of s. 15.2(6)(b).
   3. Mrs. Moge continues to suffer economic hardship as a result of the breakdown of the marriage within the meaning of s. 15.2(6)(c).
   4. Mrs. Moge has failed to become economically self-sufficient notwithstanding her conscientious efforts.

Concurring: (McLachlin J)

* Considering the factors in s. 15.2(6) together, the judge’s task is to make an order which:
  1. Provides compensation for marital contributions and sacrifices,
  2. Takes into account financial consequences of looking after children of the marriage,
  3. Relieves against need induced by the separation,
  4. To the extent it may be “practicable,” promotes the economic self-sufficiency of each spouse.
* Subsections (a) and (c) raise the requirement of causation by the marriage or its breakdown.
  + What this requires is a common-sense, non‑technical view of causation that compares the spouse's actual situation before and after marriage breakdown.
    - Proving causation does not need be done with scientific precision. It will generally suffice if the parties tell the judge in a general way what each party did.
    - e.g., a spouse will not have to establish conclusively that they lost future earning power as a result of being a stay-at-home parent.
  + In disproving causation, it is not enough to say in the abstract that the ex-spouse should have done more or be doing more and argue from this that it is her inaction rather than the breakup of the marriage which is the cause of her economic hardship.
    - Arguments that an ex-spouse should be doing more for herself must be considered in light of her background and abilities, physical and psychological.
      * e.g., it may be unreasonable to expect a middle-aged person who has devoted most of her life to domestic concerns to compete for scarce jobs with young college graduates.
* In the context of this case, the trial judge erred in principle by giving weight to the first three factors of s. 17(7) and imposing a categorical requirement of self‑sufficiency.
  + The majority of the MBCA was correct in rejecting the view that there is an absolute obligation for a spouse to become self‑sufficient and that there is a time after which one spouse should no longer have to support another.

Ratio:

* Under the *Divorce Act*, means and needs are no longer the exclusive criteria for support; compensation and entitlement must also be considered.

Notes:

* In this case, L'Heureux-Dubé J downplayed the dichotomy between traditional and modern marriages, saying that each marriage needed to be considered on its own facts.

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

Facts:

* Sharon Bracklow, an accountant and data processor, began living Frank Bracklow, a heavy duty mechanic, in 1985. In 1989, they married. Sharon brought two children to the marriage. Both parties worked, although Sharon experienced some periods of unemployment. In the first two years of their relationship, Sharon paid 2/3 of the expenses because she earned more than Frank and her two children from a previous relationship lived with them. Thereafter, they shared household expenses equally. The marriage imposed minimal restrictions on the parties' job circumstances, though Sharon did make a few employment-related accommodations for the family. In 1991, Sharon was admitted to hospital suffering from psychiatric problems and did not work thereafter. In 1992, the parties separated. Sharon now lives in subsidized housing and receives $787 monthly in disability benefits.

Procedural history:

* The BCSC found that the marriage or its breakdown did not cause Sharon's economic hardship. However, it awarded Sharon spousal support in the amount of $400 per month from May 1994 to September 1996 based on "the Defendant's proposal not upon the necessity of law." The BCCA upheld this finding. Sharon argued that support should continue as long as her need persists.

Issue and holding:

* May Frank have an obligation to support Sharon over and above what is required to compensate Sharon for loss incurred as a result of the marriage and its breakdown? **YES** (*new trial ordered*)

Analysis:

* Nothing in the *Divorce Act* suggests that the only foundations for spousal support are compensatory. The law recognizes three conceptual grounds for entitlement to spousal support:
  1. To carry out a contractual support regime (contractual support).
     + This ground of child support is found in s. 15.2(4)(c), which requires a court to consider any existing agreement or arrangement when determining spousal support.
  2. To compensate for advantages or disadvantages flowing from the marriage or the breakdown of the marriage (compensatory support; see *Moge v Moge*).
     + Rooted in the “independent” model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise.
     + The objectives in ss. 15.2(6)(a) and (b)—recognizing the economic consequences of the marriage or its breakdown and apportioning between the spouses financial consequences of child care over and above child support payments—are primarily related to compensation.
     + Recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success.
  3. To assist a spouse who is unable to meet his or her needs upon marriage breakdown (non-compensatory, means/needs support).
     + Grounded in the “social obligation model” of marriage, which sees marriage as an interdependent union.
     + The objective found in s. 15.2(6)(c)—relieving economic hardship arising from the breakdown of the marriage—is capable of encompassing disadvantages arising from the fact that a person who formerly enjoyed intra-spousal entitlement to support now finds themselves without it.
       - Recognizes that when people cohabit over a period of time, their affairs may become intermingled and impossible to disentangle neatly. When this happens, it is not unfair to ask the partners to continue to support each other (although perhaps not indefinitely).
       - Places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state.
     + Therefore, where need is established that is not met on a compensatory or contractual basis, spouses may nevertheless have an obligation to meet or contribute to the needs of their former partners where they have the capacity to pay.
* Judges have a broad discretion to decide on the quantum of spousal support awarded. Such support, in the sense of both amount and duration, will vary with the circumstances and the practical and policy considerations affecting particular cases.
  + Of course, the nature and extent of the recipient's need will always be a relevant factor.
    - However, it does not follow from the fact that need serves as the predicate for support that the quantum of the support must always equal the amount of the need.
  + Limited means of the supporting spouse and obligations arising from new relationships may dictate a reduction in spousal support.
  + Factors within the marriage itself may affect the quantum of a non-compensatory support obligation.
    - e.g., it may be difficult to make a case for a full obligation of mutual support in a very short marriage (s. 15.2(4)(a) requires the court to consider the length of time the parties cohabited).
  + Subject to judicial discretion, the parties may by contract enhance, diminish, or negate support obligations.

Rationale: (McLachlin J)

* It is evident that Frank covered Sharon's needs in the early stages of her illness. Accordingly, it follows that divorce did render Sharon in a state of economic hardship, as contemplated by s. 15.2(6)(c) of the Act.
  + As such, bearing in mind the statutory objectives of support and balancing the relevant factors, Sharon is eligible for support based on the length of cohabitation, the hardship marriage breakdown imposed on her, her palpable need, and Frank's financial ability to pay.
    - This does not necessarily mean that the wife is entitled to any more support than she has already received up to the time of rehearing.

Notes:

* This decision may be criticized on the grounds that, absent a need for compensatory support, it should not be the responsibility of a former spouse to satisfy the needs of the dependant spouse that arise for reasons totally unrelated to the marriage.
* James G. McLeod criticizes this case on the grounds that, at a time when Parliament was promoting the reduction of discretion in child support cases to promote objectivity and predictability, the SCC gave trial judges incredibly wide discretion and little guidance in spousal support cases.

### *Chutter v Chutter*, 2008 BCCA 507

Facts:

* The parties got married in 1975. At the time, the appellant was working as a dental hygienist and the respondent was working to obtain his CPA accreditation. In 1982, they had a son, and the appellant took on the primary caregiver role. In the fall of 1982, the parties decided to start a business designing and manufacturing waterslides ("Whitewater"). While the respondent made the business decisions, the appellant contributed to the business by acting as secretary and taking orders. In 1985, the appellant began working as a hygienist again one day a week. During this time, she was also responsible for the care and renovation of their home. In 1989, the appellant began working as a hygienist three days a week to increase the family's income. She was also very involved in her son's schooling and extracurricular activities. Throughout the 1980s and 1990s, Whitewater grew and the respondent travelled all over the world for it. The appellant considered pursuing a career in real estate, but refrained because of her childcare obligations. The parties permanently separated in 2003. The appellant continues to work as a hygienist three days a week, and her physical ailments prevent her from working more. At 54, she expects to be able to work for five more years as a hygienist. The parties' son is no longer dependent.
* The parties agreed to a roughly equal division of assets. The appellant received were the matrimonial home, RRSPs, and a proportion of their companies' shares, all worth about $4 million. The appellant argued she was entitled to spousal support because she was economically disadvantaged by her role in the marriage (compensatory support) and because her standard of living was not equivalent to that which she enjoyed in her marriage and was far below that of the respondent’s because of his ability to earn (non-compensatory support).

Procedural history:

* The trial judge declined to grant an award of spousal support, holding that the appellant was capable of earning income from employment and investments substantially in excess of her expenses. They also rejected the suggestion that the appellant lost economic opportunities because of her contribution to the marriage.

Issues and holding:

* Did the trial judge err in not awarding compensatory spousal support? **YES**
* Did the trial judge err in not awarding non-compensatory spousal support? **YES**
* What is the quantum and duration of the spousal support award? **$2800 per month indefinitely**

Analysis:

* Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse.
  + In *Moge*, the SCC held that in long marriages, the result will be a rough equivalency of living standards.
    - Interpreting this comment, the BCSC in *W v W* held that given the difficulty in assessing the impact of household decisions on the parties' earning capacity post-separation, the rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims.
  + While a division of property may obviate the need for spousal support *if apportioned in favour of the support-seeking spouse*, there is a danger that property division alone with inadequately compensate the support-seeking spouse.
    - As the BCSC in *W v W* noted, in a typical case, a primary earner has three benefits: the benefit of a share of the assets; the benefit of having had children; and the benefit of a higher income earning ability because of full participation in the work force. The secondary earner has two of these benefits: the benefit of a share of the assets accumulated; and the benefit of having had children. However, that spouse often does not have the same income earning ability at the time of separation because of the role played in the marriage. It is that disadvantage, and the concurrent advantage to the other spouse, that can be addressed by a compensatory spousal support award.
    - As such, even in the context of high asset cases, entitlement to spousal support is not precluded.
* Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown.
  + “Need” is a relative concept. It is not alleviated simply because a former spouse can meet basic expenses on a particular amount of income. Rather, need relates to the ability to support a reasonable standard of living, assessed in relation to the economic partnership the parties enjoyed during cohabitation and the standard of living enjoyed by the other spouse.
* When entitlement to spousal support is established, the *Spousal Support Advisory Guidelines* are relevant.

Rationale: (Rowles JA)

1. The trial judge failed to consider the extent to which the appellant's prospects for financial success were diminished by the marriage and the extent to which the appellant contributed to the parties' business.
   * While the appellant was able to continue as a hygienist, her work schedule was arranged to accommodate the needs of her son, and there is evidence she refrained from pursuing other careers because of her childcare duties.
   * The appellant provided services that enabled Whitewater to grow from the beginning, and her looking after the household, enabled the respondent to expand Whitewater and gain many years of business experience.
   * While the appellant did get a share of the matrimonial property, this fails to adequately address her diminished earning capacity during the marriage.
2. In defining “need” in terms of the appellant’s ability to meet her own expenses, the trial judge failed to appreciate the relative nature of that concept in the spousal support context and its relationship to both the marital standard of living and the other spouse’s post-separation standard of living.
   * The respondent can earn income from almost all of the assets he received after division, while the appellant can only earn income from half of them.
   * It appears from the trial judge's reasons that the appellant will need to encroach on her capital to maintain her standard of living.
     + But, the wife should not have to encroach on her capital to maintain her pre-separation standard of living; if she must, she is suffering hardship from the breakdown of the marriage, since her capital would deplete over time and, eventually, she would be worse off than had the marriage continued.
   * The appellant is limited to her part-time employment and some rental income from her assets, and due to her medical problems, age, and limited employment experience, she is unlikely to be able to retrain in order to achieve higher earning capacity.
     + By contrast, the respondent’s income and income-earning capacity are substantial.
   * The respondent has more working years ahead of him than the appellant.
3. Given the *SSAGs*, spousal support in the amount of $2800 per month for an indefinite period is appropriate.

Notes:

* Property divisions should always be done before the determination of support, since it will affect the parties' means.
* A large property settlement will not disentitle a spouse to support, especially where the dominant aim of support is compensatory.
* We need to consider whether the assets assigned to one party on property division are income-producing or not.
* The spouse seeking support should not be required to encroach on their capital to support themselves.
  + Conversely, a payor with insufficient income is not required to deplete his/her capital assets for the purpose of paying child support where the overall means of the parties are relatively comparable.

## Interim Spousal Support

* The *Divorce Act* states that where an application is made for spousal support, the court may make an interim order requiring a spouse to secure and/or pay for the support of the other spouse as the court thinks reasonable [s. 15.2(2)].
* The purpose of an interim spousal support order is to provide a reasonably acceptable *short-term* solution until settlement negotiations conclude or until the matter goes to trial, at which point a more in-depth examination of the spousal support issue can be undertaken.
  + In deciding upon interim spousal support, the court does not have to embark on a detailed examination of the merits of the claims for permanent support.
  + It should only be ordered where a *prima facie* case for entitlement has been made out.
  + Interim support is more of a needs-focused inquiry, as opposed to one focused on compensation.
  + Interim support should be sufficient to allow the applicant to continue living at the same standard of living that they enjoyed pre-separation if the payor's ability to pay warrants it.
  + The considerations to be given in an order for interim spousal support are the same as those that apply to final orders; no one considerations is given priority.
  + Interim support should still be awarded within the ranges set by the *SSAGs*, absent exceptional circumstances.
  + Trial judges are not bound by the interim spousal support orders in place at the time.

### *Anand v Anand*, 2016 ABCA 23

Facts:

* The parties were married in early 2004 in India. They moved to Canada in July 2004. In October 2004, the couple had twins. The husband was an ophthalmologist whose income went from $413,927 in 2011 to $1,856,014 in 2014. The wife, on the other hand, reported income from $31,365 in 2011 to $37,104 in 2013, with almost all of it attributed to her from the husband's professional corporation for income splitting purposes. In 2013, while the wife was in India, the husband cancelled her return flight and filed for divorce, which was granted in October 2013. In May 2014, the wife filed an application for interim spousal support and access. This application was adjourned to June 2015, at which point the chambers judge awarded the wife interim spousal support of $15,000 per month.

Issue and holding:

* Did the special chambers judge err in law and in fact in ordering a quantum of interim spousal support in the amount of $15,000? **NO**

Analysis:

* Courts have an overriding discretion to award spousal support, and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives in the *Divorce Act*.
* The ultimate question for the court on an interim application is to determine what is reasonable on a temporary basis pending trial given what evidence is available (which will likely be limited).
  + In interim spousal support applications, where evidence of family assets and economic consequences of the marriage breakdown may not be fully developed, greater significance is placed on the parties’ means and needs, while the other factors in s. 15.2(4) and the objectives in s. 15.2(6) are taken into account as far as is practicable.
    - When considering "needs" the court must consider need relative to the station in life the parties have achieved before collapse of the marriage.

Rationale: (The Court)

* The court discerns no error in principle or significant misapprehension of the evidence.
  + The chambers judge considered the circumstances of the parties including the "condition" of the parties, defined as the age, health, needs, obligations, dependents and station in life.
  + The judge also considered the means of the parties which includes all pecuniary resources, capital assets, income from employment or earning capacity, and other sources from which the person receives gains or benefits.
* Further, the award of interim spousal support is not clearly wrong.

Notes:

* The Court in this case urged parties not to waste finite time and money appealing interim orders – that time and money could be better spent achieving an equitable settlement, or getting a final determination at trial of all matters in issue.

## Lump Sum Spousal Support

* While periodic spousal support payments are the norm, the *Divorce Act* provides that a court may make an order requiring a spouse to pay lump sums, periodic sums, or a combination of the two [s. 15.2(1)].
  + Unlike child support, spousal support is taxable, but only if it is done as a periodic payment; if spousal support is awarded in a lump sum, it is tax neutral.

### *Davis v Crawford*, 2011 ONCA 294

Issue and holding:

* Did the trial judge err in awarding lump sum spousal support to the respondent in the amount of $135,000? **NO**

Analysis:

* The *Divorce Act* confers on trial judge's broad discretion to make an award of periodic or lump sum spousal support, or to make an award comprising both forms of support.
  + As such, appellate courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong.
* A lump sum award should not be made in the guise of support for the purpose of redistributing assets.
* An important consideration in determining whether to make a lump sum award is whether the payor has the ability to make a lump sum payment without undermining their future self-sufficiency.
* A court considering a lump sum must weigh the perceived advantages of making a lump sum award in the particular case against any presenting disadvantages of making such an order.
  + The advantages of making such an award will be highly variable and case-specific; they can include:
    - Terminating ongoing contact or ties between the spouses for any number of reasons (e.g., short-term marriage, domestic violence, second marriage with no children, etc.).
    - Providing capital to meet an immediate need on the part of a dependant spouse.
    - Ensuring adequate support will be paid in circumstances where there is a real risk of nonpayment of periodic support.
    - A lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support.
    - Satisfying immediately an award of retroactive spousal support.
  + The disadvantages of such a lump sum award of spousal support can include:
    - The means and needs of the parties will change over time, creating a need for a variation.
    - Parties will be effectively deprived of the right to apply for a variation of the lump sum award.
    - The difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.
* It is *not* the case that lump sum awards can only be awarded in unusual circumstances, but most spousal support awards will be in the form of periodic payments, for several reasons:
  1. In many instances, monies will simply not be available to fund a lump sum support award.
  2. In many cases, there will be no considerations favouring a lump sum award from the perspective of either spouse.
  3. In at least some cases where there are considerations favouring a lump sum award, the general exigencies of life, including the possibility that the parties' means and needs will change, will outweigh the considerations favouring a lump sum award.

Rationale: (Simmons and Lang JJA)

* The trial judge's decision to award spousal support in a lump sum was not unreasonable.
  + The trial judge concluded there was a real risk the appellant would not pay periodic support.
    - The judge found that the payor had greater assets and means than he was prepared to acknowledge and that he was attempting to shelter assets from the respondent's reach.
  + The appellant's failure to make proper disclosure made a clean break highly desirable; in the absence of a clean break, the respondent likely faced unending litigation to maintain her entitlement to support.
* There is nothing to suggest that the trial judge's lump sum award of $135,000 is clearly wrong.
  + It appears that she awarded the amount that would generate an income stream of $1,000 per month for 15 years using a 4% interest rate.
    - Given that the respondent had attained the age of 66 and that there was no evidence indicating she was not in good health, the 15-year income stream projection was unreasonable.
      * In making the award, the judge undoubtedly took account of the contingency that the respondent's need for support could be longer or shorter than 15 years.
  + The trial judge was satisfied that the appellant had the means to maintain a much higher standard of living than the respondent and that, without a significant payment, the respondent would be relegated to a significantly lower standard of living than that which the parties enjoyed together for 23 years.

## Duration of Spousal Support

* + Under the *Divorce Act*, a court may make an order for spousal support for a *definite* period, an *indefinite period*, or *until a specified event occurs*, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just [s. 15.2(3)].
    - An indefinite award is not necessarily in place forever; it is an open-ended order without a specified end date that could be subject to variation or termination at a later date.
    - A time-limited order may specify the definite end date in the order (e.g., 3 years) or may specify an event, the happening of which will terminate the order (e.g., the payor retires).
      * These types of orders may be used to promote a dependent spouse's return to self-sufficiency by giving a recipient spouse an opportunity to adjust while giving them an incentive to do so.
      * Time-limited orders may be appropriate when there is not significant compensatory entitlement; courts are reluctant to make time-limited orders where the recipient sees significant disadvantages as a result of the marriage and its breakdown.
      * It is rarer to see time-limited orders in those where there are compensatory entitlements or the payee.
  + An order may also specify the point at which the order will be subject to review (either after a specified event or a fixed period of time).
    - A review period does not automatically terminate support; it is an opportunity to take a fresh look at the circumstances.
    - When an order is subject to review, neither party has to prove a material change in circumstances to vary or terminate the order (unlike with variations).
    - Orders subject to review will generally be granted for a specific reason that is reasonably contemplated at the time of the original order but about which there was no certainty.
      * They are generally appropriate when facts are uncertain but will be determined by the time of the review.
    - When an order is reviewed, the court does have to consider the factors and objectives of spousal support.

## Spousal Support Advisory Guidelines

* The *Spousal Support Advisory Guidelines* are used to help determine the quantum and duration of spousal support.

### Marie Gordon, "Spousal Support Guidelines for Dummies" (2005)

* The post-*Bracklow* era was marked by a high degree of inconsistency, unpredictability, and lack of uniformity on issues of quantum and duration of spousal support.
  + The high degree of uncertainty meant that many clients had no alternative but to litigate in order to get an answer on spousal support.
  + As such, the *Spousal Support Advisory Guidelines* represent a sacrifice of some individual justice for a higher degree of uniformity, consistency, and predictability.
* Unlike the *Federal Child Support Guidelines*, the advisory guidelines do not have the force of law. They merely act as a practical tool to assist in determining quantum and duration after entitlement has been established.
* The *Guidelines* are not meant to be applied to variations and review given the delicate issues of changes in entitlement and causation.
* Some benefits of the advisory guidelines are:
  + They provide a starting point for negotiations and decisions.
  + They reduce conflict and encourage settlement by giving parties a benchmark from which to initiate talks.
  + They reduce the costs and improve the efficiency of the process.
  + They avoid budgets and simplify the process.
  + They provide a basic structure for further judicial elaboration.
  + They create consistency and legitimacy.
* Some criticisms of the *Guidelines* include: they are too rigid, spousal support is too complicated, judicial discretion allows intuitive reasoning, and litigation will be foreclosed.

#### The Without Child Support Formula

* Assuming entitlement to spousal support has been established, this formula applies were: (1) the spouses have never had children or (2) where there were children, but they are no longer dependent.
* With this formula, both quantum and duration increase incrementally with the length of the marriage, based on the notion that as marriages lengthen, spouses tend to become more economically integrated.
* This formula is actually two different formulas for quantum and duration:
  1. The formula for quantum is applied as follows:
     1. Determine the gross income (before tax) difference between the parties.
        + e.g., if the husband earns $90,000 and the wife earns $30,000, their gross income difference is $60,000.
        + The determination of income and the definition of income sources are the same as in the *Federal Child Support Guidelines*.
        + The gross income difference acts as a proxy measure of the parties' differential loss of the marital standard of living and, in long marriages where there have been children, of the differential impact of marital roles on the spouses' earning capacities.
     2. Determine the applicable percentage by multiplying the length of the marriage by 1.5–2
        + e.g., For a 20-year marriage, the percentage range would be from 30% (1.5 x 20 years) to 40% (2 x 20 years).
        + The percentage remains *fixed* for marriages 25 years or longer at 37.5% to 50% of the income difference.
     3. Apply the applicable percentage to the income difference:
        + e.g., 30% of $60,000 = $18,000 per year ($1,500 per month) to 40% of $60,000 = $24,000 per year ($2,000 per month).
  2. Duration ranges from 0.5 to 1 year of spousal support per year of marriage, with support being *indefinite* if (1) the marriage is 20 years or longer or (2) when the marriage has lasted five years or longer, when the years of marriage and the age of the support recipient at separation total 65 or more when added (rule of 65).
* Restructuring involves trading off quantum for duration or quantifying an appropriate lump sum. It is acceptable so long as the restructured award remains within the total amount generated by the formula.

#### The With Child Support Formula

* Applies to marriages where there is a concurrent child support obligation.
  + A different formula is needed because, under the *Divorce Act*, where a court is considering an application for a child support and an application for a spousal support, the court shall give priority to child support [s. 15.3(1)].
* The formula for quantum is applied as follows:
  + Determine the individual net disposable income (INDI) for each spouse:
    - For the payor, it is the *Federal Child Support Guidelines* income *minus* child support *minus* taxes and deductions.
    - For the recipient, it is the *Federal Child Support Guidelines* income *minus* notational child support (what he/she would've paid under the *Guidelines*) *minus* taxes and deductions *plus* government benefits and credits.
  + Add together the INDIs.
  + Determine the range of spousal support amounts that would be required to leave the lower income recipient spouse with between 40 and 46% of the combined INDI.
* There are two formulas to determine duration:
  + *The Longer-Marriage Test*.
    - Where the length of the marriage exceeds the number of years remaining for the last or youngest child to finish high school, then the maximum duration under this formula would be the length of the marriage, subject to the provisions under the without child support formula for indefinite support after 20 years of marriage.
      * e.g., if a couple were married for 11 years and had two children aged 8 and 10 at separation, the maximum duration would be 11 years.
  + *The Shorter-Marriage Test*.
    - This test is applicable where the marriage is shorter than the period of time until the last or youngest child finishes high school.
    - Under this formula, the support would be subject to review:
      * Where the children are of pre-school age, then no later than the month after the last or youngest child finishes full-time school, or
        + This is the longest duration under this test.
      * Where the children are under the age of 12, then no later than the month after the last or youngest child reaches the age of 12.
* Restructuring is harder to do with this formula, as the durational limits are not so clear and therefore a global amount is harder to calculate.

#### Determining Support Within the Range

* We need to look at the facts to determine if the range provided by the *SSAGs* is appropriate and where support should fall within the ranges provided.
* The following, non-exhaustive list of factors should be considered in whether or not to fix spousal support at the lower or higher end of the range:
  1. A strong compensatory claim may be a factor that favours a support award at the higher end of the ranges for amount and duration.
     + Similarly, the age, number, and needs of children, will justify support on the higher end of the spectrum if the children are young, have special needs, and/or high in number.
  2. Where the recipient has limited income and/or earning capacity due to age or other circumstances, the recipient’s need may warrant an award at the higher end of the ranges for amount and duration. An absence of need may suggest an award at the lower end.
  3. An absence of property to be divided might suggest an award at the higher end; an unequal division in favour of the recipient may indicate an award at the lower end is more appropriate.
  4. The need and limited ability to pay of the payor spouse may push an award to the lower ends of the ranges.
  5. Self-sufficiency incentives may push in either direction.
  6. Low work incentives for the payor may push an award to the lower ends of the ranges, in that the marginal gain in net income from additional income earned may be negligible.

#### Exceptions

* Under the *Guidelines*, exceptions (i.e., departures from the ranges of amounts and durations for spousal support under the formulas) exist for:
  + Compelling financial circumstances at the interim stage.
  + Debt Payment.
  + Prior Support obligations.
  + Illness and disability.
  + The compensatory exception in short marriages without children.
  + Property division, reapportionment of property in British Columbia.
  + Basic needs/hardship: inability to meet basic need in shorter marriages under the “without child support” and custodial payor formulas where the recipient has little or no income.
  + Non-taxable payor income.
  + Non-primary parent to fulfil parental role under custodial payor formula.
  + Special needs of the child.
  + Inadequate spousal support under “the with child support” formula due to priority given to child support under s. 15.3 of the *Divorce Act*.
* There are also a number of situations that are not technically “exceptions” where the formulas do not necessarily apply but may still be helpful:
  + Payor income above the $350,000.
  + Payor income below the $30,000/$20,000 floor.
  + Prior agreement or court order.
  + Post-separation income increase of the payor.
  + Post-separation income reduction of the recipient.
  + Remarriage/re-partnering of the recipient or payor.
  + Subsequent children of the payor.

## Variation of Spousal Support

* + Under the *Divorce Act*, a court may make an order varying, rescinding, or suspending, retroactively or prospectively, a spousal support order [s. 17(1)].
    - A court may include in a variation order any provision that, under the Act, could have been included in the original order [s. 17(3)]
    - In making a variation order, the court shall not consider spousal misconduct [s. 17(6)].
    - When considering the variation of a spousal support order, child support takes priority [s. 17(6.6)].
  + From *Hickey v Hickey*, to vary spousal support orders:
    - Under s. 17(4.1) of the *Divorce Act*, the court must first satisfy itself that there has been a change in the condition, means, needs, or other circumstances of either spouse since the original order.
      * This change must be *material*; it must be one that was not contemplated at the time of the original order and that would have led the court to different terms if the changes had been known when the original order was made.
        + If the matter being relied on as constituting a material change was known at the time of the original order, it cannot be relied on as the basis for variation.
        + The change must be of a substantial, unforeseen, and continuing nature.

e.g., the normal process of aging does not suffice as a material change.

* + - * + The change may include not just the happening of something unexpected, but also the non-occurrence of an expected event.
      * The onus is on the variation applicant to prove that there has been a material change.
    - If such a change has occurred, s. 17(7) provides that a variation order should:
      * Recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown.
      * Apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage.
      * Relieve any economic hardship of the former spouses arising from the marriage breakdown.
      * Promote the economic self-sufficiency of each former spouse within a reasonable period of time.
  + Where a spousal support order is time-limited, a court may not, after its expiry, make a variation order for the purpose of varying support unless [s. 17(10)]:
    1. It is necessary to relieve economic hardship arising from a material change in the circumstances, and
    2. The changed circumstances, had they existed at the time of the making of the spousal support order, would likely have resulted in a different order.
    - Practically, if there has been a material change, an application to vary should be brought before the variation of the order to avoid the stringent requirements set out in s. 17(10).
  + A court reviewing a variation order should treat the original order as correct at the time it was made, and confine its role to considering whether subsequent changes justify a variation.
    - The court can only reconsider the objectives in relation to the material change; it is not a fresh look at all the issues.

## Termination of Spousal Support

* + If the payor wants to terminate support based on the recipient's remarriage, they must do so by establishing that the remarriage qualifies as a material change in the circumstances.
    - A remarriage does not automatically justify the termination of support (like it used to).
    - Where remarriage does constitute a material change, the burden falls to the remarried spouse to establish that continued support is nevertheless justified.
    - The effect of the remarriage should be determined in light of the rationale upon which the original order was based.
      * A needs-based order may be terminated on remarriage of the recipient because they are now sharing expense with or being supported by a new partner, and their need is reduced.
        + In varying a needs-based order, the court should ask whether the recipient spouse has a present need for support and whether their new partner has an obligation to contribute to their expenses.
      * Remarriage may not justify the termination of a compensatory order because compensation for the economic disadvantages flowing from the marriage and its breakdown may not have been achieved.
        + In varying a compensatory order, the court should ask whether the recipient has overcome the disadvantages arising from his/her role in the marriage.
  + Without specific direction that spousal support is to continue beyond the death of either spouse, the death of either spouse will terminate spousal support.

## Effect of Agreements

### *Miglin v Miglin*, 2003 SCC 24

Facts:

* Linda and Eric Miglin married in 1979 and separated in 1993. After negotiating for 15 months, they executed three agreements: a custody agreement, a separation agreement, and a consulting agreement. The custody agreement established a shared-parenting regime whereby the children resided primarily with the wife. The separation agreement provided for child support of $60,000 annually and contained a full and final spousal support release by the wife. The consulting agreement provided that the wife would receive $15,000 annually for five years from the family business, renewable on consent. The parties' divorce judgment was granted effective January 1997. Post-divorce, the parties' parenting arrangements changed such that Linda took on more responsibility for the children. After the parties' relationship deteriorated, Linda brought an application for sole custody, child support, and spousal support in June 1998. As such, the Consulting Agreement was not renewed.

Procedural history:

* The ONSC awarded Linda spousal support in the amount of $4,400 per month for five years. The ONCA confirmed that there was a material change in the circumstances regarding childcare and the Consulting Agreement that justified the amount of spousal support awarded. The husband appealed to the SCC.

Issue and holding:

* In light of the Separation Agreement, is the spousal support release valid? **YES**

Analysis:

* A fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the Act is *presumptively* dispositive of the spousal support issue but will not oust the jurisdiction of the court to make an order for spousal support.
  + As such, the *Pelech* trilogy—and their emphasis on self-sufficiency and a "clean break" model of spousal support—no longer reflect the law in Canada.
    - The *Pelech* trilogy stands for the notion that a court will not interfere with a pre-existing agreement that attempts to settle the matter of spousal support unless the applicant can establish that there has been a radical and unforeseen change in circumstances that is causally connected to the marriage.
      * However, amendments to the Act in 1985, which made explicit the objectives of spousal support, placed the goal of equitable division of the economic consequences of marriage breakdown on the same footing as self-sufficiency. This was confirmed in *Moge*.
      * Further, on a plain reading of s. 17(4.1), Parliament has not adopted a change threshold, "radical," "material," or otherwise.
    - This does not mean that objectives of autonomy and finality are wholly irrelevant, though. The *Divorce Act* still provides that self-sufficiency is an important objective of spousal support.
  + Judges must balance Parliament’s objective of equitable sharing of the consequences of marriage and its breakdown with the parties’ freedom to arrange their affairs as they see fit.
  + An agreement will not be found unenforceable only because its provisions do not mirror what a trial judge would have awarded on the basis of the objectives in 15.2(6).
    - s. 9(2) of the *Divorce Act*, which encourages parties to settle their matters outside of court, indicates Parliament's intention to negotiate settlements.
      * Without some degree of certainty that the agreement will be respected by the court, parties have little incentive to negotiate a settlement and the policy of s. 9(2) would be defeated.
    - Nothing in s. 15.2(6) suggests that an order for spousal support *must* always satisfy the listed objectives, just that it *should*.
    - s. 15.2(4)(c), which directs a judge's attention to "any order, agreement or arrangement" between the parties, suggests that the intention of Parliament was to ensure that give parties some confidence that their agreements would not be easily disturbed.
  + Contract law principles are ill-suited to separation agreements.
    - Such agreements are negotiated in periods of emotional turmoil, where one or more of the parties may be particularly vulnerable. Such circumstances do not make for rational economic decisions.
    - Marriage is also often defined by potential power imbalances and modes of influence.
      * e.g., one party may have dominance financially, or may have control over the kids.
    - At the time separation agreements are negotiated, it can be difficult to predict how post-divorce life will unfold.
    - s. 15.2(6) instructs courts that agreements are only one factor to consider.
  + Judges will owe more deference to comprehensive agreements purporting to govern all issues related to the termination of the marriage, since such agreements are often interrelated, and a change to one part of the agreement might put the whole agreement into question.
    - e.g., the parties may agree to higher child support or an unequal property division in consideration for there being no spousal support.
* In an originating application for spousal support, where the parties have a pre-existing agreement, the court should:
  1. Look to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement (i.e., determines the weight that should be afforded to the agreement).
     1. The court should first look at the circumstances of negotiation.
        + It should consider whether one party was vulnerable and the other party took advantage of that.
          - Courts should look at the conditions under which negotiations were held, such as their duration and whether there was professional assistance.
          - The court should not presume that, where there is a power imbalance or vulnerability, the parties must not have been capable of assenting to a binding agreement.

There must be *evidence* to warrant a finding that there was a fundamental flaw in the negotiation process.

* + - * + A vulnerable party needs not necessarily establish unconscionability based on contract law standards.
      * Where vulnerabilities are not present, or are effectively protected against, the court should consider the agreement as indicative of the parties' intentions and should be loathe to interfere.
        + In contrast, where a power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties’ intentions and the agreement will merit little weight.
    1. The court should then look to the substance of the agreement to determine whether it failed to comply *substantially* with the factors and objectives listed in the *Divorce Act*.
       - Such factors and objectives include not only the equitable sharing of the consequences of the marriage breakdown, but also certainty, finality, and the autonomy of the parties.
       - A *significant* departure from the general objectives of the Act will warrant judicial intervention.
         * That said, a failure to comply substantially with the Act does not mean the whole agreement has to be ignored.
  1. Ask whether, viewed from the time the application is made, the applicant has established that the agreement no longer reflects the original intention of the parties and whether the agreement is still in *substantial* compliance with the objectives of the Act.
     + i.e., a fair support settlement will be upheld in the absence of some unexpected change that undermines the continued integrity of the settlement having regard to the parties' original intention and the relevant support objectives.
     + A court will unlikely be persuaded to disregard the agreement but for a significant change in the parties’ circumstances from what could reasonably be anticipated at the time of negotiation.
       - i.e., an applicant generally must prove that something happened which the parties had not contemplated, so that that the agreement no longer reflected the parties' prior expectations and intentions.
       - Where change is foreseeable, as will often be the case, this will not justify discarding the agreement.
         * e.g., changes in the job market, the health of the parties, the price of real estate, parental responsibilities, etc. are generally foreseeable.
       - Where change is introduced by the actions of the parties themselves, this will not justify discarding the agreement.
         * e.g., a party may decide not to work or may remarry.
       - The applicant does not have to show a "radical" change in the circumstances.
       - The applicant need not demonstrate that the change is causally connected to the marriage or its breakdown.
     + However, it is not the existence of change *per se* that matters but whether, at the time of the application, all the circumstances render continued reliance on the agreement unacceptable.
       - That is, even the unexpected *absence* of change could render adherence to the agreement inappropriate.

Rationale: (Bastarache and Arbour JJ)

* The Separation Agreement should be given significant and determinative weight.
  + The circumstances of negotiation and execution do not reveal a reason to discount the agreement.
    - There is nothing to suggest that the negotiation and execution was fraught with vulnerabilities.
      * While Linda testified that the post-separation period was a vulnerable time for her, this was addressed by the help of expert counsel over an extended period (15 months).
    - The substance of the agreement does not demonstrate a significant departure from the overall objectives of the *Divorce Act*.
      * The division of assets in the agreement reflected the parties’ needs and wishes at the time and fairly distributed the assets acquired by them over the course of their marriage.
      * The quantum of child support was arrived at in full contemplation of the wife’s spousal support release, and was intended to provide the wife with a minimum amount of income in contemplation of her not working.
  + The applicant has not established that any change in the circumstances put Linda's current position outside the reasonable range of circumstances that the parties contemplated in making the separation arrangement.
    - The change with respect to the Consulting Agreement will not justify discarding the agreement.
      * It was Linda who repudiated the agreement.
      * The parties contemplated that the agreement may not be permanent.
        + Renewal required the consent of both parties.
        + Linda's income projections only anticipated five years of income from the agreement.
    - There is no evidence of any damaging long-term impact of the marriage on Linda's employability or that at the time of negotiation she underestimated how long it would take to become self-sufficient.
      * While she was no doubt responsible for looking after her children, she had previously demonstrated her willingness to engage in child-care services.
    - The change to the parties' parenting arrangement reflected the changing needs of the children, which is an ordinary fact of life that can be anticipated.
    - While Linda suggested that her financial position deteriorated post-separation, the record shows that her net worth increased by 20% after the marriage.

Notes:

* The wife proceeded under s. 15.2, and not s. 17, because there was no previous spousal support order sought to be varied.
  + Under s. 15.2, the court does not have to consider whether there has been a material change in the circumstances as a threshold question.

## Enforcement of Support Orders

* + Alberta's *Maintenance Enforcement Act* creates the Maintenance Enforcement Program (MEP), which is run by the provincial government and facilitates the collection and payment of maintenance.
    - "Maintenance" means maintenance, support, or alimony and includes an amount payable periodically, lump sums, amounts payable under a QB protection order, a charge on property as security for the payment of maintenance, or interest or the payment of legal fees or other expenses arising in relation to maintenance [s. 1(1)(d)].
    - Once there is a court order or agreement in place relating to child or spousal support, it can be registered with the MEP, giving it the ability to collect the money that the payor owes and forward it to the recipient once it passes through the MEPs trust account.
      * The MEP can also collect and enforce arrears if the payor has fallen behind on payments.
    - Under the MEP, the Director shall enforce a maintenance order filed with it in a manner that it considers appropriate, and may commence proceedings as if it were a creditor under a maintenance order [s. 5]
      * It is no longer up to the recipient to track down the payor and make court applications to enforce support.
    - All court orders dealing with support *must* be filed with the MEP unless the creditor applies to skip this step [s. 7].
      * However, a creditor or debtor may withdraw a maintenance order filed by them by filing with the Director a notice in writing of their wish to not have the order enforced by the Director [s. 9].
    - To enforce payment or collect arrears, the Director may file a writ at the Personal Property Registry, garnish funds owed to the payor by the federal government (e.g., tax refunds), register a writ against real property, garnish wages, freeze bank accounts, enforce a motor vehicle restriction (e.g., withhold a vehicle registration renewal), restrict recreational hunting and fishing licenses, suspend the payor's licenses (e.g., driver's license, passport).

# Parenting Issues

* Parenting is one of the more difficult areas of family law; people are often emotional, angry, and are trying to convince the court that they are the better parent.
  + Plus, generally, the more parents fight about parenting, the more their children suffer.
* There are two acts that govern parenting.
  + You proceed under the *Divorce Act* if the couple is married and is seeking a divorce.
  + You proceed under the *Family Law Act* if you are unmarried or you are married but are seeking a parenting order.
* If you want to bring an application for parenting, you will have to take the Parenting After Separation course.
  + It outlines the way to approach a parenting dispute without harming the children involved.
  + You don't have to take this course to make an application if all the children are over 16 or if there is domestic violence or an abduction and the party bringing the order undertakes to take the course at a later time.
* The vast majority of parenting disputes are resolved by negotiation.
* The best interests of a child are the sole criteria used to make parenting and contact orders.
  + The best interests of a child are the positive rights to the best possible arrangements in the circumstances.
  + The determination of best interests is very fact-specific.

## Parenting & Contact Orders

### Parenting Orders

* A court 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 spouse or (b) a person, other than a spouse, who is a parent of the child [s. 16.1(1)].
  + A person other than a spouse that is seeking a parenting order must seek leave from the court to do so [s. 16.1(3)].
* A parenting order may [s. 16.1(4)]:
  1. Allocate parenting time in accordance with section 16.2.
     + *Parenting time* means the time that a child spends in the care of a person, whether or not the child is physically with that person during that entire time [s. 2].
     + Parenting time may be allocated by way of a schedule [s. 16.2(1)].
     + Unless otherwise ordered, a person to whom parenting time is allocated has exclusive authority to make, during that time, day-to-day decisions affecting the child [s. 16.2(2)].
       - e.g., what to eat for dinner, when to go to bed, whether to go out with friends.
  2. Allocate decision-making responsibility in accordance with section 16.3.
     + "Decision-making responsibility" refers to the responsibility for making significant decisions about a child's well-being, including in respect of health, education, culture, language, religion, spirituality, and significant extra-curricular activities [s. 2].
     + Decision-making responsibility in respect of a child may be allocated to either spouse, to both spouses, to someone described in paragraph 16.1(1)(b), or to any combination of them [s. 16.3].
  3. Include requirements with respect to communication, during the parenting time allocated to a person, between a child and another person to whom parenting time is allocated.
  4. Provide for any other matter that the court considers appropriate.
     + e.g., somebody's parenting time has to be supervised.
* 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 [s. 16.1(5)].
  + It may direct the parties to attend a family dispute resolution process [s. 16.1(6)].
    - *Family dispute resolution process* means a process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law [s. 2].
  + It may authorize or prohibit the relocation of the child [s. 16.1(7)].
  + It may require that parenting time or the transfer of the child be supervised [s. 16.1(8)].
  + It may prohibit the removal of a child from a geographic area without the written consent of any specified person or without a court order [s. 16.1(9)].
* Unless the court orders otherwise, any person to whom parenting time or decision-making responsibility has been allocated is entitled to information about the child’s well-being, subject to any applicable laws [s. 16.4].
  + Includes information in respect of their health and education [s. 16.4].

### Contact Orders

* A court may, on application by a person other than a spouse, make an order providing for contact between that person and a child [s. 16.5(1)].
  + A person in respect of whom a contact order is made simply gets the right to see the child; they do not get any decision-making authority or the right to access information about the child's well-being.
  + The court may make an interim order providing for contact between that person and the child pending the determination of the application [s. 16.5(2)].
  + A person other than a spouse must seek leave from the court before making such an application [s. 16.5(3)].
* In determining whether to make a contact order, the court shall consider all relevant factors, including whether contact between the applicant and the child could otherwise occur [s. 16.5(4)].
  + Courts look at the involvement that the person seeking contact had with the child prior to separation and how strong their relationship is.
* In a contact order, the court may provide for (a) contact between the applicant and the child in the form of visits or any means of communication and (b) any other matter that is appropriate [s. 16.5(5)].
* 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 [s. 16.5(6)], including the supervision of the contact or transfer of the child [s. 16.5(7)].
  + It 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 [s. 16.5(8)].
* The court may make an order varying a parenting order to take into account a contact order, and subsections 17(3) and (11) apply as a consequence with any modifications [s. 16.5(9)].

### Parenting Plans

* The court shall include in a parenting order or contact order, any parenting plan submitted by the parties unless 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 [s. 16.6(1)].
  + A "parenting plan" means a document or part of a document that contains the elements relating to parenting time, decision-making responsibility or contact to which the parties agree [s. 16.6(2)].

## Interim Orders

* Under the *Divorce Act*, the court may, on application, make an interim parenting order pending the determination of an application for parenting time or decision-making responsibility [s. 16.1(2)].
  + An interim order is a stopgap measure designed to put something in place until the matter gets to trial or is finalized between the parties that will minimize harm to the children.

### *R v R*, 1983 ABCA 156

Facts:

* The parents were married in 1974 and established a home on a farmstead near Champion. In 1978, they adopted a daughter. About three years later, the marriage broke down, and the mother moved to Lethbridge. An interim agreement was reached that the mother would have interim custody but the father would take the child for four days every other week. This arrangement persisted until divorce proceedings in January 1983, where custody was disputed.

Procedural history:

* The trial judge found each parent to be fit, able to provide material and emotional support to the child. However, he awarded custody to the father on the grounds that he would be able to spend more time with the child (given his job as a farmer) and that his mother lived on the farmstead and could help with childcare. That said, the child's mother was given very liberal access to the child as well.

Issues and holding:

1. Did the trial judge give insufficient weight to the status quo during the interim period? **NO**
2. Did the trial judge err in not considering the "tender years principle"? **NO**
3. Did the trial judge err in putting decisive emphasis on the fact that the father had more weekday time available to share with his daughter than the mother? **NO**

Analysis:

* An appellate court cannot overrule the decision of a trial judge simply because it would have come to a different conclusion absent a manifest error.
  + The harm which comes from the delay and confusion which would arise from continual review outweighs any good which might come from a different result, especially in cases where, given their presence at trial, the trial judge had the best chance to be right.
* The "tender years principle" provides that a child of "tender years" should be in custody of its mother.
  + According to this view, no father, no matter how well-intentioned or how solicitous for the welfare of such a child, can take the full place of the mother.

Rationale: (Kerans JA)

1. *De facto* arrangements should not lightly be disturbed; all else equal, it is not in the best interest of a child to substitute an uncertain situation for a certain one. However, it is *at the time of an interim disposition* that one should not lightly disturb *de facto* arrangements, not at the time of a permanent order.
   * Interim custody is a makeshift solution; when a permanent order is being made, an interim arrangement should not be treated as a waiver by one party of the right to seek custody since that would discourage litigants from agreeing to workable interim arrangements.
   * That said, in this case, the status quo was not dispositive; the child was equally used to being with either parent and the husband's situation offered no gamble or risk greater than the wife's.
2. The "best interest of the child" is the paramount criterion to determine parenting.
   * Judges must decide each case on its own merits, with due regard to the capacities and attitudes of each parent.
   * That the female human has some intrinsic capacity, not shared by the male, to deal effectively with infant children is an assumption that is now widely rejected.
     + This view traps women in a social role not necessarily of their choosing, while at the same time freeing men of childcare obligations.
     + Further, this view is self-perpetuating: by putting the female child in the custody of somebody who accepts the maternal role model so described, the rule ordains that she will have just such a role model at close hand during her most impressionable years.
3. Where other things are equal, it is not improper to take into account that one parent can spend more time with the child than the other, or that one parent can provide greater short-term benefits.

Dissent: (McGillivray CJA)

* The difference in amount of time that one parent can at any given period spend with the child is not a sound criterion on which to base a custody order (quality not quantity of parental care should be weighed), particularly when the effect is to overturn the arrangement that the parties themselves had made.
* The judge should have recognized the wife’s advantage as a mother in relation to a child of tender years.
  + The importance of a mother's tender care and soothing voice to a young child has been affirmed in previous decisions.

### *Richter v Richter*, 2005 ABCA 165

Facts:

* The parents separated with a 4-month-old child. The parents had great difficulty in dealing with each other and making decisions affecting the child. Even the circumstances of the separation are disputed. In August 2004, the court appointed a psychologist, Ms. Ailon, to complete a report dealing with issues of parenting. The report recommended a shared parenting arrangement. The father thus brought an application seeking joint custody and a shared parenting arrangement.

Procedural history:

* The chambers judge ordered interim joint custody and interim shared parenting.

Issues and holding:

* Did the chambers judge err in ordering interim joint custody and shared parenting? **YES**

Rationale: (Fraser CJA)

* Generally, joint custody and shared parenting arrangements should not be ordered where the parents are in substantial conflict, nor should such orders be made before trial if there is significant disagreement on the evidence.
  + Joint custody requires a sincere willingness by both parents to work together to ensure the success of the arrangement.
* Further, *de facto* child custody arrangements should not be lightly disturbed pending trial.
  + A primary consideration is to ensure that there is some stability and certainty in a child’s life.

### *Rensonnet v Uttl*, 2014 ABCA 304

Facts:

* The unmarried parties cohabited for four years before separating in July 2013. They have two boys, born in 2009 and 2011. In September 2013, the mother applied for an *ex parte* interim parenting order. The order was granted, giving day-to-day care of the boys to the mother and allowing the father occasional access. The father challenged this order on the grounds that it was not based on any justification and that the maximum contact principle and the children's best interests demand a shared parenting order.

Issue and holding:

* Did the chambers judge err in granting the interim parenting order? **NO**

Analysis:

* Due to their fact-based and discretionary nature, interim parenting orders warrant a very deferential standard of review.
  + Intervention is allowed only where the judge below erred in law or made a material error in his or her appreciation of the facts.
* Shared parenting arrangements should not be ordered where the parties are in substantial conflict with each other, nor should such orders be made before trial if there is significant disagreement on the evidence.

Rationale: (The Court)

* Much of the argument on appeal was devoted to the same disputed facts that properly led the special chambers justice to conclude that the parenting issues in this case could only be resolved by trial.
* Given the deference owed on interim parenting matters, the special chambers justice did not err in maintaining his earlier order pending resolution of this high conflict issue by trial.

### *Shwaykosky v Pattison*, 2015 ABCA 337

Facts:

* The parties have three kids. They are involved in protracted litigation. In 2010, the parties consented to a shared parenting regime of one week with each parent. In 2013, the eldest child stopped participating and moved in primarily with his father. In 2014, the father applied for an order granting him primary care of the other two children. A "View of the Child" report was ordered, and it indicates that the two youngest children expressed a strong, clear desire to reside primarily with the father and have weekends with the mother.

Procedural history:

* The case management judge, relying heavily on the views expressed by the children, ordered that the father should have primary care of all of the children and that the interim order was effective for one year. This was done without a *viva voce* hearing.

Issue and holding:

* Did the chambers judge err in awarding the father primary care of the children in the interim? **YES**

Analysis:

* Except in the case of urgency and only where it is clearly in the child’s best interests, a chambers judge should not substantially change a parenting regime without the benefit of *viva voce* evidence (i.e., in the interim).
  + Doing so is fraught with problems, is often procedurally unfair, and may lead to protracted litigation and moving children unnecessarily.

Rationale: (Paperny JA)

* Here there was conflicting evidence and no apparent urgency; the children were not in apparent jeopardy, although they had expressed views to the expert that they preferred a change in their care.
  + The preferable practice was to direct a *viva voce* hearing leaving the status quo until better evidence accompanied by procedural safeguards was available.
* However, despite issues with the procedure adopted, intervention is not appropriate.
  + The matter is proceeding to a *viva voce* hearing and further disruption of the children’s day-to-day lives is not in their best interests.

Notes:

* When the court is granting an interim order, the *de facto* parenting arrangements are very important.
  + In contrast, with respect to final orders, the status quo is just one factor; it does not carry any more weight than any other factor. The interim arrangement is not going to be presumed to be what's in the best interests of the children.

## Types of Parenting Regimes

* + Types of parenting regimes that a court might order include:
    1. Primary residence regimes
    2. Shared parenting regimes
    3. Parallel parenting regimes
    4. Bird-nesting regimes

### Primary Residence Regimes

* Primary residence is a form of order wherein one parent is awarded primary residence of the child while the other is (possibly) awarded specified parenting time.
  + Day-to-day decision-making authority typically resides with whichever parent has the child while major decisions regarding the child's health, welfare, education, association, etc. are made jointly.
  + There may be situations where decisions regarding one aspect of the child's life are assigned to one parent and decisions regarding other aspects are assigned to the other.

#### *K(MM) v K(U)*, 1990 ABCA 254

Facts:

* The parties were married in 1981 and separated in 1987, at which point they had a 4 1/2-year-old daughter and a new-born son. In divorce proceedings the mother was granted interim custody. The father was charged with sexual assault but the proceedings were stayed. In December 1987 the father was granted supervised access. A psychologist and a social worker were appointed to study and report on the family situation. The psychologist's November 1988 report commented negatively on the mother's objectivity and her emotional and psychological disturbance. The report also positively assessed the father's parenting ability and status as a role model, and concluded that the daughter had not been sexually abused and was not likely to in the future. In a subsequent report in December 1989, the psychologist's assessment of the mother had improved considerably while his assessment of the father was less favourable.

Procedural history:

* The trial judge awarded custody to the father, referring extensively to the psychologist's 1988 report.

Issues and holding:

1. Did the trial judge commit a reviewable error in awarding custody to the father? **YES**
2. Should a new trial be ordered? **NO**
3. If no, which parent should be granted custody of the children? **Mother**
4. What access, if any, should be granted to the non-custodial parent? **Liberal but structured access**

Analysis:

* The scope of judicial review is limited to a consideration of whether or not there has been a palpable and overriding error in the trial judgment (i.e., unless it has clearly acted on some wrong principle or disregarded material evidence).
  + Parenting decisions are best left to the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances.

Rationale: (Stratton JA)

1. The trial judge committed a reviewable error by:
   * Disregarding the psychologist's second report and misconstruing some earlier evidence.
   * Giving undue weight to the “excellent role model” said to be presented by the father; this factor should have had minimal impact, if any, on the ultimate custodial decision.
     + Within a regime of liberal access by the noncustodial parent, as was under consideration here, the ability of that parent to establish a role model would not be lost.
     + It is difficult to imagine that in a case such as this, where both parents have ultimately been found to be good parents, the ability to provide a role model should carry much weight.
     + Even if the role modelling concept were significant, on the facts of this case the mother appears to be at least equally able to provide a high level of “role modelling.”
2. This court can, without difficulty, decide the case from the record and should not order a new trial.
   * A new trial would extend the uncertainty, trauma, and anxiety for the children and the parties.
   * While the special advantage enjoyed by the trial judge is also of major significance when the question of credibility of key witnesses is at issue, that is not the situation here.
     + The appellate court can fairly evaluate the testimony in the transcript; fairness does not require a new *viva voce* hearing.
3. The mother is the custodial parent who will best serve the interests of the children.
   * The evidence suggests that the trial judge’s concern for the mother's psychological health, and the resultant effect which that might have on her parenting ability, were adequately answered at trial.
   * While the father has possession of the former matrimonial home in a good neighbourhood close to various amenities, this is not of paramount importance.
     + The children have not lived in that house for much of their lives, and the mother lives in a modern apartment building with lots of amenities. She plans to move them into a three-bedroom suite.
   * While the father did have some flexibility to schedule his work, the mother is self-employed, she works 4 to 5 hours a day (some of which she does from home), and her mother lives with her and would be available for childcare.
   * Most importantly, the evidence supported the conclusion that the children were more closely bonded to the mother and that she was better able to meet the kids' emotional and psychological needs.
     + The evidence shows that the mother, who has always been the kids' primary caregiver, has good parenting skills; the father's parenting skills, by contrast, are untested.
       - It is not in the best interest of the kids to substitute a certain situation with the mother for a uncertain one with the father.
     + This is not to apply the "tender care doctrine"; it is merely to say that, in the facts of this case, the mother is in the best position to care for fulfill the kids' day-to-day needs.
4. Although the children would benefit from contact with the father, the animosity between the parents required that the father be given liberal but structured access.

#### *RAL v RDR*, 2007 ABQB 79

Facts:

* The parties were married in 1987 and had a child in 1993 (now age 13). That same year, the father had a child in an extramarital relationship. As a result of this relationship, the parties separated in 1997 and ceased cohabiting in February 1998. The mother filed for divorce and sought sole custody in 1999. She claimed that the father was trying to alienate the child from her, while the father claimed that the mother was motivated by spite.

Issues and holding:

1. Is joint custody appropriate? **NO**
2. If no, who should have custody of the child? **Mother**
3. Should the father have access to the child? Under what conditions? *(See below)*
4. Does the father owe arrears of child support?

Analysis:

* Joint custody should only be ordered where the parents can co-operate and communicate effectively, and ought not to be ordered where the parents are in substantial conflict with each other.
* A custody determination is based on what is in the best interests of the child under the circumstances considering, among other things:
  1. The mental, emotional and physical health of the child and her need for appropriate care or treatment, or both.
  2. The views and preferences of the child, where such view and preferences can be reasonably ascertained.
  3. The effect upon the child of any disruption of the child’s sense of continuity.
  4. The love, affection, and ties that exist between the child and each person to whom the child’s custody is entrusted, each person to whom access to the child is granted, and, where appropriate, each sibling of the child.
  5. The need to provide a secure environment that would permit the child to become a useful and productive member of society through the achievement of his full potential according to his individual capacity.
  6. The child’s cultural and religious heritage.
  + Courts must be careful that the child’s needs and concerns are accommodated and not obscured by abstract claims of parental rights.
* It is normally desirable to maximize contact between the child and each parent; however, access must support and contribute to the health and best interests of the child.
  + This means that there are circumstances under which the welfare of the children is best promoted by a denial of access to one parent.
  + What children need even more than both parents is peace; inter-parental conflict constantly shows up as the major cause of children’s maladjustment and problems.

Rationale: (Martin J)

1. In this matter there is no evidentiary basis to justify continuing joint custody.
   * There is no evidence of historical co-operation and appropriate communication between the parents and no basis on which to hope that it may occur in the future.
     + In the extended period before trial it has been repeatedly demonstrated that the parents are unable to jointly make decisions in the child’s best interest.
       - Matters which other parents may resolve through discussion and agreement regularly came before the court as contested motions.
     + The father intentionally engaged in a pattern of behaviour to alienate the child from the mother and convince her that he is the one caring parent.
       - The criticism and blaming of the mother was a near constant factor in the child’s life during the many years she spent with the father.
   * Previous parenting arrangements involved many moves between households for the child, which made it difficult for them to have friends and engage in age-appropriate activities.
2. Sole custody should go to the mother.
   * The mother is better prepared to give priority to the child's best interests and meet her mental, emotional, and physical health needs.
     + She has developed a careful and thoughtful analysis of the child’s position and how she may best support her needs, interests, and aspirations.
       - She is more prepared to broaden the scope of the child’s life with learning, associations, and challenges.
       - She realizes the toll this situation has had on the child and shows genuine regret about it.
       - She has a history of ensuring that the child receives the mental health assistance she requires.
     + The father has not accepted the need to consider the child’s best interest before his own.
       - He appears more restrictive in what he will permit as activities during his access times.
       - He has been unable to stop his negative behaviors or work towards fixing the problems he's created.
       - He has demonstrated a sporadic dedication to bringing his daughter to therapy.
   * The mother offers the greatest stability, both now and in the long term.
     + A move to the father’s house would be disruptive.
       - It would require the child to build a new relationship with a live-in step-mom.
       - She would be required to change schools, and it could not be assumed that any of her old friends would be there for her.
     + At her mother’s home, the child will be part of a family she knows.
       - She will be a sibling to a young half-sister and it will be important emotionally for her to have a sibling, to learn to care for another, and to be the big sister.
   * The mother is recognized as the stricter parent and promises to be a more appropriate role model for the children in terms of values, direction, and limit setting.
   * While the child has expressed a desire to live with her father, these views have likely been heavily influenced by her father, who has repeatedly put the child in positions of stress, conflict, and anxiety, while at the same time presenting himself as the parent who fought for what the child wanted.
     + The father has placed the child in a position in which she feels she must protect him. She accepts his characterization of himself as a victim and worries about his finances and health.
   * While the child may initially be adverse to change and their relationship may be difficult, the child appears to warm to the mother when she spends more time with her and the influence of the father is removed.
3. Access by the father is suspended until further order by the Court. The earliest there may be a review of this order is February 2008. There is to be no contact directly or indirectly between the father and the child by any means.
   * While the child desires continued contact with the father, there needs to be a cooling off period to allow the child to find peace and calm and focus on herself and her studies.
   * Certain conduct on the part of the father creates an additional risk for this child.
     + The father has an alternative sexual lifestyle; he attended swingers clubs and participated in group sex and solicited “dates” on various internet sites.
       - While there is no evidence that the child has been exposed to the father’s sexual practices, she is bright and it would be difficult to keep secrets from her.
     + Also, the father had convinced his girlfriend to engage in prostitution, and set up web site to promote this, in order to make money to pay household bills.
       - These actions demonstrated that he considered prostitution a legitimate career for loved ones and this thinking could impact teenage daughter at this point in her development.

### Shared Parenting Regimes

* Under the *Divorce Act*, 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 [s. 16(6)].
  + What this means is that there are *no* presumptions in favour of shared parenting regimes.
    - Changes to the *Divorce Act* came into effect in 2021, after a lengthy consultation process; had Parliament wanted to ensure a presumption in favour of shared parenting, it would have said so.
    - This does not necessarily mean, though, that judges will never make presumptions in favour of shared parenting; it just means that they will not come right out and say it.
  + A determination that shared parenting should not be ordered must be based on a fact-specific determination that it would not in the child's best interests.

#### *McCurry v Hawkins*, 2004 ABQB 827

Facts:

* The parties started living together in 1995. They have an 8-year-old boy and 4 1/2-year-old twins. During the relationship, the parties structured their lives so that they both had childcare responsibilities. They separated in 2004. Relations remained cordial, and each party spent considerable time with the children, amounting to a shared parenting regime. Since then, relations have soured, namely because of the animosity between the father and the mother's new boyfriend. The mother sought an order that the primary residence of the children be with her, as she doubted the father's parenting abilities, showed concern about the father's new girlfriend (who had three kids of her own) looking after the children, and believed that the parties could not cooperate enough to make shared parenting work. The father sought a shared parenting regime.

Issue and holding:

* Is shared parenting appropriate? **YES**

Analysis:

* Parents having the legal status of joint custody and joint guardianship, should also have the real status of joint parenting except where such an arrangement is not in the best interests of the children.
  + *Note*: this is currently an incorrect statement of the law, as it reflects a presumption in favour of shared parenting.
* One type of joint or shared parenting is parallel parenting, the parenting regime developed to deal with situations where parents cannot cooperate in parenting.
  + In parallel parenting:
    - A parent assumes responsibility for the children during the time they are with that parent.
    - 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, vacations is shared in writing, usually in the form of an access book.
  + Parallel parenting is a useful mechanism for at least three reasons:
    - A typical term of a parallel parenting regime requires the parents to maintain a record of communications between themselves, thereby allowing the court to decide which of the parents is unreasonable, controlling, or otherwise preventing effective co-parenting.
    - It avoids a destructive result: if the parents don’t get along with one another, the children lose a parenting relationship with one of them and exchange, for the parenting relationship, a very different relationship – that of a baby-sitter.
    - It nurtures Parliament’s objective of ensuring, where possible, as much contact as possible between children and their parents.
  + Parallel parenting will not *always* be a viable option in a situation where the parents can no longer cooperate, particularly when they are in a high conflict situation.

Rationale: (Veit J)

* The parties shall attempt to set up a parallel parenting scheme based on a week-on, week-off arrangement, at least until September 2005.
  + The reinstitution of joint parenting will provide stability to the children’s lives and will assure the children that each of their parents still loves them.
  + The evidence discloses that the father cared for the three children in the early morning for the last 3 1/2 years; there is no doubt that he can get the children ready for their daytime activities.
  + There is no suggestion that the father's girlfriend is unable to take care of six children.
    - It is not a counter-indication to shared parenting, especially when the mother herself uses non-parental childcare.
  + The children have been faring well in what amounts to a shared parenting situation; both parents have been very much involved in their children’s lives and have demonstrated shared parenting values.
  + While cooperation between the parents has broken down, a parallel parenting scheme can be sufficiently rigid to avoid the necessity of cooperation in deciding questions of access, at least until the high emotions surrounding the separation and the establishment of new relationships settle down.
    - The fact that there have been threats between the mother’s new boyfriend and the children’s father is not a factor preventing shared parenting – especially where there has been no violence between the parents or between the parents and their children.

Notes:

* This decision was one in a series of cases that looked at s. 16(6) of the *Divorce Act* and concluded that there was a presumption in favour of shared parenting. As explained below, this is no longer an accurate statement of the law.

#### *Cavanaugh v Balkaron*, 2008 ABCA 423

Facts:

* The parties married in 1987, had two children, and began living separate and apart under the same roof in December 2004. In October 2007, the mother and children moved out of the matrimonial home, and in February 2008, the father applied to implement a shared parenting regime. The daughter, then 17, advised that she wished to live with her mother, to which the father agreed. The son wished to decide for himself when to visit his father. A chambers judge ordered shared parenting of the son unless the mother was able to demonstrate that such an arrangement was not in the son's best interests.

Issue and holding:

* Did the chambers judge err in ordering a shared parenting arrangement? **YES**

Analysis:

* Presumptions in relation to parenting orders have given way to the principle that the best interests of the child is the determining factor.
  + While the interest of maximizing parental access is important in making a custody order, the *Divorce Act* makes that factor subject to the best interest of the child.

Rationale: (The Court)

* The judge erred in finding that the father’s guardian rights favoured a default position of shared custody.

#### *Botticelli v Botticelli*, 2009 ABQB 556

Facts:

* The parties have a 22-month-old son. Each parent is a mature, responsible adult in comfortable financial circumstances. The mother has been the primary caregiver. The father sought an interim shared parenting order.

Issues and holding:

* Is an interim shared parenting arrangement appropriate? **YES**

Analysis:

* The express wording of s. 16(1) makes clear that the only standard in making a parenting order is the best interests of the child; parental preferences and "rights" play no role.
  + The test for the child's best interests is broad and flexible; the variety of circumstances which may arise in disputes over custody and access is so diverse that bright-line rules may not be useful.
* The primacy of the child's best interests means that are no presumptions in parenting disputes; as such, in *Cavanaugh v Balkaron*, the ABCA overruled previous statements of courts concerning parenting presumptions.
  + This means that there is no presumption in favour of the primary caregiver or the *status quo*.
    - However, where a trial is close at hand, a court may well conclude that it is not in the best interests of the child to disturb safe existing arrangements by shuffling the child around.
  + This also means that there is no presumption in favour of shared parenting.
    - Under the direction of the *Divorce Act*, courts should strive to provide the child with maximum contact with each parent as possible, but *only* if it is consistent with the best interests of the child.
* Without reliance on presumptions, the content of the notion of “best interests” is established by evidence and conclusions.
  + It is in the best interest of every child to be safe from physical, psychological, and emotional harm; to have their ordinary and special needs addressed as effectively as possible; to be nurtured with a view to maximizing their potential.
  + There are some aspects of best interest which are age-related: the younger the child, the greater need to have frequent bonding opportunities; the wishes of older, more mature children will be taken into account.

Rationale: (Veit J)

* No evidence establishes that Parliament’s goal of maximum contact with each parent should be restricted in this case because that goal conflicts with the best interests of the child.
  + While the mother is the primary caregiver, there is no presumption in favour of awarding custody to primary caregivers.
  + The evidence does not establish that the father is incapable of meeting his son's best interests; since separation, he has had parenting responsibilities without any reported negative effect on the child.

Notes:

* In this decision, released the year after *Cavanaugh*, the ABQB discards all presumptions relating to parenting.

#### *CAS v NPC*, 2020 ABQB 421

Facts:

* The parties have two young children but disagree on parenting. The mother has been the primary parent since at least separation and seeks to continue in that role. The father, who has had varying levels access since separation, seeks shared parenting.

Issue and holding:

* Is shared parenting appropriate? **YES**
* Should the shift to shared parenting occur gradually? **YES**

Analysis:

* The paramount factor in making a parenting order is the best interests of the child [*DA*, s. 16(1)].
  + No presumptions guide the assessment of a child's best interests.
    - There is no presumption in favour of the status quo.
    - There is no presumption in favour of the custodial parent.
    - There is no presumption in favour of maximum contact between the child and both parents.
* In making a parenting order, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of the child [*DA*, s. 16(5)].
* In making a parenting order, a court should provide the child with as much contact with each spouse *as is consistent with the best interests of the child* [*DA*, s. 16(6)].
  + Factors supporting shared parenting include (*AA v JA*):
    - Both parties being capable and engaged parents (*PJG v ZIG*).
    - Good communication between the parents (*SDK v ALK*).
    - Each parent (and their new partners) loving the children, with no evidence that they will not be properly cared for with all their needs met in the care of each parent (*Gordon v Gordon*; *CZ v RB*).
    - Nothing to suggest any harm to or neglect of child by non-primary parent (*CRW v SJA*).
    - Both parents having an appropriate residence for the children (*Nissen v Nissen*).
    - Adequate proposed work and child-care arrangements from the non-primary parent, even if less developed than the primary parent’s (*Gray v Gray*).
    - History of shared parenting (*Leikeim v Leikeim*).
    - Parents having different and important interests and capabilities to pass on to their children (*Leikeim v Leikeim*).
    - Where children have spent significant time with the non-primary parent and have strong attachments to both parents (*TLG v CLL*).
    - A parenting assessment recommending shared parenting (*MacDonald v MacDonald*).
    - Children preferring shared parenting (particularly where sounded by a parenting expert) (*PJG v ZIG*).
    - Child’s extracurricular activities not having to change (*MacDonald v MacDonald*).
    - Shared parenting enhancing children’s contact with a parent's cultural background (*PJG v ZIG*) and native tongue (*VC v KC*).
    - Child retaining meaningful contact with other members of the family (*MacDonald v MacDonald*).
    - Continuation of shared parenting allowing children to continue attending the school where their friends are (*PJG v ZIG*).
    - Non-primary parent in unique position to assist child with disabilities (*CRW v SJA*).
    - The ability of both parents to adapt easily to shared parenting (*Nissen v Nissen*).
    - A shift to shared parenting giving the current primary parent a break from the children and allowing her more time to focus on attaining other goals (*Nissen v Nissen*).
    - Manageable driving time between parental residences (*CZ v RB*).
    - Where shared parenting may neutralize or minimize the parents’ communication difficulties and personal hostility (*TT v JT*).
    - A primary parent’s efforts to thwart the other’s parenting time (*CZ v RB*).
    - A working-at-home non-primary parent’s ability to manage both work and childcare (*VC v* KC).
    - Where the post-separation status quo was shared parenting (*HG v RG*).
  + Factors that do not weigh for or against shared parenting include (*AA v JA*):
    - Childcare is provided by one parent’s new partner, especially where the other parent also relies on non-parental child care (*PLM v DJH*).
    - Where the current primary parent’s only objections were that “change would be difficult” and that the other parent “can be difficult” (*Nissen v Nissen*).
    - The fact of non-primary parent having more time and ability to parent is insufficient (*IMD v RAD*).
  + Factors signaling against shared parenting include (*AA v JA*):
    - Parents' inabilities to put their children’s interests ahead of their own to such a degree that regular cooperation and coordination in scheduling is impossible (*Rensonnet v Uttl*).
    - Demonstrated inability of a non-primary parent to responsibly exercise access (*Ernst v Martins*).
    - The parties being and having been in substantial conflict and lacking a genuine willingness to work together to ensure the success of a shared-parenting arrangement (*AE v TE*).
    - Where separation of the child from his or her primary caregiver, particularly at a young age, may be emotionally and developmentally disruptive for the child (*TLG v CLL*).
    - Medical evidence suggesting no major changes to routines of a disabled child (*AJC v TCC*).
    - A parent's frequent violence and angry outbursts against child (*LSA v JM*).
    - Child at risk of serious psychological problems (*LSA v JM*).
    - One parent’s residential and new-relationships instability, coupled with an information gap about who would care for child during that parent’s working time (*Davenport v Misa*).
    - A parent’s proposal that each enroll the children in separate activities, to be pursued only while with the enrolling parent, which would lead to parallel, compartmentalized lives and severely restrict the type of activities in which they could engage (*Rensonnet v Uttl*).
    - One parent having more scheduled work commitments requiring him to delegate responsibility to third parties, which would offer less consistency than that available with the other parent, who works from home (*Rensonnet v Uttl*).
    - The absence of definite plans for where the non-primary parent would live with the children or where they would go to school (*Rensonnet v Uttl*).
    - The opposed-to-shared-parenting opinions of the children, as reflected in a “View of the Child” report finding their opinions to be “independent and considered” (*Shwaykosky v Pattison*).
    - Distance between parents’ residences making shared parenting impractical (*Gregory v Ball*).
    - One parent very likely moving away (*Gregory v Ball*).
    - Before trial, where there is significant disagreement on the evidence (*Rensonnet v Uttl*).
    - Non-primary parent does not have their own residence that can accommodate them and the children *(Leikeim v Leikeim*).
    - One parent’s possible serious dependency issues (*Cech v Fisher*).
    - Evidence is needed of the impact of a proposed shared parenting arrangement (*RNK v JLL*).
    - A re-introduction-of-absent-parent process has yet to be completed (*SLT v AKT*).
* Determining a child’s best interests is not simply a matter of scoring each parent on a generic list of factors.
  + The listed factors in one case merely serve as indicia of the best interests of the child. By their very nature, custody and access applications are fact-specific. The listed factors may, therefore, expand, contract, or vary, depending on the circumstances of the particular case.

Rationale: (Lema J)

* Shared parenting is in the children's best interests.
  + These parties are both loving, capable, involved, and committed parents, with each having a track record of taking the parenting lead, at various times, over many years.
    - While the mother claimed that she handled virtually all the child-care tasks, the evidence reveals that the parties passed the lead-parenting role back and forth as their respective work commitments and other circumstances required, and that both parents are fully capable and have been fully involved in caring for their children.
    - The mother's evidence failed to convincingly reveal any serious incapacity or shortcomings in the father's parenting.
      * If the father did display such shortcomings, it is unlikely that the mother would have relied on the father for childcare when she was at work.
  + The parents' communication difficulties are not insurmountable, as they've been able to cooperate at times.
    - The less-than-amicable comments adduced by the parties do not indicate any irreparable hurt feelings, reflecting any unfitness to parent in any way or bearing on the parenting equation at all.
    - While the parties have had their rough patches and do not agree on everything, the record shows many examples of co-operation.
      * While it may not have worked perfectly, they managed a form of in-matrimonial-home shared parenting for about six months.
      * Each party specified that they were willing to work out an appropriate parenting schedule.
  + No evidence points to the children not being strongly bonded to both parents.
    - While the mother claimed that the children have not bonded to their father, this does not comport with the level of involvement he's had in their lives and is not supported by any evidence at all.
  + The children’s needs will be fully met in each home; each parent appears to have a suitable-for-parenting residence, in which the children's needs will be fully met.
  + None of the counter-indicator factors apply here, with one possible exception being that the children are very young (4.5 and 2.25).
* Whatever pattern the parties agree on, the ramp-up to full shared parenting shall occur gradually and at an even pace over the next four months.

### Parallel Parenting Regimes

* Parallel parenting is meant for situations where parents cannot communicate and make joint decisions.
  + It's not nearly as popular as it used to be, but you still sometimes see parents arguing for it.
* In Lori's view, parallel parenting is an attempt to award bad behaviour on the part of parents.
  + She believes it is not in the best interests of children to live two completely separate lives in two separate homes.

#### *B(JE) v B(C)*, 1998 ABQB 774

Facts:

* The parties have two children, aged 10 and 7. Each party wants to have primary care of the children. The mother wants sole custody and the father feels like joint custody is appropriate.

Issues and holding:

* Is shared parenting appropriate? **YES**
* If yes, what are the conditions of the parenting arrangement? *(See below)*

Analysis:

* One type of joint or shared parenting is parallel parenting, the parenting regime developed to deal with situations where parents cannot cooperate in parenting. In parallel parenting:
  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 verbal messages.
  7. Information about health, school, vacations is shared in writing, usually in the form of an access book.

Rationale: (Trussler J)

* In this situation, a parallel parenting arrangement is most appropriate.
  + The father is a good parent; he relates well to his children and they wish to spend time with him.
  + However, the level of animosity between the parties is high.
    - The father has trouble with abstract concepts and reasoning, has anger management problems, has a rigid personality, frustrates easily, is controlling, and lacks insight.
    - At trial, where he was a self-represented litigant, the father made unsubstantiated and harsh allegations against the mother.
    - The father has been obstinate and unwilling to make any compromises.
* The conditions of the arrangement are as follows:
  + The father will parent the children each week during the school year from noon on Thursday until 5:30pm on Saturday.
    - He will pick the children up from school when students are dismissed shortly after noon and he will return them to the mother's home on Saturday.
    - When he returns the children, he will say “good-bye” to them inside his vehicle. He will not exit the vehicle and under no circumstances will he enter the property where the mother is residing.
  + The father will have his own clothing for the children which they will wear at his place after changing out of the clothes they wore to school on Thursday.
    - The children will return to the mother's on Saturday in their Thursday school clothing.
  + The children will have an access book with them (a coil bound notebook) and the parties may pass messages to each other that relate to the children in it.
    - There will be no comments about each other in the book and they will have no other contact with the mother except in extreme emergency situations.
  + The mother will make all decisions respecting nonemergency health care, dental care, and schooling.
  + The father will parent the children from June 29 to July 13 and from August 7 to August 22 each year. The mother will deliver the children to the father's residence at 7:00pm on both June 29 and August 7
    - Either party may take the children out of province during their summer time without the permission of the other party but if a parent wishes to take the children from the province for a vacation, the other parent must be given notice in the access book.
  + Neither party may take the children out of the country without Court approval.
  + Christmas holidays will be divided in half.
  + Both parents will have complete access to all school records and medical records.
  + Both parents should maintain active contact with the school.
    - Both parents are to make arrangements with the school to have all school schedules, report cards, and notices mailed to them at their own expense.
  + Neither parent is to make disparaging remarks about the other parent.
  + The children may telephone their parents whenever they wish but a parent may not telephone the children when they are with the other parent.
  + This parenting regime will be reviewed in March 2001, at which point it will be ascertained if the father's behaviour has been modified so that the parents are able to co-parent.

#### *McCurry v Hawkins*, 2004 ABQB 827

Analysis: (Veit J)

* Parallel parenting is a useful mechanism for at least three reasons:
  1. A typical term of a parallel parenting regime requires the parents to maintain a record of communications between themselves, thereby allowing the court to decide which of the parents is unreasonable, controlling, or otherwise preventing effective co-parenting.
  2. It avoids a destructive result: if the parents don’t get along with one another, the children lose a parenting relationship with one of them and exchange, for the parenting relationship, a very different relationship – that of a baby-sitter.
  3. It nurtures Parliament’s objective of ensuring, where possible, as much contact as possible between children and their parents.
* Parallel parenting will not *always* be a viable option in a situation where the parents can no longer cooperate, particularly when they are in a high conflict situation.

### Bird-Nesting

* In bird-nesting arrangements, instead of the kids moving between parents, the kids stay in one residence, and the parents move in and out as ordered.
  + - This is rarely, if ever, ordered by the court; it is almost always something the parties agree on, and it is almost always used on an interim basis.
    - The reason this regime is not used often is because it requires that each parent maintain a residence of their own and then contribute to the maintenance of a residence where the children live.
    - However, this regime is generally good for children, providing them with a measure of stability.

## Factors Governing the Award of Parenting Time

* 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 [s. 16(1)].
  + This includes an interim parenting order and a variation order in respect of a parenting order, and an interim contact order and a variation order in respect of a contact order [s. 16(7)].
* In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including [s. 16(3)]:
  1. The child’s needs, given the child’s age and stage of development, such as the child’s need for stability;
  2. 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;
  3. Each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse;
  4. The history of care of the child;
  5. The child’s views and preferences, giving due weight to the child’s age and maturity;
  6. The child’s cultural, linguistic, religious and spiritual upbringing and heritage;
  7. Any plans for the child’s care;
  8. 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;
  9. 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;
  10. Any family violence and its impact on, among other things,
      1. The ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
      2. 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
* In considering the impact of any family violence, the court shall consider [s. 16(4)]:
  + - 1. The nature, seriousness and frequency of the family violence and when it occurred;
      2. Whether there is a pattern of coercive and controlling behaviour in relation to a family member;
      3. Whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
      4. The physical, emotional and psychological harm or risk of harm to the child;
      5. Any compromise to the safety of the child or other family member;
      6. Whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
      7. 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
      8. Any other relevant factor.
    1. *Family violence* means any conduct, criminal or not, by a family member towards another family member that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct — and includes [s. 2]:
       1. Physical abuse (not including self-defence)
       2. Sexual abuse
       3. Threats to kill or cause bodily harm to any person
       4. Harassment (including stalking)
       5. The failure to provide the necessaries of life
       6. Psychological abuse
       7. Financial abuse
       8. Threats to kill or harm an animal or damage property
       9. The killing or harming of an animal or the damaging of property
  1. Any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.
  + When considering these factors, the court shall give primary consideration to the child’s physical, emotional and psychological safety, security and well-being [s. 16(2)].
* 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 it is relevant to the exercise of their parenting time, decision-making responsibility, or contact with the child [s. 16(5)].
* 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 [s. 16(6)].

### History of Care of the Child

* An important factor for determining the best interests of the child is: what role the parties had with respect for caring for the child and what roles the parties have assumed since then.
  + The courts give important weight to whoever has historically been the primary caregiver of the child.
    - However, the inquiry is always fact-specific; e.g., if the primary caregiver was a stay-at-home parent, and they have entered the workforce since separation, the status quo may not be advisable (i.e., the history of care may not carry a lot of weight).
  + As a piece of practical advice, Lori says that you can usually determine who the primary caregiver was by asking each party what the child's teacher's name, their best friend's name, etc.

#### *K(MM) v K(U)*, 1990 ABCA 254

Facts:

* The parties were married in 1981 and separated in 1987, at which point they had a 4 1/2-year-old daughter and a new-born son. Initially, the two children resided with the mother in the family home. In June 1987, the mother petitioned for divorce and sought full custody of the children with no access for their father and a restraining order against the father. In November 1987, the mother filed a civil suit against the father alleging that he assaulted her and sexually assaulted their daughter. He was criminally charged with sexual assaulting their daughter, but the proceedings were stayed. The mother dropped her civil suit. In December 1987, the father was granted supervised access. A psychologist and a social worker were appointed to study and report on the family situation. The experts' opinions originally reflected negatively on the mother's objectivity and her emotional and psychological disturbance. They also positively assessed the father's parenting ability and status as a role model, and concluded that the daughter had not been sexually abused and was not likely to in the future. The trial with respect to custody then took place in December 1989. Between the filings of their reports and the trial, the experts' opinions had changed on account of a change in the circumstances that had occurred subsequent to their reports being filed. Accordingly, the experts' assessment of the mother had improved considerably while his assessment of the father was less favourable.

Procedural history:

* The trial judge awarded primary residence to the father, referring extensively to the pre-trial expert reports.

Issues and holding:

1. Did the trial judge commit a reviewable error in awarding custody to the father? **YES**
2. Should a new trial be ordered? **NO**
3. If no, which parent should be granted custody of the children? **Mother**
4. What access, if any, should be granted to the non-custodial parent? **Liberal but structured access**

Analysis:

* The scope of appellate review is limited to a consideration of whether or not there has been a palpable and overriding error in the trial judgment (i.e., unless it has clearly acted on some wrong principle or disregarded material evidence).
  + Parenting decisions are best left to the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances.
* While one must always consider such tangible factors as the residence which a parent proposes for the children, and the ability of a parent to provide for a child’s material well-being, such considerations must take a secondary position to the children’s emotional, psychological, and intellectual needs.
  + In large part, provision may be made for a child’s material well-being by ordering an appropriate regime of child support payments; the same cannot be said for the more intangible types of support.

Rationale: (Stratton JA)

1. The trial judge committed a reviewable error by:
   * Disregarding the experts' testimonial evidence and misconstruing some earlier evidence.
   * Giving undue weight to the “excellent role model” said to be presented by the father; this factor should have had minimal impact, if any, on the ultimate custodial decision.
     + Within a regime of liberal access by the noncustodial parent, as was under consideration here, the ability of that parent to establish a role model would not be lost.
     + It is difficult to imagine that in a case such as this, where both parents have ultimately been found to be good parents, the ability to provide a role model should carry much weight.
     + Even if the role modelling concept were significant, on the facts of this case the mother appears to be at least equally able to provide a high level of “role modelling.”
2. This court can, without difficulty, decide the case from the record and should not order a new trial.
   * A new trial would extend the uncertainty, trauma, and anxiety for the children and the parties.
   * While the special advantage enjoyed by the trial judge is also of major significance when the question of credibility of key witnesses is at issue, that is not the situation here.
     + The appellate court can fairly evaluate the testimony in the transcript; fairness does not require a new *viva voce* hearing?
3. The mother is the custodial parent who will best serve the interests of the children.
   * The evidence suggests that the trial judge’s concern for the mother's psychological health, and the resultant effect which that might have on her parenting ability, were adequately answered at trial.
   * While the father has possession of the former matrimonial home in a good neighbourhood close to various amenities, this is not of paramount importance.
     + The children have not lived in that house for much of their lives, and the mother lives in a modern apartment building with lots of amenities. She plans to move them into a three-bedroom suite.
   * While the father did have some flexibility to schedule his work, the mother is self-employed, she works 4 to 5 hours a day (some of which she was do from home), and her mother lives with her and would be available for childcare.
   * Most importantly, the evidence supported the conclusion that the children were more closely bonded to the mother and that she was better able to meet the kids' emotional and psychological needs.
     + The evidence shows that the mother, who has always been the kids' primary caregiver, has good parenting skills; the father's parenting skills, by contrast, are untested.
       - It is not in the best interest of the kids to substitute an certain situation with the mother for a uncertain one with the father.
     + This is not to apply the "tender care doctrine"; it is merely to say that, in the facts of this case, the mother is in the best position to care for fulfill the kids' day-to-day needs.
4. Although the children would benefit from contact with the father, the animosity between the parents required that the father be given liberal but structured access.

Notes:

* It is quite rare that the Court of Appeal will overturn the decision of a trial judge on issues of parenting.

### Conduct/Lifestyle

* Conduct by the parents shall only be taken into consideration in determining what is in the best interests of the child if it is relevant to the exercise of their parenting time [*DA*, s. 16(5)].
* Drug and alcohol abuse may be a relevant lifestyle characteristic that militates against parenting time.
  + But, parenting orders may contain terms that require a parent to avoid consuming intoxicating substances while the children are in their care.
* Diet may be a relevant factor where one parents alleges that the other is feeding the child unhealthy food or is not feeding the kid a diet that they say is required on moral or religious grounds (e.g., vegan, kosher).
  + But Lori says that judges may not be willing to tell parents what to feed their kids.
* Anger issues and corporal punishment may be a relevant factor in a parenting order.
  + The court may require a party to engage in anger management and get a letter from their counsellor.
* A parent may take issue with the people around their child when in the care of the other parent (e.g., a friend, family members, a new partner).
  + In general, the courts will trust a parent's judgment and assume that a parent would not put their child at risk by exposing them to somebody harmful.

### Health

* When a child has special health needs, then depending on how limiting their issues are, the court may take into account which party has demonstrated best a willingness to meet the needs of the child and adapt their lives to do so.
* The health of a parent may be relevant, but counsel should be cautious when asserting that a parent cannot meet the best interests of the child because of problems with their physical, mental, and emotional health.

### Religious and Cultural Upbringing

* In determining the best interests of the child, the court shall consider the child’s cultural, linguistic, religious and spiritual upbringing and heritage [s. 16(3)(f)].
  + Difficult cases arise where each parent wants to raise the child according to conflicting belief systems; judges tend to believe that exposing kids to different belief system, unless proven to be harmful, should not be restricted.

#### *Bachor v Lehmann-Bachor*, 2001 ABCA 53

Facts:

* The appellant and respondent were married in 1997. There is one child of the marriage, born in January 1998. The parties divorced in November 1998. The parties signed Minutes of Settlement establishing that the mother would have sole custody of the child. In April 1999, the father sought sole or shared custody. The application was dismissed but the court directed the parties to attend at mediation to decide when the father would have access. The parties reached agreement, giving the father access somewhat sporadically throughout the week. In April 2000, the mother and child moved to Onoway while the father remained in Edmonton. In September 2000, the appellant again sought joint custody, access on a three days on, three days off arrangement, and an order allowing him to hold a Child Dedication Ceremony for the child at the Church of God.

Procedural history:

* The chambers judge dismissed the application for joint custody because there had not been a material change in the circumstances since the 1999 order. The judge varied the parenting arrangement to limit the father's access to Friday morning to Sunday morning based on the mother's move to Onoway. The judge held that the father could not hold a Child Dedication Ceremony without the mother's permission. The father appealed, claiming that the judge failed to consider the information he placed before the court.

Issues and holding:

* Did the chambers judge err in refusing to vary the custody arrangement from a sole custody to a joint custody situation? **NO**
* Did the chambers judge err in varying the terms of the father's access to the child? **NO**
* Did the chambers judge err in requiring the father to obtain the permission of the mother prior to conducting a Child Dedication Ceremony? **NO**

Analysis:

* Due to the fact-based and discretionary nature of custody and access orders, judges must generally be given considerable deference by appellate courts.
  + The exercise of a discretion will not be interfered with unless it was based on a palpable and overriding error.
* The *Divorce Act* provides that before a court varies a custody order it must satisfy itself that there has been a change in the conditions, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order [s. 17(5)].
* It has long been recognized that the custodial parent has the sole and primary responsibility to oversee all aspects of the child’s day-to-day life and long-term wellbeing, as well as major decisions with respect to education, religion, health, and well-being.
  + The *Divorce Act* gives the access parent a right to be informed of these decisions, but a custodial parent’s decisions are never subject to the approval of the non-custodial parent.

Rationale: (The Court)

* The trial judge did not err in determining that there was no material change in the circumstances that affected the child or the parents' ability to meet the child's needs in any significant way.
* The trial judge did not err in varying the access arrangements.
* The trial judge did not err in his holding with respect to the Dedication Ceremony, as the mother, being the custodial parent, is responsible for the pivotal decisions respecting the child's religion.
  + The trial judge only erred insofar as he prohibited the child from being involved in *any* religious celebrations without the consent of the mother, which goes too far.
    - Some sharing of religious beliefs is permissible, so long as it is consistent with the best interests of the child and does not undermine the religious choice made by the custodial parent.

#### *Van de Perre v Edwards*, 2001 SCC 60

Facts:

* The respondents Mr. and Mrs. Edwards had twin girls in 1990 and were married in 1991. Starting in 1996, Mr. Edwards (who is Black) had an extra-marital affair with the appellant Ms. Van de Perre (who is Caucasian). In June 1997, Mr. Edwards and Ms. Van de Perre had a son named Elijah. When Elijah was 3 months old, the appellant commenced proceedings against Mr. Edwards for sole custody and child support. Mr. Edwards sought sole custody.

Procedural history:

* The trial judge awarded sole custody to the appellant and granted Mr. Edwards access for four one-week periods quarterly each year. Mr. Edwards appealed the trial decision, and Mrs. Edwards was added as a party to seek joint custody with her husband. The Court of Appeal granted joint custody to the respondents. It held that the interests of the child must prevail over those of the parties and of society in finality, implying that the basic principles of appellate review are not fully applicable to child custody cases.

Issues and holding:

* Was there any scope for appellate intervention in this case? **NO**
* Did the Court of Appeal err in intervening on the grounds that the trial judge failed to give consideration to issues of race and interracial problems that Elijah might face? **NO**
* Did the Court of Appeal err in adding Mrs. Edwards as a party? **YES**

Analysis:

* The principal determination to be made in cases involving custody is the best interests of the child.
  + In making this determination, the trial judge must consider numerous factors, in particular those stated in the pertinent legislation, in light of the evidence adduced.
    - Trial judges might stress one factor over another, which is inevitable in custody cases that are heavily dependant on the particular factual circumstances at issue.
* In reviewing family law cases involving custody, the scope of appellate review is narrow.
  + Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
    - An appellate court is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.
    - Appellate intervention requires proof of material error in the sense that the judge misapprehended the evidence, erred in law, or reached a conclusion that was so perverse on the evidence and law as to exceed the generous ambit within which reasonable disagreement is possible.
  + The views of the Court of Appeal on the standard of review in child custody cases is *wrong*; the standard of review does not change because of the type of case on appeal.
    - Finality is not merely a social interest; it is particularly important for the parties and children involved in custodial disputes.
      * A child should not be unsure of his or her home for years.
    - Custody and access involve a case-by-case consideration of the unique circumstances of each child, requiring a balanced evaluation of the best interests of the child.
* The approach to appellate review requires an indication of a material error.
  + If there is an indication that the trial judge did not consider relevant factors or evidence, an appellate court may review the evidence proffered at trial to determine if the judge ignored or misdirected himself with respect to relevant evidence.
  + At the same time, a trial judge does not need to address *every* single piece of evidence in detail, or at all, when explaining their reasons for awarding custody to one person over another.
    - An omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored, or misconceived the evidence in a way that affected his conclusion.
* Although 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 the development of racial identity in a manner that avoids discord, conflict, and disharmony.
  + This is a question of fact to be determined by the courts on a case-by-case basis and weighed by the trial judge with other relevant factors.
  + That one parent will denigrate or not acquaint a child with his or her cultural or racial background is relevant to determining custody, but a court should not assume that only a minority parent can acquaint a child with his or her culture.
    - Whenever one parent is granted custody of a biracial child, the child will have less contact with the other parent's culture and heritage, but this does not mean that a custodial parent cannot help a child appreciate his or her other cultural heritage.
  + Race may play a more important role where the court must make a decision either granting or denying a child exposure to his or her own heritage (e.g., cases involving prospective adoptive parents who do not share the same race and culture as the child).
    - This is different from a situation where one parent will be granted custody and another will be granted access, with the result being that the child will have exposure to both sides of his racial and cultural heritage.
  + It is generally understood that biracial children should be encouraged to positively identify with both racial heritages.
    - That said, evidence regarding the so-called “cultural dilemma” of biracial children (i.e. the conflict that arises from belonging to two races where one may be dominant) is relevant.

Rationale: (Bastarache J)

* There is no indication from his reasons that he made any material error or ignored any relevant evidence.
* The Court of Appeal erred by intervening on the grounds that the trial judge gave “no consideration” to issues of race and interracial problems that Elijah might face.
  + The judge clearly considered the mixed race of Elijah and implied that race may matter in some cases; however, the he was clearly of the view that, even if the biological father provided some benefits by fostering a positive racial identity, these benefits did not outweigh the negative findings related to him.
  + Further, there was absolutely no evidence adduced which indicates that race was an important consideration; the issues of race and ethnicity were not argued at trial, nor were written submissions provided in the appeal.
    - While the respondents claimed that this was because it is 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.
      * General public observations are unreliable as indicators of what experiences a particular child will face.
* Adding a party on the initiative of the Court of Appeal is unfair to other parties.

### Child's Views and Preferences

* In determining the best interests of the child, the court shall consider the child’s views and preferences, giving due weight to the child’s age and maturity [s. 16(3)(e)].
* A child's wishes may be admitted into evidence in two ways:
  1. A Voice of the Child report under Practice Note 7.
  2. Counsel appointed to represent the child.
     + The *Family Law Act* specifies that the court may at any time appoint an individual to represent the interests of a child in a proceeding under the Act [s. 95(3)].
     + There is nothing in the *Divorce Act* that allows this, but the courts will use their *parens patrie* jurisdiction to appoint counsel for the children.
     + Lawyers who act for children have to have specialized training.

### Violence Within the Family

* In considering the best interests of a child, the court may take note of any family violence and its impact on, among other things [*DA*, s. 16(3)(j)].
  1. The ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
  2. 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
* In considering the impact of any family violence, the court shall consider [*DA*, s. 16(4)]:
  1. The nature, seriousness and frequency of the family violence and when it occurred;
  2. Whether there is a pattern of coercive and controlling behaviour in relation to a family member;
  3. Whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
  4. The physical, emotional and psychological harm or risk of harm to the child;
  5. Any compromise to the safety of the child or other family member;
  6. Whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
  7. 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
  8. Any other relevant factor.
  + Hence, it is not just abuse of the child that will militate against parenting time for the abuser; it also includes the exposure of the child to conflict and violence, which is shown in scientific research to be harmful to children.

#### Allegations of Sexual Abuse

* Where one parent makes an allegation of child sexual abuse against the other parent or someone in their household, Practice Note 5 (from the ABQB) provides for a specific procedure to follow.
  + The parent making the allegation must fill out Form 1 and provide it to the Clerk of the Court.
  + Upon receipt of Form 1, Children's Services appoints an investigator to determine whether there are grounds for further investigation.
  + If the Child Protection Screening reveals a need for further investigation, an investigation will proceed and may utilize the assistance of the appropriate police authority as required.
  + The investigator will produce a report and provide it to the court in a sealed envelope.
    - Upon receipt of the report, the court will hold a case conference to consider changes to parenting.

### Interference with Parenting Time/Parental Alienation

* Relevant to determining the best interests of the child is each spouse's willingness to support the development and maintenance of the child’s relationship with the other spouse [s. 16(3)(c)] and to communicate and cooperate on matters affecting the child [s. 16(3)(i)].
  + Parental alienation occurs when one of the parties knowingly or unwittingly interferes with the relationship between the child and the other parent or alienates the affections of the child for the other parent by, for example:
    - Telling the child all of the bad things the other parent ever did.
    - Telling the child that the other parent took all their money.
    - Making themselves the victim so that the kids feel bad for them.
    - Making exciting plans during the other parent's time.
    - Talking about how much they miss the child during the other parent's parenting time, thus making the child feel guilty about spending time with the other parent.
    - Vilifying the other parent's new partner.
    - Refusing to let the other parent exercise their parenting time.
  + When parental alienation occurs, it creates a very difficult situation, because it often cannot be rectified by placing the child in the care of the vilified parent.

#### *TS v AVT*, 2008 ABQB 185

Facts:

* The mother and father met on a dating site but were never married. They lived together briefly, during which the mother had a 2 1/2 year old daughter. They had a child of their own in July 2003. The father visited the child in the hospital when she was born, but shortly thereafter, the mother began denying the father access. In November 2003, the father applied for access to the child, which was granted in December 2003. However, the mother consistently thwarted the father's access, and would not provide compensatory access. She also alleged that the father abused and sexually assaulted her and her eldest daughter, abused alcohol, threatened to commit suicide on several occasions, and mutilated himself. The father denied the allegations, and expert evidence examining the father and the mother's eldest daughter failed to give credence to the mother's allegations. In July 2004, the ABQB declared the father a guardian of the child, and in September 2006, it ordered joint custody for the mother and father. The father now applies for sole custody and primary residential care of the child.

Issue and holding:

* What parenting arrangement is in the best interests of the child? *(see below)*

Rationale: (Moen J)

* It is in the best interests of the child to have one parent take primary responsibility for the child.
  + This is a high conflict family which has had great difficulty in communicating about the best interests of the child; as such, this is not a family that can work together to make decisions about the particular concerns of the child.
  + Given that the parents live 6-7 hours apart, it is not possible for the child to continue to see both of her parents through blocks of access time.
* While both parents are good parents, the child's best interests will be served by having the father take primary responsibility for the child, with the mother having appropriate parenting time as is possible in the circumstances.
  + Based on the history of the case, the father will be more willing to protect the child’s relationship with both parents and their families, which is important for the child's emotional and physical health.
    - Based on the history of the mother's attempts to thwart the father's access, the child will most likely lose her relationship with her father if she continues to live with the mother, which would thwart the natural growth of the child's attachment and deprive the children of the love and support of both parents.
    - On the other hand, the father's behaviour supports the conclusion that he supports the child's relationship with the mother and her siblings.
      * He has cooperated with the mother on reasonable requests from the mother in changing the access schedule.
      * He has attended every Court hearing and been respectful of the Court and the mother.
      * He has complied with every order of the Court.
  + While the mother has had care of the child since the child's birth, undue weight should not be put on this *de facto* arrangement because of the mother's alienating behaviour.
  + When the father has had overnight access to the child, it appears that the father and the father's family were able to care for the child very well; the child appears to be cheerful, affectionate, and confident with the father.
    - Although the father will not be available full time to look after the child given his work schedule, when necessary, childcare will occur using the father's family, including his mother and sister; there was no evidence to suggest that third-party care would damage the child.
  + There is no evidence to support the mother's allegations of abuse; given that they were made whenever the father tried to obtain access, it appears that they were made for the sole purpose of thwarting the relationship of the father and the child.
* To facilitate an ongoing relationship between the child and her mother, maternal grandparents, and siblings when she is in residence with her father, the father shall buy and set up a web-cam so that the child can communicate frequently with the mother's side of the family.
  + This will also facilitate the child's relationship with her father and her father's extended family when she is in residence with her mother.

#### *Van de Veen v Van de Veen*, 2001 ABQB 753

Facts:

* The parties were married in July 1986. There are three children of the marriage: two boys aged 11 and 9 and a girl aged 7. The parties separated in 2000 after the mother discovered that the father had been having an affair, and divorced in May 2001. On September 14, 2000, the issued an order permitting the father access to the children. The father seeks have the mother held in contempt of the access order on the grounds that she alienated the children from their father. In the opinion of a custody and access expert, the mother had used the children as weapons to hurt the father. The mother claims that she has done nothing to alienate the children, and that they are afraid of the father and do not wish to visit him.

Issues and holding:

* Is the mother in contempt of the access order? **YES**
* If yes, what is the appropriate remedy? *(see below)*

Rationale: (Veit J)

1. Although the court must not lightly conclude that an access problem has been caused by parental alienation, the evidence of the children’s behaviour, of the mother's words and actions, and the opinion of the independent assessor establish beyond question that the mother has alienated the children from their father, and that this has caused the access problems experienced by the father.
   * The mother’s campaign of denigration of the father with the children has promoted an unwarranted vilification of the father by the children.
   * The independent expert concluded that the mother embarked on a campaign to use the children to hurt her husband.
2. The only remedy which is within the court’s power to grant and which is in the best interests of the children is barring the mother to bring any application in these proceedings and a punitive costs award against her, pursuant to which she will indemnify the father of all of his costs of these proceedings out of her share of the matrimonial property.
   * Transferring custody to the father is not an option.
     + The children are so deeply alienated from the father that it would not be in the best interests of the children to require them to have access visits with their father at this time.
   * Jailing the mother would harm the children and the children's possible relationship with their father.
   * Fining the mother would deprive the children of financial support because of the mother's limited financial resources.

Notes:

* What if there was no property to be divided? If there wasn't, the court's options would be extremely limited.
* Given the absence of remedies in cases like this, the courts will want assessments, interventions, re-unification therapy, etc. in order to prevent damage to the parent–child relationship that is so deep that it is virtually impossible to remedy satisfactorily.

#### *BAR v CJS*, 2006 ABQB 400

Facts:

* The parties dated for 10 years before marrying in 1991. There are three children of the marriage: Carmela (13), Francis (11 1/2), and Gabriel (8). In 1996, the parties moved to Calgary. They separated in October 1997, at which point the mother moved to Edmonton. In 1997, the mother was granted interim custody of the children with no access to the father. In 1998, a trial on the issue of access was heard in Provincial Court. The father was granted supervised access and unlimited telephone access. In 2002, supervision was no longer required and he was allowed to take the children to Calgary for access. In 2003, the father was given specified telephone access four nights a week and a block of time in the summer. The father now seeks joint custody of the children but is willing for the mother to have residential care of the children.

Issue and holding:

* Should the father be granted joint custody? **YES**

Rationale: (Trussler J)

* The mother made this file high-conflict when was less than candid with the Provincial Court on her application for interim sole custody.
  + She testified that the father was physically abused the children, which appears not to have happened, and that the police were considering laying charges, when she knew they had decided not to.
  + As a result of her dishonesty, a long battle ensured to restore the father's parenting time, resulting in the father having to pay a considerable amount of money and take on a lot of stress.
* To award the mother sole custody would amount to rewarding her bad behaviour, and would no doubt make the father feel aggrieved, resulting in numerous court applications.
  + Thus, since the parties are in high conflict, a situation of parallel parenting is required. *(details of parallel parenting schedule omitted)*

## Third-Party Expert Reports

* Family Law Practice Note 7 (from the ABQB) allows the Court to make an order appointing a parenting expert to conduct an interventions where the parties are in high conflict and the Court requires assistance.
  + One type of intervention is a Voice of the Child report, which canvasses the specific needs or, where appropriate, wishes of the children.
    - This is a way to get a child's views and preferences into evidence, which, when given due weight to their age and maturity, is a consideration in determining the child's best interests [s. 16(3)(e)].
    - The parenting expert will generally interview each parent and each child separately with a view to identifying special needs or risk factors.
      * Often the child is seen twice, once after being in the care of each parent.
  + Another such intervention is a therapeutic intervention, wherein a parenting expert works with individual or combinations of family members to try to reduce conflict, facilitate parenting agreements, revise existing parenting plans, address children's needs or repair damaged parent-child relationships.
* Family Law Practice Note 8 allows the Court to order a parenting assessment where the parties are at an impasse and the Court requires assistance from parenting experts.
  + The parenting expert will meet with the parties, speak with the child individually, conduct psychological testing, consult with collateral references, conduct a home visit with each parent, etc.
    - It is a long, involved, and intrusive process.
  + The parenting assessment provides an objective assessment of the family by a parenting expert to assist the Court in addressing the best interests of the children.
    - It evaluates the parents' capacities to meet their children’s needs, and their personal and parenting strengths and vulnerabilities.
      * It may assess any new partners, extended family members, or others who play a significant role in parenting the children within the home.
    - It involves a comprehensive evaluation of the children’s developmental needs, observation of parent/child interactions, and corroboration of reports and observations through collateral information sources.
  + At the end, a parenting assessment will provide recommendations as to what, in their opinion, is the appropriate form of parenting arrangement.
    - While the Court does not rubber-stamp these recommendations, they do give them great weight.
    - Ideally, then, these reports will lead to negotiated settlements.
  + The parents are entitled to view the report, but they may not receive copies of it (with the exception of the recommendations) without prior leave of the Court.
  + The Court may direct that a report be admitted as evidence in any proceeding in which the best interests of the child are at issue.
    - Where for any reason the Court deems it appropriate, it may order that the filed report be sealed.
  + A Parenting Expert who prepares a report is compellable to give *viva voce* evidence and to be cross-examined by the parties.
* Each order for an intervention or parenting assessment must address funding, timelines for funding, and each parent’s responsibility for that funding.
  + If the parties can't pay and subsidies aren't available, an intervention or parenting assessment must not be ordered.
  + Lori says that a parenting assessment, for example, tends to be at least $40,000.
* Where a parent refuses to provide his/her consent to the intervention or parenting assessment or consent to allow the parenting expert to speak to the children, the Court may dispense with that parent’s consent and order the intervention or assessment to proceed without that parent’s involvement.

## Change in Residence/Relocation

### Change in Residence

* Under the *Divorce Act*, a person who has parenting time or decision-making responsibility and who intends to change their place of residence or that of the child shall notify any other person who has parenting time, decision-making responsibility, or contact in respect of that child of their intention [s. 16.8(1)].
  + The notice shall be given in writing and set out the date on which the move is expected to occur, the address of the new place of residence, and the contact information of the parent [s. 16.8(2)].
    - The court may, on application, provide that these requirements do not apply or may modify them, including where there is a risk of family violence [s. 16.8(3)].
  + This section does not apply to a change in the place of residence that is a relocation [s. 16.7].
    - e.g., it would apply if a parent wants to live from Mills Woods to Riverbend, as this move would likely not have a significant impact on the relationship between the child and the other parent.

### Relocation

#### Definition

* Under the *Divorce Act*, "relocation" means a change in the place of residence of a child or a person who has parenting time or decision-making responsibility that is likely to have a significant impact on the child’s relationship with (a) a person who has parenting time or decision-making responsibility or (b) a person who has contact with the child [s. 2].
  + e.g., a parent moves from Calgary to Hamilton.

#### Persons with Parenting Time or Decision-Making Responsibility

* A person who has parenting time or decision-making responsibility in respect of a child and who intends to relocate shall notify, at least 60 days before the expected date of the relocation, any other person who has parenting time, decision-making responsibility, or contact in respect of that child of their intention [s. 16.9(1)].
  + The notice must set out (a) the expected date of relocation, (b) the address of the new residence and the contact information of the parent, (c) a proposal as to how parenting time, decision-making responsibility, or contact could be exercised, and (d) any other information prescribed by regulation [s. 16.9(2)].
    - The court may, on application, provide that these requirements do not apply or may modify them, including where there is a risk of family violence [s. 16.9(3)].
* A person who has given notice under s. 16.9 and who intends to relocate a child may do so as of the date referred to in the notice if [s. 16.91(1)]:
  1. The relocation is authorized by the court, or
     + In deciding whether to authorize a relocation of, the court shall, in order to determine what is in the best interests of the child, consider, in addition to the factors referred to in s. 16 [s. 16.92(1)]:
       1. the reasons for the relocation;
       2. the impact of the relocation on the child;
       3. the level of involvement in the child’s life of 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;
       4. whether the person who intends to relocate the child complied with any applicable notice requirement under s. 16.9, provincial family law legislation, an order, arbitral award, or agreement;
       5. the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
       6. the reasonableness of the proposal of the person who intends to relocate 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
       7. whether each person who has parenting time or decision-making responsibility has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.
     + In deciding whether to authorize a relocation, the court shall not consider whether the person who intends to relocate the child would relocate without the child or not relocate [s. 16.92(2)].
  2. The person who receives a notice under s. 16.9 does not object to the relocation within 30 days after the day on which notice is received and there is no order prohibiting relocation.
     + The objection must set out a statement that the person objects to relocation, the reasons for the objection, and the person's views on the proposal for the exercise of parenting time, decision-making responsibility, or contact that is set out in the notice [s. 16.91(2)].
* If a court authorizes a relocation of a child, it may apportion the costs relating to the exercise of parenting time by a person who is not relocating between that person and the person who is relocating [s. 16.95].

#### Burden of Proof

* Who bears the onus in cases of relocation depends on how much time the child spends with each parent.
  + If a child spends substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that it would be in the best interests of the child [s. 16.93(1)].
  + If a child 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 it would not be in the best interests of the child [s. 16.93(2)].
  + 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 [s. 16.93(3)].
    - A court may decline to apply subsections (1) and (2) if the order referred to in those subsections is an interim order [s. 16.94], in which case the court treats it as a fresh inquiry.

#### Persons with Contact

* A person who has contact with a child 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 [s. 16.96(1)].
  + 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 and shall also set out a proposal as to how contact could be exercised in light of the change [s. 16.96(2)].

## Variation Orders

* A court may make an order varying, rescinding, or suspending a parenting order on application by (i) either former spouse or (ii) a person other than a former spouse who stands in a place of a parent [s. 17(1)(b)].
  + - A person to whom the parenting order in question does not relate may make an application only with leave of the court [s. 17(2)].
    - Where the court varies a contact order, it may make vary the parenting order to take account of that variation [s. 17(2.1)], and where the court varies a parenting order, it may vary any contact order to take into account that variation [s. 17(2.2)].
    - The court may include any provision that 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 [s. 17(3)].
    - Before a court may vary a parenting order or a contact order, the court must satisfy itself that there has been a change in the circumstances since the making of the order [s. 17(5)].
      * i.e., you cannot seek to vary an order just because they do not like it.
      * A former spouse’s terminal illness or critical condition shall be considered a change in the circumstances of the child [s. 17(5.1)].
      * The relocation of a child is a change in the circumstances of the child [s. 17(5.2)].
        + However, a relocation that has been prohibited by a court does not, in itself, constitute a change in the circumstances [s. 17(5.3)].

i.e., you cannot move the child, contrary to a court order, and then claim a change in the circumstances.

* + - * In making a variation order, the court shall not consider any conduct that it could not have considered in making the original order [s. 17(6)].
        + *Remember*: under s. 16(5), the court cannot consider the past conduct of any person unless it is relevant to the exercise of their parenting time, decision-making responsibility or contact.
* To establish a change in the circumstances of the child, the court must be satisfied that (*TS v AVT*):
  + - 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.
    - 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.

## Appeals

* The standard of review for questions of law is correctness, while the standard of review for questions of fact is reasonableness.
* Appeals that relate to parenting are fast-tracked in the Court of Appeal.
* When a judgment is handed down that you are going to appeal, you might ask the trial judge for a stay of the decision pending an appeal; if they do not grant it, you will have to ask the Court of Appeal for a stay.
  + A stay is more likely if the stay is a major change to the status quo.
* The Court of Appeal can confirm the decision (i.e., dismiss the appeal), order a new hearing, or substitute their decision for that of the trial justice.
* As a general rule, litigants cannot introduce fresh evidence on appeal without applying to do so.
  + The Court of Appeal will only allow new evidence if it was not known at trial and it is relevant to the issues at hand.

### *K(MM) v K(U)*, 1990 ABCA 254

Analysis: (Stratton JA)

* The scope of judicial review is limited to a consideration of whether or not there has been a palpable and overriding error in the trial judgment (i.e., unless it has clearly acted on some wrong principle or disregarded material evidence).
  + Parenting decisions are best left to the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances.

### *Van de Perre v Edwards*, 2001 SCC 60

Procedural history:

* The Court of Appeal granted joint custody to the respondents. It held that the interests of the child must prevail over those of the parties and of society in finality, implying that the basic principles of appellate review are not fully applicable to child custody cases.

Analysis: (Bastarache J)

* In reviewing family law cases involving custody, the scope of appellate review is narrow.
  + Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
    - Recognizes that the discretion involved in making an order is best exercised by the judge who has heard the parties directly.
    - Avoids giving parties an incentive to appeal judgments and incur added expenses, thus promoting finality in family law litigation.
  + An appellate court is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.
    - Appellate intervention requires proof of *material error* in the sense that the judge misapprehended the evidence, erred in law, or reached a conclusion that was so perverse on the evidence and law as to exceed the generous ambit within which reasonable disagreement is possible.
    - If there is an indication that the trial judge did not consider relevant factors or evidence, an appellate court may review the evidence proffered at trial to determine if the judge ignored or misdirected himself with respect to relevant evidence.
      * At the same time, a trial judge does not need to address *every* single piece of evidence in detail, or at all, when explaining their reasons for awarding custody to one person over another.
      * An omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored, or misconceived the evidence in a way that affected his conclusion.
  + The views of the Court of Appeal on the standard of review in child custody cases are *wrong*; the standard of review does not change because of the type of case on appeal.
    - Finality is not merely a social interest; it is particularly important for the parties and children involved in custodial disputes.
      * A child should not be unsure of his or her home for years.
    - Custody and access involve a case-by-case consideration of the unique circumstances of each child, requiring a balanced evaluation of the best interests of the child.

## Costs

* + When you file a pleading — whether it's a statement of claim for divorce whether its claim under the family law act it's an application for an interim application — you should generally plead costs.
    - But, only do so if it is reasonable; sometimes it might not be appropriate to ask for costs.
      * e.g., if each party walked away with a win, it is probably appropriate for each party to cover their own costs.
      * e.g., if you win a relocation application, it may not be appropriate to ask for costs because the other party is losing time with the child.
  + The rationale for costs is to act as a deterrent from taking unreasonable positions in litigation.
  + Costs are found in Schedule C of the Alberta Rules of Court.
  + Costs do not cover a party's legal fees, but solicitor-client costs do.
    - Solicitor-client costs are difficult to get; they are used as a punitive measure when one litigant’s conduct is outrageous.
  + A lawyer can be ordered to pay costs if they act improperly.

## Extra-Provincial Enforcement

### *Extra-Provincial Enforcement of Custody of Orders Act*

* A court shall, on application, make any orders necessary to give effect to parenting orders from other jurisdictions unless it is satisfied that the child affected by the order did not, at the time it was made, have a real and substantial connection with that jurisdiction [s. 2(1)].
* A court may vary an order from another jurisdiction if it is satisfied that [s. 3(1)]:
  1. the child affected by the order does not, at the time the variation application is made, have a real and substantial connection with the jurisdiction in which the order was made or was last enforced, and
  2. that the child has a real and substantial connection with Alberta or all the parties affected by the custody order are resident in Alberta.
     + A person is not resident in Alberta for these purposes when they are in Alberta solely for the purpose of making or opposing an application under this Act [s. 3(2)].
       - i.e., the court is not going to allow jurisdiction shopping where, for example, a parent gets an order they don't like in Saskatchewan and they move to Alberta to get another order.
* Notwithstanding anything in this Act, when a court is satisfied that a child would suffer serious harm if they remained in the custody of the person named in a custody order, the court may at any time vary the order or make any other order for the custody of the child that it considers necessary to keep the child safe [s. 4].

### *International Child Abduction Act*

* Adopts the Convention on the Civil Aspects of International Child Abduction [s. 2].
  + The removal or the retention of a child is to be considered wrongful where [art. 3]:
    1. it is in breach of rights of custody attributed to a person under the law of the state in which the child was habitually resident immediately before the removal or retention; and
    2. at the time of removal or retention those rights were actually exercised or would have been so exercised but for the removal or retention.
  + Where someone has wrongfully removed a child, then the court will direct the return of the child.

# Division of Property

* In the 1970s and 1980s, provinces enacted legislation that provided for property sharing on marriage breakdown that was no longer based on ownership or who purchased the property.
  + Part of the reason for this was the public outcry about *Murdoch v Murdoch*. In that case, the wife of an Alberta rancher claimed a resulting trust in the family ranch that was registered under her husband's name. The SCC dismissed the application on the grounds that since there was no financial contribution not intention to create a trust, there could be no resulting trust. The majority said that the wife's contributions were what was ordinarily expected of a rancher's wife.
* The *Family Property Act* came into effect on January 1, 2020; it replaced the *Matrimonial Property Act*.
  + Much of the case law still refers to the *Matrimonial Property Act*, but the two acts are substantially similar, so the earlier case law is still relevant.
  + While the *Matrimonial Property Act* applied only to people who were legally married, the *Family Law Act* applies to both former spouses and adult interdependent partners.

## *Family Property Act*

### Definitions

* "Adult interdependent partner" means [s. 1(1)(a)]:
  1. an AIP within the meaning of the *Adult Interdependent Relationships Act*, as in
     1. They've lived with the other person in a relationship of interdependence for a continuous period of not less than 3 years (or if there is a child of the relationship, a period of some permanence), or [*AIRA*, s. 3(1)(a)]
        + A "relationship of interdependence" is a relationship outside of marriage in which two persons share one another's lives, are emotionally committed to one another, and function as an economic and domestic unit [*AIRA*, s. 1(1)(f)].
     2. The person has entered into an AIP agreement with the other person [*AIRA*, s. 3(1)(b)].
     + Persons related by blood or adoption can become AIPs, but only by entering into an AIP agreement [*AIRA*, s. 3(2)].
  2. A former AIP.
     + An AIP becomes a former AIP when the earliest of the following occurs [s. 1.1(1)]:
       1. The AIPs enter into a written agreement that provides evidence that they intend to live separate and apart without the possibility of reconciliation.
       2. The AIPs live separate and apart for more than one year and one or both of them intend that their relationship as AIPs not continue.
          - A period of living separate and apart is not considered interrupted or terminated by reason only that (a) either AIP has become incapable of forming the intention to live separate and apart or (b) the AIPs have resumed living together during a period of not more than 90 days with reconciliation as its main purpose [s. 1.1(3)].
       3. One of the AIPs marries a third party.
       4. The AIP enters into a valid AIP agreement with a third party.
       5. One or both of the AIPs have obtained a declaration of irreconcilability under the *FLA*.
     1. AIPs who marry each other cease to be adult interdependent partners but are not former adult interdependent partners for the purposes of this Act [s. 1.1(4)].
* "Family home" means property [s. 1(a.2)]:
  1. that is owned or leased by one or both spouses or AIPs,
  2. that is or has been occupied by the spouses or AIPs as their family’s home, and
  3. 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 condominium, or (E) a suite.
* "Household goods" means personal property [s. 1(b)]:
  1. that is owned by one or both spouses or AIPs, and
  2. that was ordinarily used or enjoyed by one or both spouses or AIPs or one or more of the children residing in the family home, for transportation, household, educational, recreational, social or esthetic purposes.

### Application by Spouse or AIP

* A spouse or AIP can only apply for a family property order if (a) both habitually reside in Alberta, (b) their last joint habitual residence was in Alberta, or (c) they did not have a joint residence but each of their habitual residences during the marriage or partnership was in Alberta [ss. 3(1), 3.1].
* 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 [s. 3(2)], which must be in the form of a statement of claim [s. 4].
  + Spouses can commence a claim for divorce and division of family property at the same time, even though the *Divorce Act* is federal legislation and the *Family Property Act* is provincial legislation.
  + AIPs just bring a statement of claim for the division of family property.
* The conditions precedent for an application for a family property order are different for spouses and AIPs:
  + Under s. 5(1), a family property order in respect of *spouses* may only be made if:
    1. A divorce judgment has been granted or a declaration of nullity of marriage has been made.
    2. One of the spouses has been granted a judgment of judicial separation.

b.1. One or both of the spouses have obtained a declaration of irreconcilability under the *FLA*.

* + 1. 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.
  + Spouses may be held to be living separate and apart notwithstanding that they have continued to reside in the same residence or that either spouse has rendered some household service to the other during the period of separation [s. 5(3)].
  + The period during which spouses have been living separate and apart is not interrupted by reason only that there has been a resumption of cohabitation by the spouses during a single period of not more than 90 days with reconciliation as its primary purpose, and that period shall not be included in the period of living separate and apart [s. 5(4)].
    1. The Court is satisfied that the spouses are living separate and apart at the time the application is commenced and the defendant spouse:
       1. has transferred or intends to transfer substantial property to a third party who is not a bona fide purchaser for value, or
       2. 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
    2. 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.
* Under s. 5.1(1), a family property order in respect of *AIPs* may only be made if:
  1. They have become former AIPs.
  2. The Court is satisfied that the AIPs are living separate and apart at the time the application is commenced and the defendant AIP has:
     1. Transferred or intends to transfer substantial property to a third party who is not a bona fide purchaser for value, or
     2. 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 AIP may have under this Part.
     3. AIPs may be held to be living separate and apart notwithstanding that they have continued to reside in the same residence or that either AIP has rendered some household service to the other during the period of separation [s. 5.1(3)].
  3. The Court is satisfied that the AIPs are living separate and apart and one AIP is dissipating property to the detriment of the other AIP.

### Time for Application

* Spouses:
  + An application for a family property order to which ss. 5(1)(a), (b), or (b.1) apply may be commenced [s. 6(1)]:
    1. 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
    2. May be commenced *not later than 2 years* after the date of the decree nisi, declaration, or judgment.
  + An application for a family property order to which ss. 5(1)(c) or (e) applies may be commenced within 2 years after the date the spouses separated [s. 6(2)].
  + An application for a family property order to which s. 5(1)(d) applies may be commenced within (a) 2 years after the spouses separated or (b) 1 year after the property is transferred or given, whichever occurs first [s. 6(3)].
    1. Any single period of not more than 90 days during which the spouses resumed cohabitation with reconciliation as its primary purpose shall not be included in computing the 2‑year period under subsection (2) or (3) [s. 6(4)].
* Adult interdependent partners:
  + An application for a family property order may be commenced not later than 2 years after the date the applicant first knew, or ought to have known, that they had become a former AIP [s. 6.1(1)].
  + An application for a family property order to which section 5.1(1)(b) applies may be commenced not later than (a) 2 years after the date the applicant first knew, or ought to have known, that they had become a former AIP or (b) one year after the date the property is transferred or given, whichever occurs first [s. 6.1(2)].

### Distribution of Property

* The Court may make a distribution between the spouses or AIP of all the property owned by both spouses or AIPs and by each of them [s. 7(1)].
* Property is divided into three categories:
  1. Property that will not be divided (i.e., s. 7(2) property).
  2. Property that may be divided unequally (i.e., s. 7(3) property).
  3. Property that is presumptively split 50/50 (i.e., ss. 7(4) and (5) property).

#### Section 7(2) — Exempt Property

* Section 7(2) deals with property that is not available for distribution (i.e., that belongs to one of the parties alone and is not to be divided).
  + e.g., if someone gets $100,000 as a gift and puts it in a personal bank account, that money remains exempt, and any increase in value as a result of interest would become available for distribution.
  + A party claiming an exemption has to show that it is exempt by tracing it into an existing asset.
    - e.g., if someone gets $100,000 as a gift, puts in their personal bank account, and spends $40,000 of it on vacations, then they can only claim a $50,000 exemption.
* The market value of the following property is exempted from distribution [s. 7(2)]:
  1. property acquired by a spouse or AIP by gift from a third party,
     + e.g., a spouse receives $10,000 as a birthday gift from their aunt.
     + e.g., NOT if a couple is given $10,000 as a wedding gift by a parent.
  2. property acquired by a spouse or AIP by inheritance,
  3. property acquired by a spouse or AIP before the relationship of interdependence or marriage,
     + i.e., 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 before the marriage [s. 7(2)(c)]
     + i.e., in the case of spouses who were in a relationship of interdependence with each other immediately before the marriage, property acquired by a spouse before the relationship of interdependence began [s. 7(2)(c.1)].
     + i.e., in the case of AIPs, property acquired by an AIP before the relationship of interdependence began [s. 7(2)(c.2)].
  4. damages in tort in favour of a spouse or AIP, unless the award or settlement is compensation for a loss to *both* spouses or AIPs, or
  5. 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 AIPs.
     + This almost always applies to life insurance policies.
* Unless a written agreement by the parties provides otherwise, the relevant date for *valuation* of property to be distributed is the date of the trial [s. 7(2.1)].
  + Establishes the date at which we determine the value of the assets and liabilities.
  + If one of the parties has sold property or paid down debts between separation and trial, this is taken into account when considering whether to make an unequal distribution of property, but it ultimately does not change the relevant date for valuation.
* The market value that is exempt under subs. (2) is the market value of the property on the following date, as applicable [s. 7(2.2)]:
  1. In the case of spouses who were not in a relationship of interdependence 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.
  2. 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.
  3. In the case of AIPs, (i) on the date the relationship of interdependence began, or (ii) on the date the property was acquired by the AIP, whichever is later.

#### Section 7(3) — Equitable Distribution

* Considering the matters in s. 8, the Court shall distribute the following *in a manner that it considers just and equitable* [s. 7(3)]:
  1. Any increase in the value of exempted property.
     + i.e., the difference between the exempted value of "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 of a disposition of the original property [s. 7(3)(a)].
     + e.g., if someone gets $100,000 as a gift, and they take it and purchase a condo with it, any increase in the value of that condo is s. 7(3) property.
  2. Property acquired using income derived from exempt property.
     + i.e., in the case of spouses who were not in a relationship of interdependence 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) [s. 7(3)(b)].
     + i.e., in the case of spouses who were in a relationship of interdependence 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) [s. 7(3)(b.1)].
     + i.e., in the case of AIPs, property acquired by an AIP 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) [s. 7(3)(b.2)].
     + e.g., a spouse has a rental property that is "original property" that is exempt under s. 7(2). Any property that is acquired from the rental income of that rental property is s. 7(3) income.
  3. Property acquired after separation.
     + e.g., a spouse wins $2 million in the lottery post-separation. If the winning ticket was acquired close to separation, the winnings might be divided. If the winning ticket was acquired many years later, the winnings are unlikely to be divided.
     + i.e., 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 *FLA* [s. 7(3)(c)].
     + i.e., in the case of AIPs, property acquired by an AIP after becoming a former AIP [s. 7(3)(c.1)].
  4. Property that was a gift from one spouse or AIP to the other.
     + i.e., 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 [s. 7(3)(d)].
     + i.e., property acquired by an AIP by gift from the other AIP at any time on or after the date on which the relationship of interdependence began [s. 7(3)(d.1)].

#### Sections 7(4) and (5) — Equal Distribution

* **Spouses**: if the property being distributed was acquired by a spouse during the marriage or during a relationship of interdependence immediately before the marriage and *is not property referred to in subs. (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*, considering the matters in s. 8 [s. 7(4)].
* **AIPs**: if the property being distributed was 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 AIPs unless it appears to the Court that it would not be just and equitable to do so*, considering the matters in s. 8 [s. 7(5)].

### Matters to be Considered

* The matters to be considered in making a distribution under s. 7(3) or rebutting the presumption of equal distribution under ss. 7(4) and (5) are the following [s. 8]:
  1. Each party's contributions to the marriage and/or relationship of interdependence and to the welfare of the family, including any contribution made as a homemaker or parent.
  2. The contribution, whether financial or some other form, directly or indirectly, made by a spouse or AIP to the acquisition, operation, management, or improvement of an enterprise owned or operated by one or both spouses or AIPs or by one or both spouses or AIPs and any other person.
     + Includes contributions made during a marriage and/or relationship of interdependence.
  3. The contribution, whether financial or some other form, directly or indirectly, made by a spouse or AIP to the acquisition, conservation, or improvement of the property.
     + Includes contributions made during a marriage and/or relationship of interdependence.
     + e.g., a spouse's parents give a significant amount of money so that the spouses can purchase a house. This contribution would be relevant under s. 8, even though it is from a third party.
  4. The income, earning capacity, liabilities, obligations, property and other financial resources of each spouse or AIP.
     + i.e., in the case of spouses, the financial resources [s. 8(d)]:
       1. 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
       2. that each spouse has at the time of the trial.
     + i.e., in the case of AIPs, the financial resources (i) that each AIP had on the date the relationship of interdependence began, and (ii) that each AIP has at the time of the trial [s. 8(d.1)].
  5. The length of the relationship.
     + i.e., in the case of spouses [s. 8(e)]:
       1. If they were in a relationship of interdependence immediately before the marriage, the combined duration of the marriage and the relationship of interdependence, or
       2. if subclause (i) does not apply, the duration of the marriage.
     + i.e., in the case of AIPs, the duration of the relationship of interdependence [s. 8(e.1)].
  6. Whether the property was acquired when the spouses or AIP were living separate and apart.
  7. The terms of an oral or written agreement between the spouses or AIPs.
  8. That a spouse or AIP 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.
  9. A previous distribution of property between the spouses or AIPs by gift, agreement, or family property order.
  10. A prior order made by a court.
  11. A tax liability that may be incurred by a spouse or AIP as a result of the transfer or sale of property.
      + When we divide property, we try as much as possible to use the after-tax value of the assets.
  12. That a spouse or AIP has dissipated property to the detriment of the other spouse or AIP.
  13. Any fact or circumstance that is relevant.

### Powers of the Court

* If part of the property of the spouses or AIPs 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 s. 7 of all the property wherever it is situated [s. 9(1)].
  + A court can only order the sale or transfer of an asset if it is situated in Alberta. The court can take property in other jurisdictions into account for the purposes of property division but cannot order them sold or transferred.
* To effect a distribution under s. 7, the Court may do any one or more of the following [s. 9(2)]:
  1. Order a spouse or AIP to pay money or transfer an interest in property to the other spouse or AIP.
  2. Order that property be sold and that the proceeds be divided between the spouses or AIPs.
  3. Declare that a spouse or AIPs has an interest in property notwithstanding that the spouse or AIP in whose favour the order is made has no interest in it.
* To give effect to an order under this section, the Court may do any one or more of the following [s. 9(3)]:
  1. Order a spouse or AIP to pay money over a period of time with or without interest.
  2. Order a spouse or AIP to give security for all or part of any payment.
  3. Charge property with all or part of a payment to be made under the order and provide for the enforcement of that charge.
  4. Prescribe the terms and conditions of a sale ordered under subsection (2).
  5. Require a spouse or AIP to surrender all claims to property in the name of the other spouse or AIP.
  6. Require a spouse (not an AIP) to release dower rights under the *Dower Act* with respect to all or any property owned by the other spouse.
  7. Impose a trust in favour of a spouse or AIP with respect to an interest in property.
  8. Vary the terms of an order made under subsection (2) in accordance with this subsection.
  9. If property is owned by spouses or AIPs as joint tenants, sever the joint tenancy.
  10. Make any other order that, in the opinion of the Court, is necessary.

### Putting Property in Joint Names

* The Court shall not apply the presumption of advancement to a transaction between the spouses or AIPs in respect of property acquired [36(1)]:
  1. in the case of spouses, by one or both spouses before or after the marriage, or
  2. in the case of AIPs, by one or both of them before or after they became AIPs.
  + Notwithstanding subs. (1), the fact that property is placed in the name of both spouses or AIPs as joint owners is proof, absent evidence to the contrary, that a joint ownership of the beneficial interest in the property is intended [36(2)(a)].
    - Includes money deposited with a financial institution in the name of both spouses or AIPs [s. 36(2)(b)].

## Dissipation

### Preventing Dissipation

* If the Court is satisfied that a spouse or AIP 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 AIP, the Court may make an order restraining the transfer or gift [s. 34(1)].
  + When you get an order under s. 34, you have to serve it not only on the other party, but also on the financial institution that holds the asset or on the potential buyer or transferee of the asset.
  + To get an order under s. 34, the applicant must establish (*Welsh v Welsh*):
    1. A strong *prima facie* case to a portion of the matrimonial property.
    2. A strong risk that the defendant will dissipate assets.
    3. That the balance of convenience favours granting the order.
* A spouse or AIP who commences proceedings under this Act may file a certificate of lis pendens (CLP) against any of the real property at issue [s. 35(1)].
  + When the Registrar of Land Titles accepts a CLP for registration, they shall make a memorandum of the CLP on the certificate of title to which it relates [s. 35(2)].
  + The certificate gives notice to anyone who pulls title to the property that a claim is being advanced against the land; it does not give the person who files the CLP a present interest in the property.
  + If a CLP is registered, any instrument that is registered after the registration of the CLP and that purports to affect land included in the certificate of title is subject to the claim of the spouse of AIP that filed the CLP [s. 35(3)].

### Remedying Dissipation

* The purpose of s. 10 of the *Family Property Act* is to prevent spouses or AIPs from dissipating their property to shield it from division under a family property order.
  + When an application has been made for a family property order, the Court may do any one or more of the things referred to in subs. (2) if it is satisfied that [s. 10(1)]:
    1. A spouse or AIP has (i) transferred property to a person who is not a bona fide purchaser for value or (ii) made a substantial gift of property.
    2. The spouse or AIP making the transfer or gift did so with the intention of defeating a claim that the other spouse or AIP may have under this Part,
    3. 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 AIP may have under this Part, **and**
    4. The transfer or gift was made not more than 1 year before the date on which either spouse or AIP commenced the application for the family property order.
  + If subs. (1) applies, the Court may do any one or more of the following [s. 10(2)]:
    1. Order the transferee or donee to pay or transfer all or part of the property to a spouse or AIP.
    2. Give judgment in favour of a spouse or AIP against the transferee or donee for a sum not exceeding the amount by which the share of that spouse or AIP under the family property order is reduced as a result of the transfer or gift.
    3. Consider the property transferred or the gift made to be part of the share of the spouse or AIP who transferred the property or made the gift, when the Court makes a family property order.
  + If a spouse or AIP applies for an order under subs. (1), the applicant shall serve the transferee or donee with notice of the application and shall include the allegations made [s. 10(4)].
    - A transferee or donee who is served with notice under subs. (4) is deemed to be a party to the application as a defendant [s. 10(5)].

#### *Cox v Cox*, 1998 ABQB 987

Facts:

* Mr. and Ms. Cox were married in 1973. Throughout the marriage, Mr. Cox assumed the role of financial provider while Ms. Cox managed the family, the home, and their finances. The parties separated in January 1997. At the time of separation, Mr. Cox was the sole shareholder of Donnart Holdings Inc ("Donnart"), which held 44% of the shares of PDQ Mechanical Ltd ("PDQ"). Mr. Cox sold his interest in PDQ to his partner and first cousin, Gilles Petrin, who is now 100% owner of PDQ through his holding company, PDQ Holdings Inc. Proceeds of $146,812 were to be held in trust. At the time of separation, Mr. Cox also had an RRSP worth $52,000. At the time of trial, the value was $31,000. Both Mr. and Ms. Cox now seek a division of matrimonial property.

Issue and holding:

* Has there been a dissipation of assets or any other circumstances under s. 8 of the *Matrimonial Property Act* ("the Act") such that an equal distribution would be inequitable? **YES**

Analysis:

* Section 7(4) of the Act creates a presumption of an equal distribution of non-exempt matrimonial property, unless it would not be just or equitable to do so taking into account the considerations in s. 8.
  + A conclusion that equal distribution would be unjust or inequitable should not be lightly reached.
* Section 8(1) provides that one of the factors which can lead to an unequal distribution is where one spouse dissipates assets to the detriment of the other.
  + Dissipation, does not necessarily result where an asset is worth less at trial than it was at separation; it requires a degree of intent.
    - Intent does not necessarily have to extend to intentionally depriving the other spouse of a fair distribution of matrimonial property; it is sufficient if one spouse intends to dissipate the assets (usually for their own enjoyment), and that dissipation arises in detriment to the other spouse.
  + Dissipation must result in actual detriment to the other spouse.
  + The law generally does not find dissipation if the reduction in assets was due to reasonable expenditures made on behalf of the family or to maintain existing matrimonial assets.
    - However, the court will look to see if the spouse could have paid those expenses out of income rather than by depleting assets.
    - Purely personal expenses which do not benefit the other party that are paid out of matrimonial property may be considered dissipation.
  + If an asset is sold or otherwise reduced, the courts will not consider this dissipation if the proceeds can be traced to another asset; the replacement assets form part of the assets available for distribution.
  + If assets are sold for less than fair market value, the courts may determine whether the sale was done improvidently, hastily, or fraudulently in deciding whether it was dissipation.
    - If the sale is effected in accordance with pre-separation negotiations, it may not be considered dissipation.
  + The total amount actually dissipated “to the detriment” of the spouse is one-half of the amount by which the asset was reduced.
  + Ultimately it is in the discretion of the trial judge, based on the consideration of all the facts, to determine whether or not dissipation exists.

Rationale: (Paperny J)

* In total, Mr. Cox dissipated $55,800; half of this amount should be paid to Ms. Cox.
  + Of the $21,000 reduction in the value of Mr. Cox's RRSP, it is concluded that $4,000 was lost due to market conditions, while the other *$17,000 was dissipated*.
    - Mr. Cox spent substantial sums gambling, traveling, dining, and on consumer goods; this is evidenced by the extraordinarily high Visa bills he consistently incurred since separation.
  + Donnart removed at least $57,900 from Donnart's cash account since October 1997; of this, *he dissipated $38,800*.
    - $10,000 was used to make the down payment on his new home and another $15,000 appears to have been used to buy furniture for his new home; however, these sums *do not amount to dissipation* because the decreases can be traced to a distributable asset.
    - $22,800 was paid from Donnart as interim child support; this is considered dissipation.
      * The child support payments should have been paid out of Mr. Cox's personal income stream (since Mr. Cox has the ability to pay money out of his income stream).
    - $16,000 was used to pay his personal income taxes, attributable to income earned after separation; paying this debt out of the matrimonial property pool constituted dissipation.
      * Mr. Cox should have paid for them out of his personal income stream; they were payments exclusively for his own benefit.

Notes:

* When property is dissipated, a court will put the amount dissipated on the side of the property statement for the person who engaged in the dissipation.

## Possession of Home/Household Goods

* A party can make an application for exclusive possession of real property or household goods.

### Real Property

* On application by a spouse or AIP, the court may (a) direct that a spouse or AIP be given exclusive possession of the family home, (b) direct that a spouse or AIP be evicted from the family home, or (c) restrain a spouse or AIP from entering or attending at or near the family home [s. 19(1)].
  + An order under s. 19 does not change anyone's equity in the home.
  + In addition, the Court may give a spouse or AIP possession of as much of the property surrounding the family home as is necessary for the use and enjoyment of the family home [s. 19(2)].
  + The Court may subject the order to any conditions and for any time it considers necessary [s. 19(3)].
  + An order under s. 19 can be varied by the Court on application by a spouse or AIP [s. 19(4)].
* In deciding whether to exercise its powers under s. 19, the Court shall have regard to [s. 20]:
  1. The availability of other accommodation within the means of both the spouses or AIPs,
  2. The needs of any children residing in the family home,
  3. The financial position of each of the spouses or AIPs, and
  4. Any order made with respect to the property or the support of one or both of the spouses or AIPs.
  + Another important factor is whether continued cohabitation has been rendered intolerable.
* An order for exclusive possession of real property can be registered with the Registrar of Land Titles [s. 22(1)], and if it is, the spouse or AIP with an interest in the property may only dispose of or encumber that property with the written consent of the spouse or AIP having a right of exclusive possession [s. 22(3)].
* If a family home is leased by one or both of the spouses or AIPs under an oral or written lease and the Court makes an order giving possession of the family home to one spouse or AIP, that spouse or AIP is deemed to be the tenant for the purposes of the lease [s. 24].
* The person against whose real property an order is registered can apply to the Court for an order cancelling the registration [s. 29(1)].
* The right to exclusion possession of the family home are in addition to and not in substitution for or derogation of the rights of a spouse under the *Dower Act* [s. 28(1)].

#### *Portigal v Portigal*, 1987 ABCA 248

Facts:

* The parties were married in 1973 and had three children. In 1979, the family moved into the matrimonial home. In 1984, the husband moved out and the wife and children remained. At trial, the judge directed that the wife was to have exclusive possession of the home until the youngest child (who was 9 at the time) reached the age of 19 years, at which point it could be sold. He directed that the wife was to make the mortgage and tax payments, but that upon the sale of the home, she would get credit for the total amount of the mortgage payments made by her and one half of the taxes.
* The husband appealed the order giving the wife exclusive possession of the family home, arguing that the home should be sold immediately and the proceeds used to pay the debts incurred by the parties prior to their separation. He also appealed the decision giving the wife credit for mortgage payments and half of the tax payments on sale of the home.

Issue and holding:

* Did the trial judge err in giving the wife exclusive possession of the matrimonial home? **NO**
* Did the trial judge err in directed that the wife was to be given credit for the mortgage payments and half of the tax payments? **YES**

Rationale: (Hetherington JA)

1. The trial judge's decision was based on the concern that the children should be disrupted as little as possible, meaning that they should remain in the home that they had lived at since 1979; this reasoning is sound.
   * The husband testified at trial that he expected his business associate to pay off, indicating that there is no need to sell the matrimonial home so that the debts can be paid from the proceeds of the sale.
2. The effect of giving the wife credit for the total amount of the mortgage payments and one half of the taxes would be that she could live in the home with minimal expenses in spite of the fact that the husband had an interest in that home.

Notes:

* A 9-year exclusive possession order is rare; normally, an exclusive possession order lasts until the parties divide their property, agree that it has to be sold, etc.
* Property taxes and insurance payments are usually shared between the party with exclusive possession and the other party because they maintain an asset that the parties share.
  + The party with exclusive possession usually have to make mortgage payments, though, because to hold otherwise would, in effect, allow them to live there with minimal expenses.

#### *Tawiah v Tawiah*, 2002 ABQB 314

Facts:

* The wife seeks interim exclusive possession of the matrimonial home and the contents therein, while the husband wants it to be sold immediately. The wife alleges that, though the husband has not hit her, he has a "quick and volatile temper" and, as a result, she fears for her safety. She also claims that she runs a catering business out of her home, which is her only source of income. The husband says that she actually operates the business out of the local curling rink. The wife claims that there are no apartments available in town that can accommodate her business needs, and that renting a house or duplex is too expensive. The wife also claims that she may wish to purchase the husband's interest in the home.

Issue and holding:

* Should the wife be granted exclusive possession of the home? **YES**

Rationale: (Lee J)

* The wife is very financially disadvantaged compared to her husband, and her only source of income is her catering business which she runs partly out of the matrimonial home.
  + While the wife operates her main cooking duties out of the local curling rink kitchen, she does appear to require the basement of the matrimonial home for storage and for her office work.
* While the husband has offered to pay $1000 a month to cover the cost of renting a house, the disruption to the catering business is still a significant factor.
* While there is no evidence of any physical abuse during the course of their marriage, there is obviously tension between these parties if they continue to live in the same house.
  + Given the very obvious financial stability of the husband in this matter, he can easily afford to move out and rent his own premises, whereas the wife cannot.
* The wife may wish to buy the husband's interest in the home out.

### Household Goods

* The Court may direct that a spouse or AIP be given the exclusive use and enjoyment of any or all of the household goods [s. 25(1)].
  + An order may be made subject to any conditions and for any time the Court considers necessary [s. 25(2)].
  + An order may be varied by the Court on application by a spouse or AIP [s. 25(3)].
* An order under s. 25 can be registered in the Personal Property Registry [s. 26], and if so, the party with an interest in those household goods can only dispose of or encumber that interest with the written consent of the spouse or AIP with a right of possession [s. 27(2)].
* The person against whose property an order is registered can apply to the Court for an order cancelling the registration [s. 29(2)].

## Interim Distribution and Costs

* Parties can bring an application for an interim distribution of property or for interim costs.
  + The purpose of interim distributions and costs are to level the playing field by providing a party in need with resources with which to fund their litigation.
  + Courts prefer interim distributions of property because they will ultimately be accounted for in the final distribution.

### *Gartner v Ewasiuk*, 2002 ABQB 797

Facts:

* The parties were married for 32 years until the wife left the matrimonial home in 1995. During the marriage, the parties acquired substantial corporate and real estate assets. Since the separation, the husband has had either possession or control of the bulk of the matrimonial property.

Issues and holding:

* Is the wife entitled to an interim distribution of matrimonial property? **YES**
  + The husband shall pay the wife $200,000 by way of an interim distribution of the matrimonial property.
* Is the wife entitled to interim costs? **YES**
  + The husband shall pay the wife $10,000 as interim costs.

Analysis:

* The Court has jurisdiction to grant interim distribution and costs under s. 9(3)(j) of the *Matrimonial Property Act*, which provides that the Court may make any order that, in its opinion, is necessary to give effect to an order under s. 9.

Rationale: (Acton J)

* The wife is entitled to an interim distribution of matrimonial property for the following reasons:
  1. The majority of the assets were acquired by the parties during the course of the marriage and will be presumptively split equally.
  2. The net assets available far exceed the amount of the interim distribution.
  3. The husband has had control over virtually all of the matrimonial assets since the parties' separation.
  4. The corporate entity has liquid assets in the form of shareholder's loans which can provide the necessary cash for an interim distribution or, if necessary, could borrow the necessary funds.
  5. The interim distribution can be made without serious prejudicial tax consequences.
  6. An interim distribution can be made without a serious prejudicial effect on the matrimonial assets.
  7. The wife is in need of funds to meet capital demands.
  8. There is a fundamental imbalance in the parties' ability to protect their respective interests.
* Interim costs are required so that the wife can retain the services of the experts required to properly assess the real property and the corporate assets, and to give evidence on her behalf at the trial of this action.

### *Tarapaski v Tarapaski*, 2007 ABQB 81

Facts:

* The parties were married in 1991 and separated in 2004. A divorce and matrimonial property trial is scheduled for April 2007. There are substantial matrimonial assets. One such asset is Teem Energy Ltd, the shares of which are held entirely by the husband. The wife estimates that Teem Energy has a value of $0–$10 million in oil and gas properties and at least $3 million in shares of other companies. The wife seeks an interim distribution of Teem Energy, achieved through a distribution of the shares of the company. The husband argues that the court does not have the jurisdiction to award an interim distribution and, in the alternative, if they do have jurisdiction, they should decline to exercise it.

Issues and holding:

1. Has the wife met the conditions precedent for the making of a matrimonial property order? **YES**
2. Does the court have jurisdiction to make an interim distribution of matrimonial property? **YES**
3. Should the court make an interim distribution of property in the circumstances here? **YES**

Analysis:

* The mere fact that no prejudice will be created to either party by an interim distribution of property may not be a sufficient reason to make such a distribution; it may be necessary for the applicant for such a distribution to establish that there is actually some benefit that will be achieved by the distribution.

Rationale: (Veit J)

1. Pursuant to s. 5(1)(c) of the *Matrimonial Property Act* ("the Act"), the husband and wife have been separated for more than one year.
2. This court has the jurisdiction to make interim distributions of matrimonial property derived from both s. 9(3)(j) of the Act itself and from its inherent jurisdiction as a superior court with a right to fashion remedies that carry out the intention of the legislature.
3. The court should make an interim distribution of property for the following reasons:
   * The husband has not claimed any matrimonial property exemption, and if he were able to establish one at trial, there are sufficient remaining matrimonial property from which he could be compensated for any oversight that occurred from an interim distribution.
   * Some benefit will be achieved by the interim distribution; it is probable that the removal of the Teem Energy issues from the trial will in fact result in the saving of one week of trial time.
     + Distributing Teem Energy 50/50 would obviate the necessity of valuing the company: whatever it is worth, it is divided equally between the spouses.
   * The interim distribution can be effected without prejudice to the interests of either party.
     + For example, the addition of a shotgun agreement to the division will allow the husband to buy out the wife's shares if, for some reason, he is intent on complete control of Teem Energy.

### *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71

Analysis: (LeBel J)

* The criteria that must be present to justify an award of interim costs are as follows:
  1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and the litigation would be unable to proceed if the order were not made.
  2. The claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
     + *Note*: this is generally not too difficult to establish in family property actions because the applicant can usually show entitlement to the property at issue.
  3. There must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

Notes:

* Interim costs are typically only awarded when one of the parties has control of all the family property and the other party has no access.

## Section 7(2) & (3) Property

* When you receive a list of assets and liabilities from a client, you go through each item and ask the following:
  1. Is there a valid written agreement that deals with the division of property? If yes, divide the property in accordance with that agreement.
  2. If no, identify any exempt property under s. 7(2).
     + If there is exempt property that exists as it was received, determine its value at the time it was received, and compare it to the current value.
     + If the exempt property does not exist as it was received, determine whether it has been exchanged for something else. If so, determine how much of the original property can be traced into the new property.
       - For property to be exempt, you must be able to trace that property into an existing asset.
       - e.g., if you receive a $50,000 inheritance and use it to pay down the mortgage on a house, you can trace that asset into the house. If you use it to finance consumption, the exemption is lost.
     + If any of the exempt property has been put under joint names, 50% remains exempt while the other half becomes s. 7(3) property, unless the donor can establish that a gift was not intended.
  3. If there is an increase in value of exempt property, that becomes s. 7(3) property and is split based on what is just and equitable.
  4. Any remaining property is s. 7(4) and is split presumptively equally.

### *Quigg v Quigg*, 1983 ABCA 5

Facts:

* The parties were married in 1974. At the time, the husband had a $14,000 equity in a house in Calgary which he had bought out of his own savings. The house was subsequently sold and the proceeds were used to buy a home in St. Albert. Title to the St. Albert home was taken in the names of both spouses in order to qualify for a mortgage. The parties separated in 1978 and the home was sold after a matrimonial property action was commenced. At trial, the husband claimed an exemption for the "original" property (i.e., the house equity) that he brought into the marriage.

Procedural history:

* The trial judge held that there was no exemption for the "original" property because the St. Albert house (which the original property was used to purchase) is in joint names and is thus divided equally. The husband objected, claiming an exemption for the house equity that he brought into the marriage. The wife took the position that, since the St. Albert home was jointly owned, it was not subject to distribution under s. 7 of the *Matrimonial Property Act* ("*MPA*") at all.

Issue and holding:

* Is jointly held property outside the *MPA*? **NO**
  + Joint property comes within the distribution provisions of the *MPA*.

Analysis: (Stevenson JA)

* The Act does not define "property" and *prima facie* embraces all manner of property.
* Although s. 36(2) of the *MPA* contains a presumption of joint ownership with respect to jointly held property absent evidence to the contrary, it does not mean that the concept of "exempt property" is inapplicable to such property.
  + Since the husband brought a house into the marriage with a net equity of $14,000, he remains entitled to a deduction of $14,000 for exempt property even though that house is subsequently replaced with a jointly owned matrimonial home.

Notes:

* Under *Jackson* and *Harrower*, the husband would not have gotten the full $14,000 exemption; $7,000 would have remained exempt while the other $7,000 would have become s. 7(3) property to be divided in a manner that is just and equitable in the circumstances.

### *Jackson v Jackson*, 1989 ABCA 197

Facts:

* During the marriage, but before the separation, the husband's mother gave him a total of $61,500 in cash. The money was placed in the husband's and wife's joint names and was used to pay down the mortgage on the jointly owned matrimonial home and for the down payment on a duplex bought in the husband's name.

Procedural history:

* In distributing the matrimonial property, the judge regarded the cash as exempt but held that the husband had given 1/2 of the cash ($30,750) to the wife, causing that half to lose its exempt status. He held that the gifted half was distributable matrimonial property under s. 7(3)(d) and directed that the wife receive 2/3 of the value of that gift. The husband appealed, arguing that "an exemption is an exemption is an exemption." While he acknowledged that an exemption can be lost, he held that there must be a formal gift and acknowledgement.

Issue and holding:

* Did the trial judge err in concluding that the husband gave a 1/2 interest in the money to his wife by putting it in joint names? **NO**

Analysis:

* Section 7(2)(a) holds that property which is acquired by a spouse as a gift from a third party is exempted from distribution.
* Under s. 36(2), when property is placed in joint names, it is presumed that joint ownership of the beneficial interest in the property is intended, absent evidence to the contrary.
  + A donor must therefore show that he or she did not intend to create a beneficial interest in order to rebut the presumption of sharing.
    - *Note*: e.g., by establishing that the donor put the property in joint names simply to refinance the house, proving that it was just a paper transaction.
  + i.e., 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.
* Under s. 7(3)(d), property that is acquired by a spouse as a gift from the other spouse is to be distributed in a manner that the court considers just and equitable.

Rationale: (Stevenson JA)

* Under s. 7(2)(a), when the husband received the money from his mother, the full amount was exempt from distribution (since the money was a gift from a third party).
* When the husband placed the money in joint names, the trial judge found that the husband gave the wife a beneficial interest in the money (i.e., he failed to rebut the presumption of joint ownership of a beneficial interest in the money); there is no error in fact or law in the conclusion.
  + As a result, the half that the husband gave to the wife ($30,750) lost its exempt status.
* Thus, without evidence to the contrary, the 1/2 interest that the husband gave to the wife ($30,750) was distributed under s. 7(3)(d) based on what is just and equitable.
  + *Note*: If the husband was able to prove that he did not intend to gift his wife the $30,750, then he would be able to claim the entire $61,500 as an exemption.

Notes:

* When exempt funds are placed into jointly owned assets, half remains exempt, and half becomes s. 7(3) property subject to distribution in a manner that is just and equitable.
  + Section 36 allows a spouse to argue that there was no intention to create joint ownership of the beneficial interest, which would enable the entire asset to remain exempt.

HARROWER / JACKSON 
EXEMPT PROPERTY 
s. 7(2) 
MOVE TO 
JOINT NAMES 
50% 
REMAINS EXEMPT 
50% 
BECOMES s.7(3) PROPERTY 
AVAILABLE FOR DISTRIBUTION 

### *Harrower v Harrower*, 1989 ABCA 196

Facts:

* When the parties married, neither had significant assets. The property they acquired during the marriage and their bank accounts were all held jointly. In the distribution of matrimonial property, the husband claimed an exemption for $72,000 given to him by a friend. The money was traceable to the acquisition of jointly owned properties and the retirement of some debts. At the time of trial, the only significant assets were a heavily encumbered matrimonial home and the husband's pension.

Procedural history:

* The trial judge found that when the $72,000 was put into joint names, the husband in effect gave the wife 1/2 of the money and the exempt status was lost for that half. The trial judge found that the other half was not traceable into the home nor the pension and that the husband could not claim the exemption. The husband appealed the distribution order.

Issue and holding:

* Is the husband entitled to an exemption regardless of traceability? **NO**

Analysis:

* Exempt property is “exempted” to the extent of the market value mentioned in s. 7(2).
  + The difference between the exempted value and the value at trial, and the other special types of property referred to in s. 7(3), are distributed in a manner that is just and equitable.
  + Property not referred to in ss. (2) and (3) is subject to a presumption of equal distribution.
* Property brought into the marriage does not have to be held in specie to qualify for an exemption.
  + Denying exempt status to property for which the property brought into the marriage is exchanged is not consistent with the *MPA*'s purpose of according special status to assets brought into the marriage.
* However, to be exempt, property brought into the marriage must be traceable into an existing asset.
  + e.g., one spouse inherits $100,000, which goes immediately to creditors (no tracing into an existing asset). To construe the *MPA* as allowing for an exemption in this situation would be unfair.
  + In many cases, the costs of putting a party to tracing will not be justified; *tracing can be inferred, implied, or presumed*.
    - In most cases, the party claiming an exemption need only show an asset has been acquired, directly or indirectly, and practical calculations deducting the exemptions without specific tracing will ordinarily achieve the same results while avoiding the labour of specific identification.
      * It is only in cases where the only assets to be distributed cannot be presumed to be the fruits of capital gifts brought into the marriage that the issue is likely to be pressed.
    - *Note*: e.g., two law students are married. They are not working, and they have significant student loans. One of their parents gives a spouse $100,000 and then the spouses buy a home. In that instance, if traceability is not disputed, it will be presumed that the $100,000 can be traced into the house, because it could not have come from anywhere else.
* Losses in exempt property are not divisible; if there is a decrease in the value of exempted property, that value remains exempt, but the amount by which the value decreased does not represent a liability.
  + It may be argued that if a spouse is to share in the gains that accrue to exempted property, then they might reasonably contribute to losses.
    - However, a spouse who is the donee of a gift may deal with it without consultation (e.g., a spouse may feel free to speculate with donated property); in those circumstances, the distribution of the resulting loss may impose an unfair burden .
  + *Note*: e.g., a spouse inherits $100,000, and they use $25,000 to finance consumption; in this case, their exemption is only $75,000, not $100,000.
    - The situation would be different if the $25,000 was used to purchase a vehicle or some other asset; in that case, the exemption would still be $100,000.
  + *Note*: e.g., you inherit $100,000 and use it to buy stocks. At the time of distribution, those stocks are only worth $40,000. In that case, the exemption is only $40,000, not the original $100,000.

Rationale: (Stevenson JA)

* The trial judge refused to draw the inference that the money was traceable into the second matrimonial home although the reduction of debt by the proceeds of sale from the first matrimonial home freed up moneys to reduce the financing on the second home; this was not a reversible factual error.

Notes:

* The onus is on the person claiming an exemption to trace it into an existing asset.

### *Brokopp v Brokopp*, 1996 ABCA 4

Facts:

* The parties were married in 1966. The wife's father gave the couple money to purchase a house. In 1974, they moved that house onto land owned by the husband's father. The husband's parents signed an acknowledgement that the house and improvements would remain the husband's property. The couple farmed the land with the understanding that it would eventually be inherited by the appellant. In 1985 the wife received a bequest of $27,000 from her father's estate. $13,000 was used to purchase GICs which were given as security for a family debt. Once default occurred, the bank realized on the security. The remaining $14,000 was used to purchase assets like a riding lawnmower as well as cattle and farrowing crates.

Procedural history:

* At trial, the judge awarded the wife an exemption of $22,000 for the inheritance but did not trace the money to any specific assets. The award did not include any amount for the land. While the judge found that the husband received a beneficial interest in the land, it was exempt from distribution because it was acquired as a gift.

Issues and holding:

1. Did the trial judge err in exempting that portion of the inheritance used to dissipate debts which were not traceable to specific assets? **YES**
2. Did the trial judge err in holding that the husband's father gifted him a beneficial interest in the land? **NO**
3. Did the trial judge err in restricting the beneficial interest to the son? **NO**
4. Did the trial judge err in holding that the land was exempt from distribution? **NO**

Analysis:

* The *MPA* allows a spouse to exclude or exempt the value of specified property, including gifts or inheritances received after marriage, in conducting matrimonial property accounting.
  + This exemption is lost if the inherited property is dissipated or spent on living expenses without being converted into some other asset still owned by the parties.
* A spouse who can trace the exempted property into some other asset owned by the parties is entitled to exclude the value of the traced proceeds from matrimonial property accounting.
  + Tracing can be inferred, implied, or presumed.
    - *Note*: a court can continue an exemption if on the balance of probabilities the exempted property improved the family financial position in an identifiable way.
    - *Note*: if common sense supports the conclusion that an asset was obtained using exempted assets, the proceeds should be exempted.

Rationale: (The Court)

1. When the bank realized on its security interest following separation, tracing had been lost with respect to the $13,000 held in term deposits as security at the time of separation; that amount was therefore not exempt.
   * In this case, the wife can only show that $14,000 of her bequest went into specific assets; because ownership of those assets were jointly held, the court infers an intention to gift 1/2 of the value of those assets to the husband. Accordingly, the wife was entitled to an exemption of $7,000.
2. In *Dillwyn v Llewelyn*, a son who was encouraged by his father to build a home at his own expense on the father’s property acquired absolute ownership of the property; that rule applies in this case.
3. The father and his wife acknowledged in writing that the improvements were to be the property of their son; subsequently, the husband and wife spent time, money and energy making improvements to the land, on the understanding the land would be someday belong to the son.
4. The son’s beneficial interest in the land thus formed part of the matrimonial property; but, since it was acquired by gift, it was exempt from distribution.

Notes:

* Exempt funds that are spent on debt, that cannot be traced to an existing asset, lose their exemption; debt reduction is not an asset that is included in the property accounting.
* Alberta courts have taken a more realistic attitude to tracing in family law cases, recognizing that most spouses do not keep precise records of financial transactions.

### *Sparrow v Sparrow*, 2006 ABCA 155

Facts:

* When the parties married in 1986, the husband and his brother jointly owned a cabin on lakefront property at Windermere Lake, BC. The property was transferred to the brothers by their parents. Despite the transfer, the parents continued to pay the taxes on the property. The value of the property as of the date of the marriage was $160,000. At the date of the trial, it had increased in value to $1,055,000 (a $895,000 increase). 1/2 of the increase ($447,500) belongs to the husband, and the other half to his brother. The increase in value was solely attributable to market forces. No one did any substantial improvements to it. When the parties separated in 2000, the husband owed Revenue Canada more than $91,000. He claimed it as a joint debt.

Procedural history:

* Applying the s. 7(4) presumption of equal sharing, the trial judge held that the husband's share of the increase in value ($442,500) was to be divided equally between the husband and wife. The husband disputes this. The husband also disputed the trial judge's failure to refuse to deduct any amount to account for the likely capital gains tax that would be payable on a sale of the property. Lastly, the husband disputed the trial judge's denial of tax liability as a debt of the marriage on the grounds that the husband normally owed income tax arrears, and money for the payment of these arrears usually came from his parents.

Issues and holding:

1. Did the trial judge err in holding that the husband's share of the increase in value was to be divided equally between the husband and wife? **YES**
2. Did the trial judge have proper regard to the factors in s. 8 in deciding how to split the increase in value of the exempt property? **NO**
3. How should the increase in value of the husband's share of the property be split between the husband and the wife? **70/30**
4. Did the trial judge err in refusing to deduct any amount to account for the likely capital gains tax that would be payable on a sale of the property? **NO**
5. Did the trial judge err in refusing to consider the husband's tax liability as a debt of the marriage? **YES**

Analysis:

* An appellate court should only intervene in a trial judge’s division of family property if there has been a misdirection or the decision is so clearly wrong as to amount to an injustice.
* Section 7(3) of the *MPA* provides that an increase in the value of exempt property is to be distributed in a manner that the court considers "just and equitable."
  + Section 8 outlines factors that a court should consider when determining what is just and equitable; each case must be considered on its own merits when determining what is just and equitable.
* When capital assets other than principal residences are sold, 1/2 of their increase in value is included in the seller’s income for the year in which the sale occurs, and is taxed at the applicable rate for the seller.
  + Section 8(k) of the *MPA* requires the court to consider the tax liabilities that may be incurred by a spouse as a result of the transfer or sale of the property that is being distributed.
* Debts in the name of one of the parties are normally divisible; if it arose to pay for the parties' lifestyle, they have both enjoyed the “benefit” of it and it will be split.
  + Exceptions to this general rule include circumstances in which one party appropriates incurs the debt for their exclusive use, such as feeding an addiction, paying for an extra-marital relationship, or financing consumption post-separation.

Rationale: (The Court)

1. The presumption of equal sharing does not apply to exempt property such as the lake property, and the trial judge therefore erred in law by applying such a presumption.
   * Instead, the husband's share of the increase in value ($447,500) should have been split in a manner that is just and equitable.
2. 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 only considered the parties' respective roles while at the cabin, concluding that the wife's disproportionate share of familial responsibility favoured a greater distribution to her.
     + But, this is to be expected, since the husband worked outside of the home while the wife's contribution was in the home.
   * However, the trial judge did not consider:
     + The fact that the increase in value of the properly was solely attributable to increased land value, not any improvements completed by the wife.
     + The property was acquired by the husband from his parents before the marriage; the wife did nothing to acquire it.
       - 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 it.
     + That the husband’s parents’ contribution to the land taxes and maintenance of the property was made on behalf of the husband.
3. A just and equitable distribution of the increase in value of the husband’s share of the Lake Property is 30% to the wife and 70% to the husband.
4. The potential tax liability was too speculative to be capable of being evaluated.
   * It is not inevitable that the husband will incur an income tax liability in relation to the property; in fact the husband has no plans to sell it.
   * If a sale does occur in the future, tax laws may have changed such that a current calculation of likely capital gain would be far off the mark.
   * A tax liability that may be incurred far in the future has a reduced present value.
   * The husband provided no evidence showing what the current value of the potential future liability might be.
5. The husband did not appropriate money that should have been spent on income taxes for his exclusive use; the parties used the money to maintain a lifestyle, and his income tax liability therefore constitutes a debt of the marriage.

Notes:

* It is not often that a court will not take into account capital gains on account of it being too speculative; in the vast majority of cases, if the property is subject to capital gains, the court will take it into account.

### *Felker v Felker*, 2005 ABQB 365

Facts:

* The defendant operates a mixed hay and cattle farm. He and the plaintiff first cohabited in 1997 and were married for a few months in 2001 before permanently separating. The net value of assets which the defendant brought into the relationship was $363,691. At the time of separation, the net value of the defendant's assets had fallen to about $200,000. The defendant had sold cattle in February 2001 to pay down an operations loan on his farm, which was a major source of the money to purchase the herd. A smaller portion was used to purchase farm assets. The defendant reacquired a herd within five months of sale and repeated the exercise against in December 2001 and April 2002. The plaintiff held that these things presented substantial problems to the defendant in tracing his assets, resulting in the defendant losing all of his exemptions.

Issue and holding:

* Is the defendant entitled to trace and claim the full exemption for the value of property brought into the relationship, having particular regard to the dispositions and acquisitions made? **YES**

Analysis:

* To be exempt under s. 7(2), property brought into the marriage must be traceable into an existing asset (i.e., dissipated property cannot be distributed under s. 7(3)).
  + In many cases, the costs of putting a party to tracing will often not be justified; *tracing can be inferred, implied, or presumed* from the facts.
  + 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.

Rationale: (Hillier J)

* The sales, payment on operation loans, and then reinvestment is sufficient to meet the requirements for traceability.
  + 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.

## Division of s. 7(4) Property

### *Mazurenko v Mazurenko*, 1981 ABCA 104

Facts:

* The parties married in 1945. At that time, the husband was engaged in farming lands owned by his father. The parties had two daughters. The parties separated, but then reconciled in 1950. At the time of reconciliation, the husband's parents discussed giving the couple a quarter section to share. In September 1954, the parents transferred that quarter section to the husband at a value of $5,000 in consideration of the wife returning. It was sold prior to trial for $22,000. In 1964, a second quarter section was transferred to the husband at a value of $6,000. It was worth $55,000 at the time of trial. The parties then separated permanently in 1972. In 1973, the husband purchased a house in Thorhild and registered it in the name of himself and the two daughters, all as joint tenants. The house was worth $34,000 at the time of trial. In 1974, the husband's parents transferred him a third quarter section at a stated value of $16,000. It was sold prior to trial for $30,000. Each transfer of land to the husband was expressed to be a gift.

Procedural history:

* At trial, the trial judge held that the following property was held by the parties:
  + *Husband*: first quarter ($22,000), second quarter ($55,000), cash and bonds ($45,000), grains and receivables ($7,000), and the Thorhild house ($34,000), totalling $163,000.
  + *Wife*: liquid assets in the amount of $15,000.
  + *Total*: $178,000, less $10,000 to account for tax liabilities, real estate commissions, and other expenses.

The trial judge divided all the distributable property equally under s. 7(4), concluding that the parties contributed equally to running the farm.

Issues and holding:

1. Did the trial judge err in refusing to exempt the second and third quarter sections transferred to the husband? **YES**
2. Did the trial judge err in including the full value of the Thorhild house under the husband's property? **YES**
3. Did the trial judge err in distributing the s. 7(4) property equally? **NO**
4. What is the appropriate distribution of the s. 7(3) property (i.e., the increase in value of the second and third quarters)? *(see below)*

Analysis:

* Section 7(4) property is to be divided equally unless, having regard to the circumstances of s. 8, it would be unjust or inequitable to divide the property equally; *that conclusion should not be lightly reached*.
  + The legislature is taken to have decided that, *in ordinary cases, equality is the rule*.
  + 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.
* Section 7(3) property (i.e., the increment to or proceeds from exempt property) is to be divided based on what is just and equitable having regard to the factors listed in s. 8.
  + A relevant factor when distributing increment (i.e., the increase in value of exempt property) is whether or not the exempt property from which it derives was brought into the matrimonial regime (i.e., whether it came in to be used for the parties' mutual benefit and account).
* The *MPA* does not accord any priority or weight to the various factors referred to in s. 8; it would be extremely difficult to establish any formula for the application of the heads in s. 8.

Rationale: (Stevenson JA)

1. The arrangement to give land to the couple in consideration for the wife's return meant that the transfer of the first quarter was not a gift from a third party; however, that arrangement *only* extended to the first property, not the second or third properties.
   * Therefore, the second and third quarter sections should have been exempt under s. 7(2) as gifts to the husband from a third party, with any increase in value being s. 7(3) property.
2. While there are mechanics in the *MPA* for recovering property gifted with intent to defeat a claim, there is no evidence that title to the Thorhild house was transferred with such an intent.
   * As such, in determining the property available for distribution, the Thorhild home should not be included in its entirety; just the husband’s equity (1/3, or $14,333) should be included.
   * *Note*: Lori states that, today, bestowing property on children without the other spouse's consent would not fly.
3. With respect to the s. 7(4) property (everything except the second and third quarters), there is nothing here that would point to a need to move away from the presumption of equality.
   * The husband worked the farm some of the time after separation and had the fruits of the farming operation available for his support.
   * The husband cared for the children, but it is likely the wife bore a heavier burden during the children’s earlier years.
   * It is likely that the real property increased in value following the separation, but much of that would be attributable to inflation rather than direct efforts.
   * The wife did not prosecute the action expeditiously but, on the other hand, the husband had the benefits of the use of the property.
   * The husband made a gift to the children, but 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.
4. The increase in the value of the second quarter should be distributed 50/50, like the rest of the property; however, the husband is entitled to 100% of the increase in value of the third quarter.
   * The second quarter came to be used for the mutual benefit and account of the parties; it was farmed, improved, maintained, enjoyed and dealt with as part of the family farm.
     + As such, the increment should be shared on the same basis as the other matrimonial property.
   * The third quarter, gifted in 1974, never came into the matrimonial regime, because it was gifted after separation and thus not employed for the parties' mutual benefit and account.
     + As such, the increment should not be distributed under the Act.

Notes:

* The court makes the following distribution under the Act:
  + Husband's property:
    - **Add** Second quarter ($55,000), first quarter ($22,000), equity in Thorhild house ($14,333), cash and bonds ($45,000), and grain and receivables ($7,000), for a total of $143,333.
    - **Less** the value of exempt property, including the initial value of the second quarter ($6,000), the initial value of the third quarter ($16,000), and the increment on the third quarter ($14,000), which is not subject to distribution.
    - Total property, $107,333.
  + Wife's property: liquid assets in the amount of $15,000.
  + Total property: $122,333, less anticipated costs of realization 10,000 to give us $112,333, which is to be divided equally.

### *Dwelle v Dwelle*, 1982 ABCA 349

Facts:

* Harry Dwelle was engaged in a large farming and ranching operation in partnership with his brother since 1945. In 1971, he married Mary Dwelle. While Mary did some work on the farm, it is agreed that any increase in the value of Harry's interest was due to inflationary rise in the value of land and equipment and not to their joint labour. At trial, Harry had distributable property of $514,435, while Mary had $110,400.

Procedural history:

* In proceedings for a division of property, the trial judge concluded that all of Harry and Mary's assets fell under s. 7(3). After engaging in a meticulous examination of the factors under s. 8, he concluded that the just and equitable division of the property would be to divide Harry's property by giving 20% to Mary and 80% to Harry and dividing Mary's property by giving 20% to Harry and 80% to Mary. In his reasons, the trial judge talked about the responsibility of the wife for the breakdown of the marriage.

Issue and holding:

* Did the trial judge err in the determination of what was just and equitable? **NO**

Analysis:

* In the case of s. 7(4) property, the court distributes the property equally unless the evidence is sufficiently persuasive to make it appear to the court that an equal division would not be just and equitable.
  + In contrast, with s. 7(3) property, there is no prescribed starting point or presumption of equality between the spouses; the distribution is governed solely by what is just and equitable.
* Appellate courts should not interfere with a trial judge's decision unless they are persuaded that her reasons disclose material error, which would include: a significant misapprehension of the evidence, an error in principle, or the outcome being clearly wrong.
  + Absent material error, appellate courts do not have an independent discretion to decide afresh the question of property division.
  + The mere omission of specific mention of every piece of evidence does not necessarily constitute an appealable error unless the judge failed to take cognizance of some evidence going to a material fact.

Rationale: (Laycroft JA)

* There was no material error in the division of the matrimonial property; there was, on the contrary, a careful review of all of the relevant factors leading to the final exercise of discretion.
  + Unlike in *Mazurenko*, the wife's role in the farming operation in this case was limited.
* The legislature has provided a very flexible regime dealing with the division of matrimonial property under s. 7(3); the court must not replace this approach of judicial discretion with the rigid rules which the legislature saw fit to reject.

Notes:

* Spousal misconduct is *only* relevant if it affects the amount of property to be divided (e.g., dissipation).
  + In this case, the Court of Appeal was not convinced that the comments from the trial judge assigning the wife responsibility for the breakdown of the marriage constituted an appealable error; Lori does not agree with this.

### *Jensen v Jensen*, 2009 ABCA 272

Facts:

* The parties married in 1991. The husband had been ranching with his father and brother since 1975. The parties separated in 2005 and the husband commenced a divorce action. This included a company known as Crowfoot Cattle Company Ltd ("CCC"), in which the parties were equal shareholders. This also included various parcels of land, some of which had been owned by the husband prior to marriage and some of which had been acquired by the parties during the marriage. One piece of land acquired during the marriage was the "Disputed Lands," which the spouses acquired jointly by a transfer of title from the husband's parents.

Procedural history:

* The trial judge excluded all of the Disputed Lands from division by finding that the husband's father did not intend to legally transfer the lands to the husband and wife. He concluded that lands were the subject of a resulting trust in favour of the husband's parents.
* Notwithstanding the presumption of equal division in s. 7(4), the trial judge divided some of the non-exempt property unequally in favour of the husband (see below). He concluded that the parties' relative contributions to the marriage and the assets acquired during it were not equal and, accordingly, it would be unfair to distribute them equally.

Issues and holding:

* Did the trial judge err in ordering an unequal division of s. 7(4) property? **YES**
* Did the trial judge err in finding a resulting trust in favour of the husband's parents with respect to the Disputed Lands? **YES**

Analysis:

* The division of matrimonial property is an exercise of discretion warranting appellate intervention only if the trial judge misdirected himself on the facts or if the decision is so clearly wrong as to amount to an injustice.
* Section 7 of the *MPA* sets out a scheme for distributing property between partners; it is meant to protect against inequities arising from dissolution of marriage and to recognize a social and economic partnership.
  + Section 7(2) property, including property acquired by a spouse before marriage, is classified as exempt from distribution.
  + Under s. 7(3), any increase in the value of exempt property during the course of the marriage may be distributed in a manner that the court considers just and equitable.
    - Section 8 sets out the factors to be taken into consideration in making such a distribution; there is no formula for applying these s. 8 factors.
  + Section 7(4) deals with the distribution of non-exempt matrimonial property, setting forth a presumption of equal distribution.
    - Only where, after considering the factors in s. 8, the court concludes it would be unjust to divide the property equally, may an unequal distribution of non-exempt property be made.
      * i.e., equal distribution is the rule, unequal distribution is the exception.
    - The presumption of equal division should not be disturbed lightly; courts should be "loath" to.
      * 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.
      * e.g., in *LeBlanc v LeBlanc*, La Forest J said that where the property has been acquired almost wholly through the efforts of one spouse and there has been no, or a negligible contribution to childcare, household management, or financial provision by the other, then, the court may order an unequal distribution.
    - It is not a requirement that the contributions of each party be equal for there to be an equal division of property.
      * Rarely if ever will the contribution of each spouse be the same; partners allocate responsibilities in a manner satisfactory to them, and that may change over time.
      * The legislation avoids microscopic analysis of the respective roles each party played to determine who did more.
* A resulting trust arises when property is in one party's name, but that party is under an obligation to return it to the original title owner.
  + There is a presumption of resulting trust where there has been a gratuitous transfer, because equity presumes bargains and not gifts; the presumption can be rebutted by evidence that a gift was intended.

Rationale: (The Court)

* He overlooked the presumption of equal distribution of s. 7(4) property and instead focussed solely on what he considered just and equitable.
  + Had the trial judge properly approached the task with a view to the presumption of equality for non-exempt assets, he would not have reached the same conclusion, as the record does not support a conclusion of exceptional circumstances sufficient to rebut the presumption of equality.
* The trial judge erred in excluding all of the Disputed Lands from division for two reasons:
  + The husband's pleadings did not make any claim in relation to a resulting trust, and at no time were the husband's parents parties to the litigation.
  + In the alternative, the transfer of the Disputed Lands was not gratuitous; therefore, it did not give rise to a resulting trust. (*reasons omitted)*

Notes:

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## Types of Divisible Property

* Property divided under the *Family Property Act* includes:
  + Real property (family homes, cabins, farms, rental properties, etc.)
    - Real property can be appraised by certified appraisers, who will produce a detailed report giving you the value of the home good for 45 to 60 days or so.
    - Be cautious about using property tax assessments to determine the value of real property, because they can be very inaccurate.
    - When dealing with real property, always pull title to see whose name it is in and what is registered against it (e.g., mortgage, judgments against one of the parties, etc.).
      * e.g., spouses get an appraisal and agree that their house is worth $500,000, but there is a $300,000 mortgage registered against it. In that case, all there is to split is $200,000.
    - Spouses will sometimes to deduct from the value of the home an amount to cover real estate commission and legal fees.
      * Lori never agrees to this, because the spouse may never sell it, and if they do, they may not use a real estate agent.
    - If a party wants to keep the family home, they must be able to either assume the mortgage or qualify for another mortgage to pay off the existing one.
    - Increases in equity in land other than principal residences are subject to capital gains tax.
  + Timeshares
    - A timeshare involves the purchase of a right to stay in a residence for a certain number of weeks per year; they are virtually impossible to sell.
    - If the parties have a timeshare, and one party wants to keep it, they are going to have to come to some sort of agreement on what it is worth.
  + Household items (furniture, electronics, collections, etc.)
    - There is very little value in fighting over household items; thus, in most cases, they come to some sort of agreement about who will keep what stuff.
      * If parties cannot agree about how to divide household items, parties may agree to hire someone to help decide who gets what.
    - When dealing with more expensive possessions, such as expensive collections, antique furniture, etc., the parties may have to get them appraised.
  + Motor vehicles, recreational vehicles (e.g. quads, boats, skidoos), campers, trailers, etc.
    - These items could be valued by a person who specializes in doing so or on a website.
    - Leased vehicles are not subject to division because neither party owns them.
  + Bank accounts
    - Bank accounts are assessed as of the date of trial, but if one party had an account worth $75,000 post-separation, and it is only worth $30,000 at the date of trial, the other party may want to know what happened to the other $45,000.
  + RRSPs
    - There are two ways to divide an RRSP:
      * You put the full amount of the RRSP on their side of the property statement (and deduct tax); allows the RRSP-owning spouse to keep their money in their RRSP.
      * You can equalize the parties' RRSPs by one spouse rolling money over to the other; in this case, they do not go on the property statement.
        + e.g., if one party has $100,000 in their RRSPs and the other has $60,000, the one with $100,000 can roll over $20,000 to the other to equalize them.
  + Corporate interests
    - If one party started a company during the marriage, it is property to be divided.
    - Normally, one or both of the parties will have to hire someone to do a business evaluation to determine the after-tax value of the business.
  + Cash value of life insurance policies
  + Stocks, bonds, stock options
    - A stock option is a promise to be able to obtain stock in the future.
    - When someone decides to exercise an option, they receive the difference between the option price and the sale price as a taxable benefit that is added to their income in the year the option is exercised (*Gardiner*).
  + Trust interests
  + Pensions
    - Pensions used to be distributed by 'if and when' orders; i.e., the order would state that the non-pension spouse was entitled to a certain amount of a pension, the order was registered with the administrator of the pension, and then when the pension spouse retired and started receiving their pension, the non-pension spouse got a cheque.
    - Now, we distribute pensions by ordering that the non-pension spouse's share of the pension be transferred into a Locked-In Retirement Account (LIRA); the non-pension spouse then cannot access that money until retirement or until they reach some specified age.
      * The share of the non-pension spouse is determined using the *McCallister* formula:
        + 
      * e.g., a owning spouse has a pension worth $800,000. They have 20 years of service with their employer and has been married for 15 years. In this case, the divisible portion of the pension is $600,000. This is s. 7(4) property split 50/50.
  + Mutual funds, TFSAs, non-registered investments, Canada Savings Bonds (subject to tax).
  + Intellectual property
  + WCB benefits
    - In *Hughes v Hughes*, 1998 ABCA 409, the husband got WBC benefits which he spent on the family ranch. He argued that it was exempt s. 7(2) property akin to damages in tort. The court held that WCB benefits are *not* exempt tort damages, but are based in statute.
* RESPs do not go onto property statements because, once the kids get to be university-age, the money goes to them; it is no longer in control of the parties.

### *DBC v RMW*, 2004 ABQB 954

Facts:

* The husband owns about 39% of the common shares of Northern Cross (Yukon) Limited, while the wife holds 1%. The parties agree that the wife has an interest in 1/2 of their combined shares (20%). The two Directors of the company are the husband and his longtime friend. Northern Cross owned a large locked-in gas field in the Yukon which had the potential to be extremely valuable. The parties agree that there is a real likelihood that a pipeline will be constructed in the next decade, in which case they will enjoy vast wealth. Thus, the parties agreed that the shares in Northern Cross must be held long-term to realize their potential. The wife argued that the husband should transfer a legal interest in 19% of the shares to her. The husband proposed that he should hold 19% in trust, with the wife as the beneficiary.
* Post-separation, the husband started working for a company called Cannaccord. His employment contract gave him stock options in the company. When he exercised his option, this yielded a return of up to $1.2 million (provided the stocks hold their present value). The wife wanted 30% of the estimated value of the shares' after-tax value because, without the love and support she provided during their marriage, the husband would not have been able to form or maintain the business relationships that led to his new position and stock option opportunities.

Issues and holding:

1. Should the parties' difference in equity be accounted for via a cash payment or an *in specie* division? ***In specie* division**
2. Should the wife's interest in the shares be a legal or a beneficial one? **Beneficial**
3. Does the husband need to exercise his vote associated with the wife's shares in consultation with her? **NO**
4. Is the wife entitled to a share of the estimated value of the Cannaccord shares? **NO**

Rationale: (Topolniski J)

1. While a clean break via a cash payment would be preferrable in this case, the parties agree that it is not possible because their interest in Northern Cross cannot realistically be valued given the speculative nature of the company’s investment in the gas field.
2. While the court has the power to declare that the wife has a proprietary interest in the shares, the court is not in a position to do so; therefore, the husband will hold the wife's shares in trust for her.
   * Most importantly, Northern Cross's Articles and Bylaws clearly prohibit the transfer of shares without the approval of the Board of Directors, and the court cannot override this restriction.
     + Since the two Directors of the company are the husband and his best friend, approval of the transfer would likely not be forthcoming.
   * The wife's past actions reveal that, if she was given a legal interest in the shares, she should create unwarranted mischief (even though she would be a minority shareholder).
3. To minimize the risks potentially inherent in an *in specie* division, the husband may exercise the vote associated with the shares he holds in trust for the wife without need for consultation with her, but must do so in what a reasonable person would consider to be in her best interests.
4. The Cannaccord shares were acquired by the husband through his effort alone, with a generous offer from his parents to mortgage their home to raise capital to lend to him (which only he is liable on).
   * The wife expended no effort in his obtaining either the job or the loan; she is not exposed to any personal liability on the loan, nor does she offer to take any risk that the value of the shares will drop before the stock can be sold.
   * I reject the wife's contention that she was instrumental in this investment opportunity because of her love and support of the husband during their marriage; no evidence was led to establish this.
   * The fact of the parties' interconnectedness alone is insufficient reason for distributing this asset.
     + Had this investment failed, the wife would likely have expressed a very different view about her perceived role in what would then be the husband's ill fortune.
   * The wife will indirectly benefit from the husband's investment by upward adjustments to support obligations when this asset is converted to income.

Notes:

* An important consideration in this case was that there was a unanimous shareholders agreement that placed restrictions on the transfer of shares.

### *Gardiner v Gardiner* (1996), 191 AR 139 (QB)

Facts:

* The parties were married for 28 years. For the majority of that time, the husband had been employed by one employer and had reached a senior executive position, which provided him with several benefits in addition to his salary:
  + Each year, he received stock options, half of which were exercisable two years after allocation and the remainder three years after allocation. At the time of trial the husband had options for a total of 56,458 shares. During or immediately after trial, he exercised the options that were exercisable and he received $155,482 as a result. There are 29,225 options left which are not yet exercisable.
  + He also received bonuses in addition to his salary. He received bonuses in 1995 and 1996. They were not guaranteed, and were determined annually, tied to company performance.
  + He also received an allocation of share equivalents (SEs) based on position, responsibilities, potential, and other factors. They were credited at the end of each performance period, and only if a certain threshold of financial results was reached. They are paid only on termination of employment.

Issues and holding:

1. Are the stock options issued to the husband matrimonial property subject to distribution? **YES**
2. If yes, how should the stock options be distributed between the parties? *(see below)*
3. Are the bonuses received by the husband in 1995 and 1996 matrimonial property subject to distribution? **NO**
4. Are the SEs matrimonial property subject to distribution? **YES**
5. If yes, how should they be distributed between the parties? *(see below)*

Rationale: (Kenny J)

1. Income often creates assets which are classified as property; the stock options (exercisable or not) are no different than arrangements where an employer contributes part of the employee’s compensation to an employment savings plan (which are no doubt property).
2. The options that have been exercised will be included in the final distribution of assets; the husband will hold 1/2 of the options that have yet to be exercised (14,627.5) in trust for the wife.
   * The husband will have sole discretion as to when the options are exercised and shall exercise the options in the best interests of both parties.
     + When the options are exercised, the wife shall receive 1/2 of the net after-tax proceeds.
   * This ensures that the wife is subject to the same ups and downs in the share price as the husband (as compared to a situation where the wife acquires the present value of the options).
3. The bonuses paid to the husband are earnings which vary with the performance of the company and over which he has no control and no legally enforceable right; therefore, they are not property subject to division.
   * *Note*: Lori says that cash bonuses are most often considered income, not property.
4. The SEs are credited to him, and they provide him with a right upon termination to receive them.
5. The value of the SEs cannot be calculated at this time and, therefore, the appropriate way to value this property is on an 'if and when' basis.
   * When Mr. Gardiner receives the 7,010.681 shares upon termination of his employment, he shall pay 1/2 of the after-tax income received to the wife.

Notes:

* Stock options, exercisable or not, are property available for distribution.
* Discretionary bonuses are not property available for distribution.

### *DGM v KMM*, 2002 ABQB 225

Facts:

* The parties married in 1988, separated in 1999, and divorced in 2000. The husband was employed by a purchasing company for an annual salary of $250,000 plus a possible bonus in 2004 if company performed well. In proceedings for division of property, the wife claimed that the bonus was divisible property.

Issue and holding:

* Is the husband's employment bonus matrimonial property? **NO**

Rationale: (Bielby J)

* The bonus was intended to motivate the husband to ensure the business's success and was thus dependent on the husband's efforts; payment in exchange for effort is characteristic of income.
* The husband has not received the bonus yet and no event had happened to effect the transformation of bonus from income into property (e.g., as when employment earnings are used to buy investments).

### *MacDonald v MacDonald*, 1997 ABCA 409

Facts:

* The parties separated after 11 years of marriage in 1988. They were divorced in Scotland in 1993 and the orders respecting divorce and matrimonial property were registered in Alberta in 1994. The husband's earnings consist of a salary, bonuses, and proceeds from the disposition of stock options. In July 1996, his employment was terminated and he received a severance of $199,500. In 1996, he had also disposed of shares acquired through the exercise of employee stock options for a net profit, and had received a bonus. The wife argued that (1) the bonus, (2) the benefits associated with the exercise and disposition of the employee stock options, and (3) the severance package should all be considered income for the purpose of calculating child support. The husband argued that they should all be considered property.

Issues and holding:

* Are the bonus, severance, and stock options income for the calculation of support? **NO**

Analysis:

* A matrimonial property action can, in certain instances, treat items that are considered income for support purposes as property for the purposes of division.
  + *Note*: i.e., the fact the payments were characterized as "income" for tax and support purposes does not mean that the payments could not also be characterized as "property" under the *MPA*.
  + Once earnings have been received, the value of it may be transformed into property if it is used to acquire assets; those assets then become property.
    - e.g., if a person earns a $20,000 bonus, he must include that in his tax return as income. If on receipt of this sum, he deposits it into his savings account and then seeks matrimonial property division, the court may look at that savings account as an asset and may direct that it is property subject to division.
* That said, earnings should not be considered both income for the calculation of support *and* property subject to division.
  + e.g., if a person earns a $20,000 bonus, and that bonus is subject to matrimonial property division, it should not be included in his income for the purposes of calculating child support because that item is no longer reflective of his ability to pay; it should not be counted twice.

Rationale: (The Court)

* Here, division of matrimonial property is not in issue; property has already been divided and the wife has already received a share.
* Therefore, the items at issue should be included as income, as they help determine his ability to pay support; indeed, bonuses, severance monies and taxable capital gains realized from the disposition of employee stock options are items which are considered income on a tax return.
  + While the bonuses are discretionary, they were historically part of the husband's compensation as an employee and are in the same category as if he were receiving them as regular salary.
  + The severance package is an acceleration of the income that would normally be earned by the respondent over the notice period.
    - These monies are intended to be an ongoing income stream as if the respondent would be working throughout this period.
  + The husband received stock options as part of his remuneration package in addition to his salary and bonuses; monies received from the disposition of such stock options should also be considered income.

Notes:

* The conclusions reached in this case run counter to those reached in *Gardiner* because, in this case, there was no property action initiated.
* Where an employer pays money into an RRSP (hence increasing an asset), there is a good argument that these earnings are assets and not income.

### *Sutton v Davidson*, 1999 ABCA 280

Facts:

* The parties were married in 1985. At the time, the husband was employed at the UofA. He was terminated in 1987 and received a severance package of about $167,000. The parties separated in 1995. The husband submitted that the severance payments were income and thus not distributable property.

Procedural history:

* The trial judge held that the portion of the husband's severance package representing wages that he would have earned during marriage was property subject to division.

Issue and holding:

* Did the trial judge err in subjecting the severance payments to division? **NO**

Analysis:

* In *Read v Read*, the court found that there are two components to a severance payment: (1) recognition for past services and (2) recognition for loss of future income.
  + The first component *is* distributable property (or at least that portion of it that reflects recognition for service during cohabitation).
  + The second component *is not* distributable as it had no tangible connection to the marriage.

Rationale:

* Income which is earned and saved (e.g., in a bank account) becomes property; thus, if it is earned and saved during the marriage, then it is property subject to distribution.
  + The trial judge did nothing more than apply that simple concept to the husband's termination payments.

Notes:

* It is often difficult, when looking at a severance package whether, to determine what amount exists to recognize past services and what amount exists to recognize loss of future income.

## Debts

* Debts accumulated during the relationship are generally divided equally.
  + Debts include credit card debt, mortgages, lines of credit, loans, CRA arrears, etc.
* If an asset is on one party's side of the property statement, any debt associated with that should be also.
* If a party alleges that a debt incurred by the other should not be split, it should not go onto their property statement.
* There is no general rule in the case law regarding whether partners should be given credit in matrimonial property division to account for them paying off the other's pre-marital debt; it's all very fact-specific.

### *Abbott v Abbott*, 2006 ABCA 204

Facts:

* The parties were married in 1975 and separated in 1998. Prior to the marriage, the husband entered into a partnership agreement with his mother in relation to his late father's farm property. The husband did not uphold his end of the bargain and his mother initiated an action to demand payment. The husband did not defend. He acknowledged a substantial debt and his mother obtained default judgment in the amount of $747,540. At trial, the wife argued that the matrimonial debt should not be apportioned to her, believing that the debt was designed to reduce her share of matrimonial property, and that there was no intention on the part of her husband to repay it.

Procedural history:

* The trial judge ultimately held that the total debt to be apportioned was $210,926.

Issue and holding:

* Did the trial judge err in apportioning the matrimonial debt? **NO**

Analysis:

* To the extent that debt acquired during the marriage relates to s. 7(4) property, acquired during the marriage, the presumption is a 50/50 division of the net equity of the property.
  + The apportionment of non-exempt s. 7(2) property contains no such presumptions, and is a matter of judicial discretion, factoring in those items outlined in s. 8.
* An appellate court can only interfere with a trial judge’s exercise of discretion regarding property division if the judge misdirected himself on the facts, or if the decision is so clearly wrong as to amount to an injustice.

Rationale: (Paperny JA)

* The trial judge agreed with the wife that the lion’s share of the debt alleged was not a legal obligation which she should be expected to shoulder, and that $200,000 fairly represented a legitimate debt incurred during the marriage which should be divided between the parties.
  + In doing so, it does not appear that the judge misdirected himself on the facts or made a decision so clearly wrong as to amount to an injustice.

### *Busenius v Busenius*, 2006 ABQB 162

Facts:

* The parties married in 1988 and separated in 2000. Post-separation, the husband borrowed money from his brother, Bryan, from time to time. He claimed to owe his brother $17,594.

Issue and holding:

* Should the husband's post-separation debt to Bryan be treated as matrimonial debt? **NO**

Analysis:

* The *MPA* speaks in terms of assets in ss. 7 and 8; there is no mention of debt.
  + However, there is no doubt that matrimonial property actions focus not just upon assets but also upon debts incurred in relation to those assets.
  + It is usual for a matrimonial property award to account for any debt that the parties expressly or implicitly agreed to incur while married.
  + Courts make matrimonial property orders that encompass debts incurred after separation where appropriate.
    - *Where post-separation debt does not create an asset and is not justified as a consequence of the marriage or its breakdown, then it is just and equitable to divide the debt unequally*.

Rationale: (Clackson J)

* The husband must bear the entire responsibility for the debt to Bryan.
  + The debt was incurred after separation and benefited only the husband.
  + The debt is not related to the marriage or its breakdown; no explanation was offered as to why the husband, whose income outstrips his total expenses, needs to borrow money to pay his living expenses.
  + There is no asset which accrued to this couple as a result of incurring the debt.

Notes:

* When determining how to divide a debt post-separation, the court should ask: What was the purpose for the debt? Who did it benefit?

## Co-Ownership of Real Property

### Occupation Rent

#### *Kazmierczak v Kazmierczak*, 2001 ABQB 610

Facts:

* The parties married in 1982 and separated in 1988. At that time, the wife moved out of the matrimonial home in Vegreville. The husband remained there with their two kids until 1999, when he accepted new employment responsibilities and moved to Edmonton. The house in Vegreville remained vacant since then. The wife claims occupation rent for the period that she was not in possession.

Analysis:

* In some circumstances, the courts recognize a right to occupation rent in favour of a joint tenant who is out of possession.
* No occupation rent is normally payable simply because one owner has enjoyed exclusive possession; however, where the party in possession makes a claim for reimbursement for the payment of current expenses, a counterclaim for occupation rent may be entertained (though it remains discretionary).
  + The spouse who is not in possession generally should not be entitled to occupation rent if the other spouse is occupying the premises with the children of the marriage, and is not making a claim for support or a contribution towards the expenses of the house.
  + Where the spouse in possession does make a claim for contribution towards the expenses of the house, that claim, the cross-claim for occupation rent, and any claim for spousal or child support should be considered together.
    - The occupation rent could be a potential expense item in one party’s budget, and a revenue item in the other party’s budget.
    - In many cases, it would be simpler just to eliminate the claim for occupation rent from the equation, and deal with child support and spousal support at large.
  + The spouse in occupation will generally not be entitled in matrimonial property proceedings for any credit for the mortgage payments and taxes paid by him or her; those payments should be a part of the support equation.
    - The only possible exception is with respect to the portion of the mortgage payment that actually goes to reduce principal, as notionally 1/2 of that payment is made on behalf of the non-occupying spouse.
    - However, if the party in occupation has not adequately maintained the property, and has essentially eroded its capital value, a set-off for the excessive wear and tear might be called for.
  + In cases where the family can no longer afford to maintain the previous matrimonial home, and one spouse insists in staying in it and is prepared to make the necessary financial sacrifices, then fairness may require that occupation rent be included in the overall equation.

Rationale: (Slatter J)

* It is inappropriate for the wife to make a claim for occupation rent during the time that it was occupied by her children; that is, up until 1999.
  + No claim has been made for the expenses of the house.
  + The notional occupational rent that she has given up should be regarded as her proper contribution to the support of the children, and should not be raised in isolation from the support issues.
  + During the period after 1999, when the husband and the children moved out, neither party was in occupation, and so no occupation rent is appropriate.

Notes:

* In matrimonial property actions, occupation rent can be added to or subtracted from the equalization payments as needed.
* There are a couple of ways to value occupation rent.
  + 1/2 of what the couple would have received if they rented out the matrimonial home.
  + 1/2 of what the non-occupying spouse is paying for rent at their own residence.

### Partition and Sale

* Where parties have a home and one party is refusing to list it for sale, cannot afford to buy out the other spouse, and there is not enough value in the other matrimonial property to offset the value of the home, the other spouse can bring an application to list the home for sale.

### Dower Rights

* Under the *Dower Act*, where a married couple has resided in a house during their marriage, neither spouse may sell or mortgage that property without the other's written consent or an order dispensing with consent.

## Agreements

### Entering Into Agreements

* Property owned or acquired by spouses or AIPs is not subject to division if they have entered into a subsisting written agreement that provides for the status, ownership, and division of that property [s. 37(1)].
  + An agreement entered before marriage is unenforceable after the marriage unless it is clear in the agreement that the parties intended the agreement to apply after the marriage [s. 37(2)].
  + An agreement may provide for the distribution of property between the spouses or AIPs at any time, including, but not limited to, the time of their separation, the time at which they become former AIPs or the dissolution of their marriage [s. 37(3)(a)].
  + An agreement may apply to property owned by both parties to the agreement and by each of them at or after the time the agreement is made [s. 37(3)(b)].
    - e.g., "any property acquired after the date of this agreement belongs to the party so acquiring."
* An agreement is only enforceable if each party has acknowledged, in writing, apart from the other party, that the party is [s. 38(1)]:
  1. Aware of the nature and the effect of the agreement,
  2. Aware of the possible rights under this Act and that the party intends to give up these claims to the extent necessary to give effect to the agreement, and
  3. Executing the agreement freely and voluntarily without compulsion.
  + This acknowledgement must 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 [s. 38(2)].
    - While it is not technically a requirement of the Act, each party should get a Certificate of Independent Legal Advice (CILA) to minimize the chance of the agreement being upset.

### Setting Aside Agreements

* It is possible to set aside an agreement for one of the following reasons:
  + It does not meet the formalities listed under s. 38 (e.g., the parties signed an acknowledgement in the presence of the same lawyer).
  + There is a lack of financial disclosure; before you can waive entitlement to property, you have to know what property there is.
  + One party misapprehended the nature and effect of the agreement.
    - The party has to have pretty good evidence of this; they cannot set aside an agreement just because they come to regret it at some point.
    - Where a party has a CILA, the court is not likely to set aside an agreement for this reason.
  + Duress; i.e., the threat of death or serious physical injury or the application of illegitimate pressure done with the intent to coerce someone to enter an agreement.
    - There has to be real duress; e.g., a party cannot claim duress because, at time of signing, they were stressed out and wanted to get it over with.
  + Undue influence; i.e., one party was able to dominate the will of the other (i.e., to exercise a persuasive influence over them), whether through manipulation, coercion, or outright but subtle abuse of power.
    - If the party claiming undue influence obtained a CILA, it is especially difficult to set aside the agreement.
  + Unconscionability; i.e., one party preyed upon or took advantage of a vulnerability of weaker party to obtain an agreement that is skewed heavily in their favour.

#### *Rick v Brandsema*, 2009 SCC 10

Facts:

* The parties married in 1973, separated in 2000, and divorced in 2002. Over the course of the marriage, they acquired land and established a dairy farm, Brandy Farms Ltd, of which they were equal shareholders. They also acquired vehicles, RRSPs, and real property. Intending to divide their assets equally, the parties negotiated a separation agreement in 2001. In 2003, the wife sought to set aside the separation agreement on the grounds of unconscionability and misrepresentation.

Procedural history:

* The trial judge found that the agreement was unconscionable because the husband had exploited the wife’s mental instability during negotiations and had deliberately concealed or under‑valued assets. This resulted in the wife receiving significantly less than her entitlement under the Act, despite the fact that it was the parties’ express intention to divide their assets equally. The judge thus ordered the husband to pay the wife an amount representing the difference between the negotiated "equalization payment" and the wife's entitlement under BC's *Family Relations Act*.

Issue and holding:

* Is there reason to disturb the trial judge’s conclusion that the separation agreement was unconscionable? **NO**

Analysis:

* Parties are generally free to decide for themselves how to distribute their assets from a former relationship; but, given the emotional environment that follows the disintegration of a marriage, special care must be taken to ensure that assets are distributed through a process that is free from informational and psychological exploitation.
  + A separation agreement need not be enforced where (1) there were any circumstances of oppression, pressure, or other vulnerabilities and (2) one party’s exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that deviated substantially from the legislation.
  + Decisions about what constitutes an acceptable settlement can only authoritatively be made if separating spouses provide full and honest disclosure of all relevant financial information; where an agreement is based on misinformation, it is not entitled to judicial deference.
    - Whether a court will intervene depends on the circumstances of each case, including the extent of the defective disclosure, the degree to which it was deliberately generated, and the extent to which the resulting negotiated terms are at variance from the goals of the relevant legislation.
      * The more an agreement complies with the statutory objectives, the less the risk that it will be interfered with.

Rationale: (Abella J)

* The combination in this case, therefore, of misleading informational deficits and psychologically exploitative conduct, led the trial judge to conclude that the resulting, significant deviation from the wife’s statutory entitlement rendered the agreement unconscionable and therefore unenforceable. This conclusion is amply supported by the evidence.

### Prenuptial/Cohabitation Agreements

* Prenuptial and cohabitation agreements typically lists all of the assets and debts of each party and specifies what each party's property rights will be after the marriage.
  + It can specify the parties' rights with respect to the property they are bringing into the relationship, and what happens with property acquired during the relationship.