A Very Brief Introduction to the *Family Law Act* for Justice System Workers and Advocates

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I. Introduction

A. Who does the new law apply to?

The *Family Relations Act* is the main law on family breakdown in British Columbia. Although there is also the federal *Divorce Act*, the *Divorce Act* only applies to married spouses. The *Family Relations Act* applies to everyone in a family relationship in British Columbia, including people who:

a) are married spouses;
b) are in unmarried "common-law" relationships;
c) are dating, or maybe didn't date at all, but have a child together;
d) want custody or guardianship of someone else's child; and,
e) want access to someone else's child.

The *Family Relations Act* has been the law in British Columbia since 1972, but on 18 March 2013 it will be cancelled and replaced by the new *Family Law Act*. The new law applies to the same people as the old law, and will also apply to people who:

f) are at risk of family violence;
g) are having a child through artificial reproduction; and,
h) want to manage a child's property.

The *Family Law Act* doesn't change the *Divorce Act*. After the new law comes into effect, the *Divorce Act* will still also apply to married spouses.

B. How will family law problems be resolved under the new law?

The *Family Law Act* will try to change how people solve family law problems. The new law will:

a) encourage people to find solutions outside of court;
b) promote negotiation, mediation, collaborative settlement processes and arbitration;
c) make financial disclosure mandatory, even outside of court;
d) make family law agreements more difficult to change; and,

e) promote the use of parenting coordinators, when there is a final agreement or order about the care of children.

When people have to go to court, however, the *Family Law Act* will give the court new ways to:

a) protect people who are at risk of family violence;
b) enforce court orders and agreements; and,
c) manage court processes and manage the behaviour of people in court.

C. What does the new law cover?

The *Family Law Act* talks about all of the things covered by the *Family Relations Act* as well as a lot of new things. The new law will deal with:

a) family violence and protecting adults and children from violence;
b) determining who is a child's parent;
c) having children through artificial reproduction;
d) who is the guardian of a child, and how guardians are appointed and removed;
e) how guardians share responsibility for the care of children;
f) the time someone has with a child who isn't the child's guardian;
g) what happens when a guardian wants to move, including with a child;
h) enforcing time with a child provided under an order or an agreement;
i) paying child support and how child support is calculated;
j) paying spousal support;
k) preserving property so that it can be divided;
l) dividing property and dividing responsibility for debt; and,
m) managing children's property.

D. The new law online and other resources

The new law makes a lot of changes and it's going to take justice system workers, advocates, lawyers and judges a while to get used to the new way of doing things. In the meantime, don't assume that anything in the new law is like it was in the old law. If you have to assume anything, assume that the new law is different.

In the meantime, until the new law comes into force, you can get a copy from the Legislature's website at:

www.leg.bc.ca/39th4th/3rd_read/gov16-3.htm

When the new law comes into force, you'll be able to find it on the website of the Queen's Printer at:

www.bclaws.ca

Right now all that's on the Queen's Printer website are the few parts of the new law that are currently in effect. The provincial government has published a lot of information about the *Family Law Act*, including a section-by-section explanation of all of the changes, at:

www.ag.gov.bc.ca/legislation/family-law/index.htm

More information is available on my blog at:

bcfamilylawresource.blogspot.ca/

Click on the "Family Law Act " label or read the "Family Law Act Information & Resources" page. The Legal Services Society has published a booklet on the new act that is available in print or online at:

resources.lss.bc.ca/pdfs/pubs/Guide-to-the-New-BC-Family-Law-Act-eng.pdf

This booklet is written in plain language and will be helpful for people involved in a family law problem as well as justice system workers.

II. The Law About Children

A. How are decisions about children made?

The new law says that parents, judges and other decision-makers must make decisions about children considering only the children's best interests and nothing else.

1. Determining the best interests of children

To decide what is in a child's best interest, parents and judges must consider all of the needs and circumstances of the child, as well as number of factors that are listed at section 37. These factors include:

a) the child's health and emotional well-being;
b) the views of the child, unless it wouldn't be appropriate to consider them;
c) the history of the child's care and the child's need for stability;
d) the child's relationships with other important people;
e) any court actions that are relevant to the child's safety and well-being; and,
f) the impact of any family violence.

2. The best interests of children and family violence

When family violence is an issue, parents and judges must consider an additional list of factors, set out at section 38, to help assess the impact of the family violence on the child and on a person's capacity to care for the child.

The new law also says that an agreement or order is presumed not to be in the best interests of a child unless it protects the child's safety and well-being to the greatest extent possible.

3. How are children's views heard?

Under section 211 of the new law, the court can order that a family justice counsellor, a social worker or another person, like a clinical counsellor or a psychologist, assess:

a) the needs of a child;
b) the views of a child; and,
c) the ability of a person to meet the child's needs.

These assessments replace reports made under section 15 of the *Family Relations Act*.

➔ *Note that views of the child reports can be ordered under section 37(2)(b) of the new law. These reports usually just describe the child's views without making an assessment or recommendations.*

B. Who is a parent?

Under the *Family Law Act*, a child's parents are the child's birth mother and biological father. If the court is not sure who the child's father is, the court can order medical tests to determine who the father is.

When people have a child through artificial reproduction, a person who donates eggs or sperm is not presumed to be a parent. However, a woman who is a surrogate mother is presumed to be a parent.

The new law lets people make agreements when they have a child through artificial reproduction. These agreements can say who is a parent and who isn't. They can say that a donor of eggs or sperm is a parent, or that a surrogate mother isn't a parent.

➔ *Under the new law, a child can have more than two parents. The courts will have to figure out how child support will work in situations like this.*

C. Guardianship

The new law describes the people who are responsible for caring for a child as "guardians." A child can have one guardian, two guardians or more than two guardians.

D. Who is a guardian?

Most of the time, a child's parents will be the child's guardians, as long as the parents have lived with the child. A parent who never lived with a child isn't a guardian unless:

a) the court makes an order that the parent is a guardian;
b) the parent and the child's other guardians make an agreement that the parent is a guardian;
c) the parent "regularly cares" for the child; or,
d) the parent is a parent because of an artificial reproduction agreement.

➔ *The courts will have to figure out what "regularly cares" for a child means.*

The court can make an order that someone who isn't a parent is the guardian of a child. The court can also make an order that someone who is a guardian is no longer a guardian. Both the Provincial Court and the Supreme Court can make orders about guardianship.

The new partner or spouse of a guardian doesn't become a guardian just because of his or her relationship with the child's guardian.

E. Parental responsibilities

The different ways that guardians care for a child and the decisions guardians have to make are called "parental responsibilities." Parental responsibilities are listed at section 41 of the new law and include:

a) making decisions about the day to day care of the child;
b) deciding where the child will live;
c) making decisions about the child's schooling and extracurricular activities;
d) making decisions about the child's health care; and,
e) deciding how the child will be raised, including making decisions about things like religion, language and culture.

When a child has more than one guardian, the guardians must usually make these decisions together. The guardians can agree or the court can order that only one

guardian should have a particular parental responsibility. Both the Provincial Court and the Supreme Court can make orders about parental responsibilities.

If the child's guardians can't agree on a particular decision, they can go and see a family justice counsellor, a mental health professional or a mediator to help them make the decision, or they can go to court.

➔ *Remember that only guardians have parental responsibilities and the right to make decisions for a child.*

F. What happens if a guardian can't exercise parental responsibilities?

If a guardian is temporarily unable to exercise parental responsibilities, the guardian can authorize someone else to manage certain responsibilities. This person doesn't become a guardian but can:

a) make decisions about the day to day care of the child;
b) make decisions about the child's schooling and extracurricular activities;
c) make decisions about the child's health care; and,
d) give or withhold permission on behalf of a child, like about going on a school field trip or having a medical treatment.

This will be useful when a guardian is going to be sick or will be out of town for a period of time and someone else needs to care for the child, or if a child from outside British Columbia will be going to school here and an adult is needed to care for the child.

G. What happens if a guardian has a terminal illness or dies?

Under the new law, a guardian can appoint someone to take over and act as the child's guardian if:

a) the guardian has a terminal illness;
b) the guardian is going to permanently unable to care for the child because of a mental illness; or
c) the guardian dies.

The new person takes over as guardian when the first guardian dies or becomes unable to exercise parental responsibilities.

A parent who is not a guardian does not automatically become the child's guardian when a guardian dies. If that parent wants to become the child's guardian, he or she will have to get a court order.

H. Parenting time and contact

The time a guardian has with a child is called "parenting time." During a guardian's parenting time, the guardian is responsible for the care of the child and has the right to make day to day decisions for the child.

The time that someone who isn't a guardian has with a child is called "contact." Parents who aren't guardians, other relatives of a child and people who aren't a child's relative can have contact with the child.

Agreements about parenting time and contact can be made by the child's guardians. The court can make orders about parenting time and contact. Both the Provincial Court and the Supreme Court can make orders about parenting time and contact.

A guardian's parenting time and a person's contact with a child can be on conditions, like that the parenting time or contact must be supervised.

➔ *Remember that only guardians have parenting time. Everyone else has contact with a child.*

I. How are parenting time and contact enforced?

The new law gives the court the power to enforce parenting time and contact when:

a) parenting time or contact has been "wrongfully withheld" from a person entitled to parenting time or contact; or,
b) a person with parenting time or contact fails to use his or her parenting time or contact.

In certain situations, it isn't "wrongful" to withhold a child from a person entitled to parenting time or contact. Under section 62, it isn't wrongful to withhold a child if:

a) the guardian with the child believes there is a risk of family violence, or that the other person is impaired by alcohol or drugs;
b) the child is sick, and the guardian with the child has a doctor's note;
c) the other person has frequently failed to use his or her parenting time or contact in the past; or,
d) the other person told the guardian ahead of time that the parenting time or contact wasn't going to be used.

The court can make orders a number of orders to enforce parenting time and contact, including requiring:

a) make-up time, when parenting time or contact was wrongfully withheld;

b) a person or a child to attending counselling;
c) the parties to try to resolve their dispute outside of court;
d) payment of a party's expenses; or,
e) payment of up to $5,000 to a person or as a fine.

Applications about the wrongful withholding of parenting time or contact must be brought within a year of when the parenting time or contact was withheld.

J. What happens if a guardian wants to move?

If a guardian wants to move and the move will have an impact on a child's relationship with another guardian or someone who has contact with the child, the guardian must usually give 60 days' notice of the move, in writing. The notice must say where the guardian plans on moving to and when the guardian plans on moving.

Only other guardians can object when a guardian plans on moving. If a guardian objects, he or she has 30 days to go to court to get an order preventing the move.

➔ *Remember that only a guardian can object to a proposed move.*

When a guardian objects, the guardian who wants to move must show the court that:

a) he or she wants to move in "good faith;" and,
b) he or she has proposed reasonable plans to preserve the child's relationship with the child's other guardians, people who have contact with the child and other people who have an important role in the child's life.

The guardian who objects to the move must show that the move is not in the best interests of the child or the move will be allowed.

When a guardian objects and the moving guardian and the objecting guardian share the child's time equally or almost equally, the guardian who wants to move must show the court that:

a) he or she wants to move in "good faith;"
b) he or she has proposed reasonable plans to preserve the child's relationship with the child's other guardians, people who have contact with the child and other people who have an important role in the child's life; and,
c) the move is in the child's best interests.

"Good faith" means that the guardian wants to move isn't planning on moving just to take the child away from another guardian, and that the move will likely improve the child's quality of life or the guardian's quality of life.

➔ *The courts will have to figure out what "reasonable plans" to preserve the child's relations with other people means, and what it means to say that a proposed move is or is not in a child's best interests.*

III. The Law About Child Support

A. Who is entitled to get child support?

Child support is usually paid to support children who are under the age of 19, or who are 19 or older but are unable to support themselves, including because they are going to college or university.

Under the *Family Law Act*, children who are younger than age 19 can stop being entitled to child support if:

a) they become a spouse; or,
b) they withdraw from the care of their parents or guardians, as long as they didn't withdraw because of family violence or because of poor living conditions.

Child support is usually paid to the person who the child mostly lives with. Child support can sometimes be paid directly to the child, usually if the child is 19 or older and living away from home and going to college or university.

B. Who is required to pay child support?

All of a child's parents and guardians are required to support the child. The person who pays child support is either a parent who is not a guardian or the guardian who the child lives with the least.

Stepparents can also be required to pay child support. A "stepparent" is the married or unmarried spouse of a parent, as long as:

a) the spouse has contributed to the child's costs for at least one year; and,
b) the claim for child support is made within one year of the spouse's last contribution to the child's costs.

➔ *Remember that under the Divorce Act, a "stepparent" is someone who is married to a parent and "stands in the place of a parent." This is a different legal test.*

The person who pays child support is called the "payor." The guardian who gets child support is called the "recipient."

➔ *The courts will have to figure out how child support works when a child has more than two parents.*

C. How is the amount of child support calculated?

Child support is determined by the Child Support Guidelines. Most of the time, child support is simple to figure out by looking up the amount payable in the Guidelines tables based on the payor's income and the number of children support is being paid for. Child support can get more complicated when:

a) a child is 19 or older;
b) the payor has an income of more than $150,000 per year;
c) one more children live mostly with each guardian, called "split custody;"
d) the guardians share the children's time equally or almost equally, called "shared custody;" or,
e) the payment of the tables amount would cause "undue hardship" to either the recipient or the payor.

The *Family Law Act* doesn't change how any of these problems are handled. What the new law does change is the calculation of child support for guardians who are not parents and for stepparents.

Under the new law, the child support obligations of guardians who are not parents come second to the obligations of parents. The child support obligations of stepparents come second to both parents and guardians, and the amount of support a stepparent should pay is based on:

a) the child's standard of living when he or she lived with the stepparent; and,
b) the length of time the child lived with the stepparent.

➔ *The courts will have to figure out how to calculate child support for stepparents. The Child Support Guidelines don't calculate child support in the way required by the new law.*

D. How is child support paid?

People can make agreements and the court can make orders about who should pay child support and about how much support should be paid. Both the Provincial Court and the Supreme Court can make orders about child support.

Most of the time, child support is paid every month, usually on the first day of the month. It is possible for child support to be paid in a single lump sum, but this is very rare. Payors can be required to pay by giving the recipient a series of post-dated cheques.

E. Are there tax consequences?

Child support is tax neutral. The payor does not get to deduct child support in his or her income tax return and the recipient doesn't have to pay income tax on the child support he or she receives.

F. What about if the payor dies?

If the payor has a life insurance policy, the parties can agree and the court can order that the payor keep the policy up to date and name a person, usually the recipient, as the beneficiary of the policy. This way, the child will still be supported if the payor dies.

The parties can agree and the court can order that the payor's obligation to pay child support will continue after the payor's death and be paid from his or her estate. Court orders about this can be made at the time the child support order is made or after the payor's death.

IV. The Law About Spousal Support

A. Who is entitled to ask for spousal support?

Only spouses can ask for spousal support. Under the new law, "spouse" includes people who:

a) are married to each other;
b) have lived together in a "marriage-like relationship" for at least two years; and,
c) have lived together in a marriage-like relationship for less than two years and have had a child together.

A spouse's entitlement to spousal support is determined based on factors taken from the *Divorce Act*, set out at section 161 of the new law.

➔ *Remember that no one is automatically entitled to get spousal support the way a child is automatically entitled to benefit from child support. Anyone who is a "spouse" can ask for spousal support, but being able to ask doesn't mean they'll get it. They must also show that they are entitled to spousal support.*

B. When do claims for spousal support have to be made?

Under the new law:

a) married spouses have to start a court action for spousal support within two years of the date of their divorce or the annulment of their marriage; and,
b) unmarried spouses have to start a court action for spousal support within two years of the date they separated.

➔ *Remember that there are no limits to when married spouses can ask for spousal support under the Divorce Act.*

The two-year countdown from the date of divorce or separation stops while the spouses are trying to resolve their dispute outside of court with the help of a family justice counsellor, a mediator, a lawyer or an arbitrator.

C. How are the amount and duration of spousal support calculated?

When a spouse is entitled to receive spousal support, the amount to be paid and the length of time support should be paid for, called "duration," is determined based on factors taken from the *Divorce Act*, set out at section 162 of the new law.

The amount of spousal support to be paid and the duration that it should be paid for is often determined using the Spousal Support Advisory Guidelines. The Advisory Guidelines is not a law like the Child Support Guidelines and is not mandatory. The *Family Law Act* does not mention the Advisory Guidelines.

➔ *Remember that the Advisory Guidelines wasn't mentioned in the Family Relations Act either. The Advisory Guidelines will continue to be used under the new law as it was under the old law.*

The spouse who pays spousal support is called the "payor." The spouse who gets spousal support is called the "recipient."

D. Is a spouse's conduct taken into account?

Under the *Divorce* Act, the court is not allowed to consider a spouse's behaviour when making an order about spousal support. The same thing is generally true under the *Family Law Act*, except that the new law allows the court to take into account misconduct that:

a) unreasonably prolongs a spouse's need for support; or,
b) unreasonably undermines a spouse's ability to pay support.

In other words, the court can look at whether a spouse is being unreasonable in not becoming financial self-sufficient and whether a spouse has reduced work hours, quit a job or refused to take a job in order to avoid paying support.

➔ *The courts will have to figure out how to address these types of misconduct when they are asked to make orders for spousal support.*

E. How is spousal support paid?

People can make agreements and the court can make orders about who should pay spousal support and about how much support should be paid. Both the Provincial Court and the Supreme Court can make orders about spousal support.

Most of the time, spousal support is paid every month, usually on the first day of the month. It is possible for spousal support to be paid in a single lump sum. Payors can be required to pay by giving the recipient a series of post-dated cheques.

F. Are there tax consequences?

There are tax consequences when spousal support is paid on a regular basis. Spousal support is tax neutral when it is paid as a single lump sum.

The recipient of regular payments of spousal support must declare the support received in his or her income tax return and pay tax on it, just as if the support payments were employment income. The payor can deduct the spousal support paid from his or her taxable income, like how RRSP contributions can be deducted from taxable income. This usually means that the recipient has to pay tax at the end of the year while the payor gets a tax refund.

➔ *Remember that taxes should be taken into account when figuring out spousal support. At a minimum, recipients should be reminded to put some money aside to pay their taxes.*

G. Reviews

It can sometimes be very difficult to figure out when spousal support should end. The person getting support usually wants support to continue for as long as possible. The person paying support wants support to end as soon as possible. It is hard to settle on an end date if, for example, it's not known when a spouse will finish job training, become self-sufficient or recover from an illness.

People often try to avoid this problem by agreeing that spousal support will be paid for now, but that will be reconsidered in the future, called a "review," after a certain amount of time has passed or when a certain event has happened.

The new law says that agreements and orders for spousal support can be reviewable. Agreements and orders for reviewable spousal support can specify:

a) what will trigger the review;
b) the dispute resolution process that will be used at the review; and,
c) the factors that will be considered at the review.

The new law says that a review can also be triggered when someone begins to receive a pension, even if the agreement or order for spousal support doesn't call for the review.

H. What about if the payor dies?

If the payor has a life insurance policy, the parties can agree and the court can order that the payor keep the policy up to date and name a person, usually the recipient, as the beneficiary of the policy. This way, the spouse will still be supported if the payor dies.

The parties can agree and the court can order that the payor's obligation to pay spousal support will continue after the payor's death and be paid from his or her estate. Court orders about this can be made at the time the spousal support order is made or after the payor's death.

➔ *Note that the rules about life insurance and support when the payor dies are the same for spousal support as they are for child support.*

V. The Law About Dividing Property and Debt

A. Who is entitled to ask to divide property and debt?

Only spouses can ask to divide property and debt. Under the new law, "spouse" includes people who:

a) are married to each other; and,
b) have lived together in a "marriage-like relationship" for at least two years.

➔ *Note that the people who are "spouses" for the division of property and debt are different than the people who are "spouses" for child support and spousal support.*

B. When do claims for the division of property and debt have to be made?

Under the new law:

a) married spouses have to start a court action to divide property and debt within two years of the date of their divorce or the annulment of their marriage; and,
b) unmarried spouses have to start a court action to divide property and debt within two years of the date they separated.

The two-year countdown from the date of divorce or separation stops while the spouses are trying to resolve their dispute outside of court with the help of a family justice counsellor, a mediator, a lawyer or an arbitrator.

C. Excluded property

"Excluded property" is the property each spouse has on the date they began to live together or got married, whichever was first.

➔ *The courts will have to figure out how to decide when a couple have started to live together. The date of cohabitation is much more important under the new law than it was under the old law.*

Excluded property includes certain property received by each spouse during the spouses' relationship, such as:

a) gifts and inheritances;
b) court awards for injury or loss, except for awards relating to both spouses or for lost income;
c) insurance payments, except for payments relating to both spouses or for lost income;
d) certain kinds of trust interests; and,
e) property bought with excluded property.

➔ *The courts will have to figure out how to deal with the problem of valuing property bought during the spouses' relationship with excluded property.*

D. Family property

"Family property" is the property either or both spouses got after the date they began to live together or got married, whichever was first. "Ordinary use for a family purpose," the test under the *Family Relations Act*, doesn't matter any more. Family property includes:

a) real estate;
b) bank accounts;
c) interests in companies and businesses;
d) debts owed to a spouse;
e) pensions and RRSPs; and,

f) other personal property.

Most importantly, the increase in value of excluded property over the course of the spouses' relationship is also family property.

➔ *Remember that excluded property includes property bought during the relationship with excluded property.*

E. Family debt

"Family debt" is all debt incurred by either spouse after the date the spouses began to live together or got married, whichever was first, up to the date of separation.

Family debt also includes debt incurred after the date of separation if the debt was incurred for to maintain family property, like repairing the family home or paying the mortgage.

F. How are property and debt divided?

Spouses can make agreements and the court can make orders about how property and debt should be divided. Only the Supreme Court can make orders about the division of property and debt.

➔ *Note that agreements and orders about debt made under the Family Law Act are only binding between spouses, and don't affect the rights of creditors or the steps they can take to collect on a date.*

1. Family property and family debt

Under the new law, spouses are presumed to:

a) each be entitled to one-half of family property, regardless of how they contributed to or used the property; and,
b) each be responsible for one-half of family debt.

When spouses separate, they each become one-half owners of all family property as tenants in common and one-half responsible for all family debt. Under the *Family Relations Act*, spouses didn't become owners of family assets as tenants in common until they made a separation agreement, got divorced or the court made a declaration under section 57. Now all it takes is separation.

➔ *The courts will have to figure out how to decide when a couple have separated. The date of separation is much more important under the new law than it was under the old law.*

The court can divide family property and family debt unequally if an equal division would be "significantly unfair." The court can take into account a number of reasons why an equal division could be significantly unfair including:

a) the length of the spouses' relationship;
b) a spouse's contribution to the other spouse's career;
c) whether the amount of family debt is more than the value of family property;
d) whether a spouse reduced the value of family property or got rid of family property to avoid sharing the property, or the full value of the property, with the other spouse; and,
e) any taxes owing from dividing the property.

➔ *The courts will have to figure out what "significantly unfair" means. The old law doesn't use this term.*

2. Excluded property

Each spouse's excluded property is presumed to remain his or her separate property and to not be shared with the other spouse.

The court can divide a spouse's excluded property if:

a) it can't divide family property or family debt that is located outside British Columbia; or,
b) it would be "significantly unfair" not to share the excluded property because of the length of the spouses' relationship or because of the contributions made by the spouse who doesn't own the property.

➔ *The courts will have to figure out what "significantly unfair" means.*

3. Value of property

The value of property is what a reasonable stranger would pay to buy the property in its current state. This is called the property's "fair market value."

The date property is valued is the date of the agreement or court hearing dividing the property.

G. How are pensions divided?

Spouses can make agreements and the court can make orders about how pensions and assets that are like pensions are divided. Only the Supreme Court can make orders about the division of pensions.

1. Equalizing RRSPs

RRSPs are family property. If RRSPs are divided, the *Income Tax Act* allows them to be equalized without any taxes being paid.

2. Workplace pensions

In general, the part of the pension accumulating between the date the spouses began living together or got married and the date of separation is family property and is divided equally between the spouses. This is true whether the pension is being paid out or not.

Agreements and orders about dividing pensions are carried out by the people who administer the pension plans, not by the spouse who owns the pension.

➔ *Note that the division of pensions can be very, very complicated. It is always best to refer people with problems about pensions to a lawyer.*

3. Canada Pension Plan credits

Spouses are entitled to equalize the CPP credits they each accumulated between the date they began living together or got married and the date of their separation or divorce.

Agreements and orders about the equalization of CPP credits are carried out by the people who administer the Canada Pension Plan in Ottawa.

H. Foreign property

Under the *Family Law Act*, the court can make orders about family property that is located outside of British Columbia, including about the:

a) safekeeping of the property;
b) right to use the property; and,
c) right to own the property.

The court can decide to divide property or family debt inside British Columbia to compensate for property outside of British Columbia, instead of trying to divide it.

➔ *Remember that the court can also divide excluded property between spouses if it can't divide property outside of British Columbia.*

I. Children's Property

Children sometimes get large amounts of money or property from inheritances, insurance policies or court awards. Under the new law, a child's guardians are not automatically the trustees of the child's property, except for property below a certain value or of a certain type that will be decided by regulation.

A guardian may apply to court to be appointed as trustee for the child's property. Only the Supreme Court can make orders about children's property.

VI. Family Violence and Protection Orders

A. What is family violence?

"Family violence" is defined in very broad terms in section 1 of the new law, and includes obvious things like physical abuse as well as:

a) sexual abuse;
b) attempts to physically or sexually abuse someone;
c) psychological and emotional abuse, including by harassing, stalking or intimidating someone, or by restricting their liberty; and,
d) in the case of children, being exposed to family violence.

Family violence does not include a person's use of force to protect him- or herself, or someone else, from family violence.

B. Duties of professionals

Family justice counsellors, mediators, lawyers, arbitrators and parenting coordinators are required to assess for family violence and the extent to which it affects someone's safety or ability to negotiate, and to discuss how different family dispute resolution processes may or may not be appropriate.

C. Determining children's best interests

To decide what is in a child's best interests, parents and judges must consider all of the needs and circumstances of the child and a number of factors that are listed at section 37 of the new law. The best interests factors include the impact of any family violence on the child.

When family violence is an issue, parents and judges must consider an additional list of factors to assess the impact of the family violence on the child and on a person's capacity to care for the child. The family violence factors are set out at section 38 and include:

a) the nature and severity of the family violence;
b) the recency and frequency of the family violence;
c) whether the family violence is situational or part of a pattern of controlling behaviour;
d) whether the family violence was directed to the child and the extent to which the child was exposed to the family violence; and,
e) the harm caused to the child's safety and well-being.

The new law also says that an agreement or order is presumed not to be in the best interests of a child unless it protects the child's safety and well-being to the greatest extent possible.

D. Protection orders

1. What are protection orders?

The court can make an order against one family member to protect another family member. Protection orders can include orders:

a) restricting contact and communications;
b) requiring a person to stay away from someone else's home, school, place of employment or place of business;
c) prohibiting stalking;
d) prohibiting a person from possessing weapons; and,
e) requiring the police to remove a person from the family home.

Protection orders remain in force for one year, unless the protection order says otherwise. Protection orders can be renewed.

2. Who can ask for a protection order?

A person at risk of family violence, or someone on that person's behalf, can ask the court for a protection order.

Applications for protection orders can be made without notice to anyone else, and may be made whether there is an existing family law court action or not.

3. What happens when a protection order conflicts with another order?

If a protection order conflicts with another order made under the *Family Law Act*, like an order for parenting time or contact with a child, the parts of the earlier order that are conflict with the protection order are suspended until either order is changed to remove the conflict or until the protection order expires.

This rule applies to orders that are like protection orders and are made under the *Criminal Code* or under the laws of another jurisdiction.

4. How are protection orders enforced?

Protection orders cannot be enforced under the *Family Law Act* or the provincial *Offence Act*. They can only be enforced under section 127 of the *Criminal Code*, which makes breach of a court order a criminal offence.

The new law directs police officers to take action to enforce a protection order, and to use reasonable force if necessary.

VII. Out of Court Processes

A. What are the alternatives to going to court?

Under the new law, processes that help people resolve family law problems outside of court are called "family dispute resolution" processes. Family dispute resolution processes include:

a) assistance from family justice counsellors;
b) mediation, collaborative processes and arbitration; and,
c) parenting coordination.

People can make an agreement that they will resolve a family law problem, or a family law problem that might arise in the future, using a family dispute resolution process.

B. How are family dispute resolution processes supported?

1. Duties of professionals

Family justice counsellors, mediators, lawyers and arbitrators are required to tell people about the different ways that family law disputes can be resolved outside of court.

Lawyers are also required to certify that they have told their client about family dispute resolutions processes when they start a court action.

2. Duties of parties making agreements

People who are trying to resolve family law problems outside of court are required to provide each other with "full and true information." Agreements about spousal support and the division of property and debt can be set aside for a number of reasons, including if:

a) a spouse did not make full disclosure of financial information; or,

b) a spouse took advantage of the other spouse's lack of knowledge or emotional upset.

However, when full disclosure is made, agreements about spousal support and the division of property and debt that were fairly negotiated are harder to set aside under the new law than they were under the old law.

3. Suspended time limits

Court actions about spousal support or the division of property and debt must normally be started within two years of the date of divorce, for married spouses, or within two years of the date of separation, for unmarried spouses. Under section 198 of the new law, the countdown for the two-year limit stops while the spouses are involved in a family dispute resolution process with a family justice counsellor, mediator, lawyer or arbitrator.

➔ *Remember to tell people that the time limit to start a court action for spousal support or for the division of property and debt is suspended while they are involved in a family dispute resolution process with a family dispute resolution professional.*

C. Mediation

Family justice counsellors, mediators and lawyers who have special additional training can help people resolve a family law dispute through mediation.

In mediation, the mediator helps people reach their own settlement. Although some mediators also give information about the law and may offer an opinion about a person's position, mediators do not make decisions for people and do not have the power to impose a settlement.

When mediation is successful, the parties will usually sign a separation agreement to document their settlement. Separation agreements can be filed in court and be enforced like court orders.

➔ *Note that the government is making new rules about the training people have to have to work as family law mediators. The rules will be released around the time that the new law comes into effect.*

D. Collaborative processes

Lawyers who have special additional training can help people resolve a family law dispute through collaborative processes. When people agree to use a collaborative process, they and their lawyers sign an agreement that they will use their best efforts to resolve the dispute outside of court, and that if the parties do have to go to court they will hire new lawyers.

Collaborative processes work like negotiation but involve other professionals when their participation will help the parties to reach a settlement:

a) clinical counsellors or psychologists can be involved as "divorce coaches," helping the parties work through their emotions;
b) clinical counsellors or psychologists can be involved as "child specialists," giving advice about parenting schedules and how the children are experiencing the parties' separation; and,
c) accountants, appraisers and tax specialists can be involved to help figure out complicated financial problems.

When a collaborative process is successful, the parties will usually sign a separation agreement to document their settlement. Separation agreements can be filed in court and be enforced like court orders.

E. Arbitration

In arbitration, a person with special training, often a lawyer, resolves a family law dispute by making a decision, called an "award," that is binding on the parties like a court order.

Although arbitration can be a lot like going to court, it has a lot of advantages over court processes:

a) the arbitration hearing can be scheduled whenever everybody is available without having to wait on trial scheduling;
b) arbitration hearings happen in private, often in the arbitrator's office boardroom;
c) the parties can choose the rules of the arbitration process; and,
d) the arbitrator can decide a dispute without hearing from witnesses if the parties want, for example by hearing the parties' arguments, by reading the parties' documents or by reading the parties' affidavits.

The result of an arbitration process is the arbitrator's written award. The arbitrator's award is private, but can be filed in court and be enforced like a court order.

➔ *Note that the government is making new rules about the training people have to have to work as family law arbitrators. The rules will be released around the time that the new law comes into effect.*

Arbitration in British Columbia is governed by the *Commercial Arbitration Act*. The *Family Law Act* will make a number of changes to this law to improve how it deals with family law problems.

F. Parenting coordination

Social workers, counsellors, psychologists, mediators and lawyers who have special additional training can help people resolve disputes about the care of children through parenting coordination. Parenting coordinators are appointed by the parties' agreement or by a court order, and are appointed for terms ranging from six months to two years. A parenting coordinator's appointment can be renewed.

Parenting coordination is only used where the parties have an agreement or a final court order about parental responsibilities, parenting time and contact, and is meant to help with:

a) implementing the parts of the agreement or order about children;
b) improving how the parties deal with conflict about their children; and,
c) improving how the parties communicate with each other.

Parenting coordinators try to resolve disputes about children by helping the parties find a settlement, like a mediator. However, when a settlement cannot be reached or the dispute is urgent, the parenting coordinator may make a decision resolving the dispute, like an arbitrator.

A parenting coordinator's decision is called a "determination." Determinations can be filed in court and be enforced like court orders.

Parenting coordinators cannot help with child support, spousal support or the division of property and debt.

➔ *Note that the government is making new rules about the training people have to have to work as parenting coordinators and about the problems parenting coordinators can help with and those that they can't. The rules will be released around the time that the new law comes into effect.*

VIII. Court Processes

A. Which court deals with which family law problem?

The powers of the Provincial Court are pretty much the same under the *Family Law Act* as they are under the *Family Relations Act*. The Supreme Court can deal with all family law problems, but the Provincial Court can only deal with problems about the care of children, child support and spousal support.

As a result, the Provincial Court can make declarations about the parentage of a child, but only if necessary to handle a claim within its jurisdiction. The Provincial

Court can also enforce agreements and orders, but only the parts of agreements or orders that are within its jurisdiction.

	Provincial Court	Supreme Court
Divorce Act claims		✓
Family Law Act claims	✓	✓
Divorce		✓
Parentage of children	limited	✓
Care of children	✓	✓
Time with children	✓	✓
Child support	✓	✓
Spousal support	✓	✓
Property and debt		✓
Children's property		✓
Protection orders	✓	✓
Asset restraining orders		✓
Enforcing agreements	limited	✓
Enforcing orders	limited	✓

B. What happens when there's an action in each court?

Starting an action in one court doesn't stop an action being started in the other court, unless the claims made in the second action have already been dealt with by the first court. Section 194 of the new law talks about what happens when there is an action in each court:

a) the making of an order by one court doesn't stop an application in the other court, unless the application is about the same thing as the order made by the first court;
b) a court can refuse to deal with a claim until the claim has been dealt with by the other court; and,
c) the Supreme Court can consolidate a Provincial Court action with its own action so that both are handled as a single action in the Supreme Court.

The Supreme Court can change a Provincial Court order to accommodate an order it is making. The Supreme Court cannot otherwise change Provincial Court orders except as the result of an appeal.

C. Managing people in court and court processes

1. Guiding principles

The new law says that court actions should be run with as little delay and formality as possible, and in a way that promotes cooperation between parties and protects adults and children from family violence.

The court is required to encourage parties to focus on the best interests of their children and minimize the effect of their conflict on their children.

2. Preventing misuse of court processes

If a party is frustrating or misusing the court process, the court can make an order prohibiting the party from making further applications without permission. When making such orders, the court can also:

a) make the order last for a specific period of time, or until the party has complied with another order;
b) require the party to pay another person's expenses; and,
c) make the party pay up to $5,000 to a person or as a fine.

➔ *Note that these orders are a lot like the orders available to the Supreme Court for "vexatious litigants" under section 18 of the Supreme Court Act.*

3. Conduct orders

Under section 222 of the new law, the court may make a "conduct order" to:

a) encourage settlement;
b) manage a party's behaviour that is frustrating settlement; and,
c) prevent misuse of the court process.

Conduct orders include orders:

a) that the parties participate in a family dispute resolution process;
b) that one or more of the parties, or a child, attend counselling;
c) restricting communication between the parties; and,
d) that a party continue to pay for debts and services related to the family home, like paying the mortgage or paying the gas bill.

➔ *Note that conduct orders restricting communication can also be made as protection orders.*

4. Case management orders

Conduct orders include "case management orders." Case management orders include orders:

a) striking out all or part of a claim or application;
b) delaying a court action while the parties participate in a family dispute resolution process; and,
c) requiring that all other applications be heard by the same judge.

D. How are orders enforced?

Some orders, like orders about parenting time and contact, have their own enforcement procedures. Where an order under the new law doesn't have a specific enforcement procedure, the general enforcement provisions of the new law are used. Under section 230, the court may enforce an order by requiring a party to:

a) post security in court to guarantee his or her future good behaviour;
b) cover the expenses of the other party resulting from his or her conduct; or,
c) pay up to $5,000 to another person or as a fine.

Where nothing else will get a party to obey a court order, the court may order that the party be imprisoned for up to 30 days.

Both the Provincial Court and the Supreme Court can enforce orders.

IX. Transitional Provisions

A. Children

If an agreement or an order, made before the new law comes into force, gives someone custody or guardianship, that person is a guardian under the *Family Law Act* and has parental responsibilities and parenting time.

If an agreement or order gives a person access without giving that person custody or guardianship, that person is not a guardian and has contact with the child.

B. Dividing property and debt

Unless married spouses agree otherwise, after the new law comes into force:

a) a court action to divide assets under the *Family Relations Act* should be continued as if the law had not been cancelled; and,

b) a court action to enforce or set aside an agreement made when the *Family Relations Act* was in effect should be made under the *Family Relations Act* as if the law had not been cancelled.

➔ *Note that these provisions will not apply to unmarried spouses since unmarried spouses have no property rights under the Family Relations Act.*