CHAPTER THREE: FAMILY LAW

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I. GOVERNING LEGISLATION AND RESOURCES

A. Resources In Print

1. Canadian Bar Association, Family Law Sourcebook for British Columbia (Vancouver: Continuing Legal Education Society of British Columbia, 2008).

    - This loose-leaf sourcebook contains a thorough overview of all aspects of family law, with cites to the relevant authorities for each statement of law.

2. Continuing Legal Education Society of British Columbia, Annotated Family Practice 2008-2009, [regular updates]. (Vancouver: Continuing Legal Education Society of British Columbia, 2008).

    - The family lawyer's legal bible. Includes important sections from the Family Relations Act. Updated every year.

3. Continuing Legal Education Society of British Columbia, British Columbia Family Practice Manual, 4th ed. [regular updates] (Vancouver: Continuing Legal Education Society of British Columbia, 2009).

    - This loose leaf provides a solid how-to approach to common family law problems and processes.

4. Continuing Legal Education Society of British Columbia, Desk Order Divorce—An Annotated Guide (Vancouver: Continuing Legal Education Society of British Columbia, 2006).

    - Annotated guide to divorce, with regular updates.

5. John D. Gardner and A.K. Korde, British Columbia Family Law: Annotated Legislation (Markham: Lexis Nexis Butterworths, 1984-2008).

    - This loose leaf contains annotated legislation and judicial consideration of statutes pertaining to family law. Remember, it will only contain amendments up to the date of publication.

Library References:

1. Mary Jane Mossman, Families and the Law in Canada: Cases and Commentary (Toronto: Emond Montgomery Publications, 2004).

    - A good casebook, which provides an overview of new family law issues in Canada.

2. Julien D. Payne, Payne on Divorce (Scarborough: Carswell, 1996).

    - A very good Canadian text on family law.

B. Resources on the Internet

1. **B.C. Supreme Court Services**
   Web site: www.supremecourtselfhelp.bc.ca

   - This service, available only in Vancouver, provides information to help users prepare the procedural aspects of a family or civil case. There is an office at 274 – 800 Hornby Street in Vancouver, but the office does not handle telephone, e-mail, or written inquiries. The staff cannot provide substantive advice on legal issues.

2. **J.P. Boyd's B.C. Family Law Web Resource**
   Web site: www.bcfamilylawresource.com

   - An excellent website for those unfamiliar with family law rights and procedures. Written in plain English and a good place to begin understanding family law for those who have not had the benefit of a family law course.

3. **BC Family Maintenance Enforcement Program (FMEP)**
   Web site: www.fmep.gov.bc.ca

   - Administered by the Ministry of Human Resources, this program helps low-income families to obtain child support and spousal maintenance orders from ex-partners, and to enforce them. The program is administered through select B.C. Employment and Assistance centres.

4. **Legal Services Society Family Law in British Columbia**
   Web site: www.familylaw.lss.bc.ca

   - This site includes general information on family law, including self-help materials like the forms a client needs to file for an uncontested divorce (in PDF format), and step-by-step instructions for filling out the forms. The site also houses web versions of Legal Services Society family law publications. Living Together, Living Apart: Common-Law Relationships, Marriage, Separation and Divorce is particularly useful:
     www.familylaw.lss.bc.ca/resources/publications/pub_livingTogetherLivingApart.asp

5. **West Coast Leaf Family Law Legal Aid Campaign**
   Web site: www.westcoastleaf.org

   - West Coast LEAF works to make Canada an equal place for all women by challenging laws and practices that reinforce and shape women's disadvantage, and support laws and practices that promote women's equality. They record women's stories about how legal aid cuts have affected them and record the stories as sworn testimonies in the form of affidavits. They can also be reached by telephone at (604) 684-8772 and by e-mail at info@westcoastleaf.org.

6. **British Columbia Vital Statistics Agency**
   Web site: www.vs.gov.bc.ca

   - The Vital Statistics Agency is a service provided by the provincial Ministry of Health Services. The web site includes information on birth and death registration and ceritificates. It also includes wills notice registration and searches, information on how to change your name, and information on marriage licences. Contact numbers are available for various services including adoption records information.

7. **Ministry of Attorney General, Family Justice**
   Web site: www.ag.gov.bc.ca/family-justice

   - This web site provides general information about a number of issues of interest to BC couples who have separated or who are about to separate. It may also be useful for guardians and other family members, such as grandparents, who may be involved in making important decisions about the family and its future.

8. **Department of Justice Canada**
   Spousal Support Advisory Guidelines, July 2008:
   www.justice.gc.ca/eng/pi/pad-rpad/res/spag/index.html
   Federal Child Support Guidelines, P.C. 1997-469:
   www.justice.gc.ca/eng/pi/sup-pen/grl/fcsg-lfpae.html

9. **British Columbia Supreme Court**
   Web site: www.courts.gov.bc.ca/supreme_court

10. **Divorce Registry of Canada**
    Web site: www.justice.gc.ca/eng/pi/flas-padf/crdp-bead.html
    Telephone: (613) 957-4519

11. **MOSAIC**
    Web site: www.mosaicbc.com
    Telephone: (604) 254-0244

    - Deals with issues that affect immigrants and refugees while settling into Canadian society. They also offer translation services.

12. **Interjurisdictional Support Orders**
    Web site: www.isoforms.bc.ca

    - Interjurisdictional Support Orders (ISOs) can be obtained from other Canadian provinces and territories and from reciprocating foreign countries by following the procedure set out in the Interjurisdictional Support Orders Act, S.B.C. 2002, Chapter 29.

13. **Children and Travel**
    Web site: www.voyage.gc.ca/preparation_information/children_enfants-eng.asp

14. **Family Mediation Practicum Project**
    Web site: www.ag.gov.bc.ca/dro/family-mediation/index.htm
    Telephone: (604) 516-0788

    - Provides free mediation services for various family disputes.

15. **Clicklaw**
    Web site: www.clicklaw.bc.ca

    - Described as a "portal-project", Clicklaw is a website aimed at enhancing access to justice in British Columbia by helping users to sort through the myriad of legal information and assistance that is available and find the most appropriate resources for a given situation.

    - Visitors are directed to user-friendly resources designed for the public by contributor organizations (including the Community Legal Assistance Society and LSLAP).

C. Resources by Telephone

1. **Family Justice Centres**

Family Justice Centres assist families going through a separation with issues of child custody and access, and spousal maintenance. Family justice counsellors provide dispute resolution services, and make referrals to legal aid, other legal services, and community resources for families facing separation.

Vancouver Metro/ Vancouver Island	Telephone: (250) 356-2811 Fax: (250) 356-2809
Abbotsford	Telephone: (604) 851-7055 Fax: (604) 851-7056
Chilliwack	Telephone: 1-888-288-8249 Fax: (604) 795-8258
Langley	Telephone: (604) 501-3100 Fax: (604) 532-3626
Surrey	Telephone: (604) 501-3100; (604) 501-8282 Fax: (604) 501-3112
Maple Ridge	Telephone: (604) 927-2217 Fax: (604) 466-7343
Port Coquitlam	Telephone: (604) 927-2217 Fax: (604) 927-2220
New Westminster	Telephone: (604) 660-8636 Fax: (604) 660-2414
North Vancouver	Telephone: (604) 981-0084 Toll-free: 1-888-837-1116 Fax: (604) 981-0035
Richmond	Telephone: (604) 660-3511 Fax: (604) 660-3640
Vancouver City Centre	Telephone: (604) 660-2084 Fax: (604) 660-4177
Vancouver Family Justice Centre	Telephone: (604) 660-6828 Fax: (604) 775-0679

2. **Provincial Court Vancouver Registry**
Family Court Registry: (604) 660-8989

3. **Provincial Court Vancouver Family Duty Counsel Service**
Telephone: (604) 660-1508

- Duty counsel is also available in other cities, contact Legal Services Society for a current list
- Legal Services Society telephone: (604) 601-6000

4. **Supreme Court Vancouver Registry**
   Main switch board: (604) 660-2847
   Family Law Registry: (604) 660-2844
   Vancouver Family Inquiry: (604) 660-2486
   Courthouse Library: (604) 660-2841

5. **Supreme Court New Westminster Registry**
   Registry: (604) 660-8522
   Divorce: (604) 775-0672
   Courthouse Library: (604) 660-8577
   Family Law Counter: (604) 660-8507

D. Relevant Legislation

1. Divorce Act, R.S.C. 1985, c. 3

This is the federal legislation that provides for both divorce law and the determination of corollary relief (maintenance, custody, and access). Maintenance orders under the Act have effect throughout Canada. All actions under the Divorce Act are heard in B.C. Supreme Court except those applications pursuant to Rule 60C of the Rules of Court, which allows such actions to be heard in certain Provincial Courts.

NOTE: The Divorce Act does not provide for division of matrimonial assets. A person has to seek division of matrimonial assets under the Family Relations Act.

2. Child, Family and Community Service Act, R.S.B.C. 1996, c. 46

This Act provides for official apprehension of children (under 19 in B.C.) who are believed to be in need of protection or care. A hearing must be held before a judge within seven days, which may result in the temporary or permanent custody of the child being given to the Superintendent or some other agency.

3. Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127

Deals with the enforcement of maintenance orders.

4. Family Relations Act, R.S.B.C. 1996, c. 128

This provincial legislation dictates corollary relief (maintenance, custody, access, guardianship, and the division of assets) and sets out the requirements for a valid marriage contract (s. 61). Actions under the Family Relations Act dealing with matrimonial property and its use are heard exclusively in the Supreme Court. Orders for maintenance, custody, access, and guardianship under the Family Relations Act may be dealt with in either Supreme Court or Provincial Court. Common law relationships are only dealt with under the Family Relations Act. Both the Family Relations Act and the Divorce Act govern marriage relationships.

5. British Columbia, Supreme Court Rules of Court, r. 51 and 60

These are the procedural rules that govern family law. The relevant rules are: Rule 60 (Divorce and Family Law), and Rule 51, which replaced Rule 65. Refer to these rules for the specific procedural requirements when making family law applications.

6. British Columbia, Provincial (Family) Court Rules, B.C. Reg. 417/98

Web site: www.qp.gov.bc.ca/dispute/famrules.htm

The purpose of these rules is to allow people to obtain just, speedy, inexpensive and simple resolution of matters arising under the Family Relations Act and certain matters under the Family Maintenance Enforcement Act in Provincial Court.

E. Referrals

1. The Non-Legal Problem

Many clients will have problems that are not strictly legal. If the client has a personal problem, refer the client to an appropriate social service agency in the lower mainland. The Red Book (www2.vpl.vancouver.bc.ca/DBs/RedBook/htmlPgs/home.html) is a very useful resource for this purpose. Often, even when a client does have a legal problem, the legal remedy will not resolve all issues for that person. Be aware of this and try to get clients the help they need.

2. The Legal Problem

Care should be taken in making referrals. Someone, after all, has referred this person to you and the client does not want to be shoved further down the line. **Do not refer** unless you are sure that the agency can, and will, handle the problem. Use the telephone to confirm information and to arrange an appointment where possible (see **Introduction & Student Guidelines** for a discussion of referrals).

Always have the Supervising Lawyer check all letters and any other documents you may write for your client.

II. LSLAP AND FAMILY LAW

A. What LSLAP Can Do

a) Uncontested divorces where there are no corollary relief issues to be decided. That is, custody, access and support have all been decided **and** there is a written agreement or order already in place.

NOTE: LSLAP will try to make an exception to this requirement for a prior written agreement in the case of divorces where the opposing party and the children reside outside of Canada. Clinicians should consult the Supervising Lawyer. Where necessary, LSLAP may also assist clients with applications for substituted service.

b) Provincial Court Family Matters:

- Initial Applications for custody, access, child support, spousal support, restraining orders (on a case by case basis);
- Responding to initial application;
- Applications to vary a provincial court order and responding to the same;
- Responding to FMEP applications to enforce maintenance;
- Applications made pursuant to the Interjurisdictional Support Orders Act, and responding to such applications;

- Applications for consent orders, paternity tests, or other interim applications;
- Preparation of all court forms, including financial forms and providing summary advice;
- Indigency applications (for clients who cannot afford filing fees).

LSLAP can refer clients to other sources of family law advice. It can also refer clients to family law resources, such as those listed at the beginning of this chapter.

B. What LSLAP Cannot Do

- Any matters that fall in Supreme Court (other than uncontested divorces);
- Property division;
- Maintenance matters where support rights have been assigned to the Ministry of Employment and Income Assistance;
- Applications to enforce maintenance (refer to FMEP);
- Adoptions;
- Child Family and Community Service Act (CFCSA) matters;
- Any matter where a lawyer is available to the client (if Legal Services Society will provide a lawyer);
- Drafting marriage agreements, separation agreements, cohabitation agreements, or post nuptial agreements;
- Cannot help clients who do not meet LSLAP's income requirements; and
- Overly complex matters (such as trials lasting over two days), assessed on a case by case basis, and determined by the Supervising Lawyer.

III. MARRIAGE

A. Marriage

Marriage creates a legal relationship between two people, giving each certain legal rights and obligations. A marriage must comply with certain legal requirements. Therefore, not all marriages are valid.

1. Legal Requirements

To be valid, a marriage must meet several legal requirements. Failure to meet these requirements may render the marriage void *ab initio*. In other circumstances, such as sham marriages or marriage in which one party did not consent or did so under duress, may be voidable, meaning the marriage is valid until an application is made to a court to annul the marriage.

a) Sex

In the past, spouses had to be of opposite genders. This has been found to be unconstitutional (see *Reference re Same Sex Marriage*, [2004] S.C.R. 698, [2004], S.C.J.

No. 75), and same-sex couples can now marry in every province and territory with the passing of Bill C-38 in the House of Commons, and subsequent passing in the Senate. Bill C-38 received Royal Assent on July 20, 2005 becoming the Civil Marriage Act, S.C. 2005, c.33.

b) Relatedness

The federal Marriage (Prohibited Degrees) Act, 1990, c. 46, bars marriage between lineal relatives, including half-siblings and adopted siblings.

c) Marital Status

Both spouses must be unmarried at the time of the marriage.

d) Age

Both spouses must be over the age of majority (19 in B.C.; see the Age of Majority Act, R.S.B.C. 1996, c. 7). In B.C., a minor between the ages of 16 and 19 can marry only with the consent of both of his or her parents (see the Marriage Act, R.S.B.C. 1996, c. 282, s. 28). A minor under the age of 16 can marry only if permission is granted in an order of the Supreme Court (s. 29). However, a marriage is not automatically invalid if the requirements of s.28 and 29 have not been met at the time of marriage (s.30); the court may preserve the marriage where it is in the interests of justice to do so (if, for example, both parties have now grown up and have been living as husband and wife for some time).

e) Mental Capacity

At the time of the ceremony, both parties must be capable of understanding the nature of the ceremony and the rights and responsibilities involved in marriage.

2. Foreign Marriages

The common law rule is that the formalities of marriage – *i.e.* who can marry, who can perform weddings – are those of the law where the marriage took place, while the legal capacity of each party is governed by the law of the place where they live.

3. Sham Marriages

When parties marry solely for some purpose such as tax benefits or immigration status, the marriage may be voidable for lack of intent. However, courts may sometimes find the marriage binding on the parties nonetheless.

NOTE: The law recognizes traditional customary marriages of Aboriginal people in some circumstances where the marriage meets the criteria of English common law marriages.

B. Common Law Relationships

1. General

There is much confusion surrounding the terms "common law spouse" and "common law relationship" both of which are widely used to describe various relationships that exist outside

of marriage. What these terms describe is the legal status and rights conferred on the parties by various statutes and the common law. Each statute may give a slightly different definition of a common law "spouse". A general rule is that for most federal legislation it takes one year of living together to qualify as common law and for most provincial legislation it takes two years to qualify. See **Section XIV: Glossary** at the end of this chapter for a brief list of definitions. For more extensive definitions, consult the current legislation.

Remember that a common law relationship is **not** a legal marriage. Nevertheless, where legal rights are conferred on common law spouses, the relationship is still valid even if one or both of the parties is currently married to someone else.

2. Estate Considerations

a) *Estate Administration Act, R.S.B.C. 1996, c. 122*

Where a person dies intestate (without a will) and leaves a common law spouse and/or child, the court may order that the estate be applied to the benefit of such spouse and/or child (s. 86). However, if the intestate also leaves a legal widow or widower and/or children, notice must be given to those parties and to the estate's administrator before common law family can benefit (s. 88). The Act, however, no longer distinguishes between legitimate and illegitimate children (s. 81).

b) Wills Variation Act, R.S.B.C. 1996, c. 490

Common law partners who have cohabited with the testator for more than two years can challenge a will that does not make adequate provision for the proper support and maintenance of the surviving spouse and/or children. The application must be made within six months of the granting of probate for the will.

c) Canada Pension Plan Act, R.S.C. 1985, c. C-8

Common law spouses who have cohabited with a contributor for one year before the contributor's death may be able to claim death benefits. Forms can be obtained from a CPP office.

d) Workers' Compensation Act, R.S.B.C. 1996, c. 492

A common law relationship is recognized after cohabitation for three years. If there is a child, one year is sufficient.

e) Employment and Assistance Act, S.B.C. 2002, c. 40

A common law relationship can arise from cohabitation as short as 3 months that is "consistent with a marriage-like relationship" (s.1.1). Common law relationships are dealt with as marriages, and as single-family units where there are children.

C. Marriage/Pre-Nuptial Contracts

1. General

LSLAP students should never draw up marriage/cohabitation/pre-nuptial contracts. Those interested in drawing up such a contract on their own can be directed to the self-help kit The Living Together Contract published in 1993 by the International Self Counsel Press of

North Vancouver. However, contracts drawn up using self-help kits are sometimes overturned in court. Clients should seek the advice of a lawyer.

2. Legislation:

a) Family Relations Act

The formal requirements for a valid marriage contract are given in s. 61 of the Family Relations Act. Agreements between unmarried couples are dealt with in s. 120.1 of the Act. For a marriage contract, the agreement and any subsequent amendments must be in writing, signed by both parties and witnessed. The agreement can take effect on the date of the marriage or the date of the agreement's execution.

While such an agreement may be binding between the spouses whether or not there has been consideration, courts have considered fairness issues when determining the validity of marriage contracts (see *Gold v. Gold*, [1993] B.C.J. No. 1799 (B.C.C.A.), and *Stark v. Stark* (1990), 26 R.F.L. (3d) 425 (B.C.C.A.)).

In *Hartshorne v. Hartshorne*, [2004] S.C.J. No. 20 it was held that in order to be enforceable, a marriage contract must operate fairly **at the time of distribution**. To determine whether the contract is substantively fair, the court has to consider whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the contract was formed and whether they made adequate arrangements to address those anticipated circumstances. Courts should respect private arrangements made between the spouses regarding the division of property, especially when the parties obtained independent legal advice.

Section 65 of the Family Relations Act also allows the court to evaluate an agreement's fairness, and to reapportion the division of property accordingly, by taking into account such factors as:

- the duration of the marriage;
- the duration of the parties' separation;
- the extent to which assets were acquired by one of the parties through inheritance or gift; and
- the present economic needs of both parties.

3. Substance of Contract

a) Assets

The main part of the agreement usually deals with the division of assets in the event of a breakdown of the relationship. The agreement may provide for management and/or ownership of family assets during a marriage. It may also set out ownership and/or division of assets when the relationship ends. The parties may also specify that neither party is responsible for debts of the other incurred either before or during the relationship.

While it was once against public policy to contract in anticipation of future separation, today s. 61 of the Family Relations Act explicitly anticipates such considerations in a marriage contract.

b) Custody

A written agreement between spouses, married or unmarried, can specify custody and access terms between the parties. Nevertheless, the **best interests of the child remains the paramount and overriding consideration** for the court in making a order regarding custody and/or access (see the Divorce Act, s.16, and the Family Relations Act, s.24). While an agreement cannot oust the court's inherent jurisdiction over custody matters, it is recognized as a legal source of custody rights unless conflicting claims arise and the matter comes before a court (Family Relations Act, ss. 34(1)(d) and (2)(b)). Custody and access issues can be heard in both the Supreme Court and Family Court. See **Section X: Custody, Guardianship, and Access**.

The written agreement may be given the force of a court order under s. 121(2) and s. 122 of the Family Relations Act if it is filed in a Supreme Court or Provincial Court registry with duly sworn consent affidavits from any person against whom a provision is to be enforced. (These sections also apply to child maintenance and spousal maintenance, below.)

c) Child Maintenance

Child maintenance is not usually dealt with in a marriage agreement. While an agreement can set out child maintenance provisions, the Supreme Court can override or vary any such terms. In particular, any term purporting to exclude maintenance obligations is likely to be found invalid on public policy grounds. The court will seldom uphold an amount lower than the guidelines, even if the parties agree on that amount, unless there is an appropriate reason to approve it, such as some other arrangement that directly benefits the child. See **Section IX: Spousal and Child Maintenance**.

d) Spousal Maintenance

The law relating to contracting for or out of spousal maintenance is complex. Clients should seek legal advice before entering into an agreement for spousal maintenance. An agreement concerning spousal maintenance cannot oust the court's jurisdiction to order maintenance and such an agreement will be only one factor considered in determining a fair level of maintenance. See **Section IX: Spousal and Child Maintenance**.

e) Void Conditions

Marriage contracts sometimes incorporate terms that are not enforceable at law. For example, a clause stating, "the husband shall do all the cooking" is a contract for personal services and is therefore not enforceable. A breach of such an agreement cannot be grounds for divorce.

NOTE: You may wish to consider whether a marriage agreement should contain a clause stating: "Anything held to be void/voidable will be severed from the agreement leaving the rest of the agreement intact". This prevents the whole of a marriage agreement being voided by the inclusion of void conditions or clauses. See the annotation in *Clarke v. Clarke* (1991), 31 R.F.L. (3d) 383 (B.C.C.A.).

IV. DIVORCE

LSLAP will assist clients who are seeking an uncontested divorce based on a one year separation and only in cases where all corollary relief has been dealt with (including property division, child support and spousal support).

NOTE: LSLAP will try to make an exception to this requirement for a prior written agreement in cases where the opposing party and the children reside outside of Canada. Clinicians should consult the Supervising Lawyer. Where necessary, LSLAP may assist clients with applications for substituted service.

A. Legislation

The federal legislation relating to divorce in Canada is the Divorce Act. The Divorce Act applies to legally married couples. It does not apply to common law couples or other unmarried couples. The provincial family law legislation in British Columbia is the Family Relations Act, which applies to people in all relationships. The reason there are two statutes governing this area is the division of powers under ss. 91 and 92 of Constitution Act, 1867, which gives the federal government jurisdiction over "Marriage and Divorce" (s. 91), while giving provincial governments jurisdiction over "The Solemnization of Marriage in the Province" and "Property and Civil Rights" (s. 92).

B. Jurisdiction

1. Supreme Court

The Supreme Court of British Columbia has jurisdiction over both the Divorce Act and the Family Relations Act. Because all divorce claims must be heard under the Divorce Act, the Supreme Court has exclusive jurisdiction over divorce claims. The Supreme Court has concurrent jurisdiction with Provincial Court over custody, access, guardianship and support for children (including common law couples) and division of property (except for common law couples).

If a Supreme Court order for custody, access, or support is made under the Divorce Act, that order supersedes any existing Family Relations Act order.

An uncontested divorce no longer requires a personal appearance in Supreme Court. Evidence can be submitted by affidavit with the application for the Divorce Order.

2. Provincial Court

The Provincial Court only has jurisdiction under the Family Relations Act and cannot hear any claim under the Divorce Act, including divorce applications.

The Provincial Court can make orders or vary original Provincial Court orders relating to custody, access, guardianship, child maintenance and spousal support. The court does **not** have jurisdiction to deal with claims for the division of property under the Family Relations Act.

C. Requirements for a Divorce

1. Jurisdiction

To obtain a divorce in a particular province, one of the parties to the claim must have been "ordinarily resident" in that province for at least one year immediately preceding the presentation of the Writ of Summons and Statement of Claim (Divorce Act, s. 3(1)). A person can be "ordinarily resident" in a province and still travel or have casual or temporary residence

outside the province.

There must not be another divorce proceeding involving the same parties in another jurisdiction. If two actions are pending and the proceeding filed first is not discontinued within 30 days after it is presented, the first court will have exclusive jurisdiction (s. 3(2)) to hear and determine the divorce proceeding.

2. A Valid Marriage: Proof of Marriage

Section 52(1) of the Evidence Act, R.S.B.C. 1996, c. 124 states that if it is alleged in a civil proceeding that a ceremony of marriage took place in British Columbia or another jurisdiction, either of the following is evidence that the ceremony took place:

a) the evidence of a person present at the ceremony (less common); or

b) a document purporting to be the original or a certified copy of the certificate of marriage (the church certificate is not acceptable).

The simplest way is to use a certificate of marriage or registration of marriage. Only if the certificate or registration of marriage is not available should the evidence of a person present at the ceremony be used.

An official translation of the marriage certificate and a translator's affidavit must be provided if the marriage certificate is in any language other than English. French language marriage certificates must also be translated.

The court may require further proof that the marriage is valid if the documents evidencing the marriage appear questionable. Immigration and landing documents can be used as additional proof of marriage in these situations.

If a marriage certificate absolutely cannot be provided (e.g. the records cannot be obtained from the parties' country of origin or were destroyed), and if there are no witnesses to the marriage available, a party to the divorce proceeding can attempt to prove her or his marriage by attesting to "cohabitation and reputation" in an affidavit. The court will hear evidence of the couple's "cohabitation and reputation" from the parties and witnesses.

Where there are witnesses to the marriage available, a witness will be required to sign and swear an affidavit stating that: he or she was at the ceremony, it was conducted in accordance with the parties' laws and religion, and to the best of his or her knowledge, the two parties were in fact married according to their law and traditions.

3. Grounds for Divorce

In accordance with s. 8(1) of the Divorce Act, either or both spouses may apply for a divorce on the ground that there has been a breakdown of their marriage as evidenced by separation for a year, adultery, or physical or mental cruelty. For the divorce action to succeed, the plaintiff must have valid grounds under s. 8(2)(a) or 8(2)(b), and the defendant must be unable to raise a valid defence.

Most divorces are based on separation rather than adultery or cruelty, in part because the accusing party must prove adultery and/or cruelty on the balance of probabilities. Where a claim for divorce based on adultery or cruelty has been filed for more than one year before the application for divorce is heard, the court will usually grant the divorce on the ground of separation. **LSLAP will only assist in divorces based on separation for one year.**

D. Divorces Based on Separation: s. 8(2)(a)

1. Separation - One Year

Under the Divorce Act, neither party needs to prove "fault" to get a divorce. Most divorces will proceed under s. 8(2)(a), separation for a period of at least one year. **Although the pleadings starting the action can be filed immediately upon separation, the Divorce Order cannot be sought until one day after the parties have been separated for one year.**

The ground of separation requires physical separation coupled with recognition by **one** of the parties that the marriage is at an end. It is not necessary that the parties form a joint intention.

2. 90-Day Reconciliation Period

Any number of reconciliation attempts may be made during the separation year without affecting the application for divorce. However, if:

- the length of any reconciliation attempt exceeds 90 days; or
- the aggregate total length of reconciliations exceeds 90 days,

then the time for calculating the one year period of separation must start over again with the first day of calculation being the first day of separation after the 90+ day reconciliation ended (s. 8(3)(b)(ii)).

3. Living Under the Same Roof

Some couples may choose to continue to live under the same roof after they have decided to separate for financial reasons or for the sake of the children. If they have separate bank accounts, separate bedrooms, cook their own meals, do their own laundry, etc. (in other words, if there is an obvious severance of the conjugal relationship), they can still be considered separated.

E. Divorces Based on Cruelty or Adultery: Divorce Act, s. 8(2)(b)

Divorces based on separation require a minimum of one year to have passed before the divorce order can be granted. Divorce claims based on the ground of cruelty or adultery can result in an immediate divorce. **LSLAP will not seek a divorce order based on cruelty or adultery.**

1. Adultery: s. 8(2)(b)(i)

Adultery is voluntary sexual intercourse between a married person and a person other than his or her spouse. The meaning of "adultery" includes sexual acts outside the marriage with a person of the same sex: *S.E.P. v. D.D.P.*, [2005] B.C.J. No. 1971 (B.C.S.C.). The standard of proof for adultery is the same as the civil standard, i.e. the court must be satisfied on a balance of probabilities that adultery was committed (see *Adolph v. Adolph* (1964), 51 W.W.R. 42 (B.C.C.A)). Proof can come in the form of an affidavit from the adulterous spouse or the adulterer.

The court will require proof that the adulterous conduct was not forgiven by the innocent spouse (condonation) and that the conduct was not conspired towards for the purposes of obtaining the divorce (collusion and connivance).

2. Physical or Mental Cruelty: s. 8(2)(b)(ii)

The test for cruelty is subjective. The question to be asked in a cruelty case is whether the conduct is of such a kind as to render intolerable the continued cohabitation of the spouses. There is no objective standard in the sense that certain conduct will constitute cruelty in every case while other conduct will not. The defendant's conduct may constitute cruelty even if there is no intent to be cruel. What has to be determined is the effect of the conduct on a particular person, rather than the nature of the acts committed: *Burr v. Burr*, [1983] B.C.J. No. 743.

If the spouses are still cohabiting, the court will infer that the conduct was not intolerable unless the plaintiff had **no** means or opportunity for leaving: *Cridge v. Cridge* (1974), 12 R.F.L. 57, (B.C.S.C.). Lack of income, children at home, and a difficulty with the English language may qualify as reasons for continuing cohabitation.

Again, to make a case based on cruelty, there must be proof on the balance of probabilities. Things that could be entered as evidence in this area include medical evidence such as charts and doctors' statements.

F. Separation Agreements

1. General

A separation agreement is a legal contract that sets out the rights and responsibilities of common law or married spouses. It generally provides for a division of assets, the maintenance of a dependent spouse, and for the maintenance, custody and/or access to a child by a parent. A separation agreement can deal with some or all of these issues. It can eliminate much of the emotional disturbance involved in courtroom proceedings, and provide the parties with an arrangement to which they have both agreed, as opposed to a court order, with which neither party may be happy.

A separation agreement between married spouses will crystallize each spouse's contingent half interest in all family property and assets of the marriage, and therefore can affect future apportionment of assets above and beyond those considered in the agreement.

It is essential that each spouse be aware of the potential influence of that agreement on future expectations, and the legal implications of that agreement on questions of ownership and title in family assets. Each spouse should have independent legal advice, even in cases where the parties seem to be in accord on the terms of a separation agreement. If a separation agreement has been signed and one party did not have independent legal advice this may go towards evidence of unfair contracting and it may be possible to overturn the contract.

It is possible that a separation agreement containing provisions for maintenance may be regarded by the court as evidence of liability on the part of the supporting spouse. While the agreement does not usurp the court's jurisdiction in maintenance or custody matters, the court will consider the terms of the agreement when making the order.

In addition to property settlements, custody and visiting arrangements, and maintenance, the separation agreement may embrace any other matters the parties wish to include in it, and often includes estate provisions, releases, penalties for breach of the contract, etc. A separation agreement can be more flexible than a court order. For example, a court order cannot contain contingent terms, but a separation agreement can.

NOTE: Because of the complicated nature of separation agreements, LSLAP does not assist clients in drawing up such agreements, nor do we assist in varying these agreements. Clients who wish to make a separation agreement should be referred to the Lawyer Referral Service, Family Court counsellors, or mediators.

2. Legislation - Family Relations Act

There is no definition of a "separation agreement" in the Act, but, under ss. 121 and 122, a written agreement for maintenance and/or custody and access that is filed in court is enforceable as if it were an order under the Act.

"Spouse", as defined under s. 121, includes a person who acknowledges in the written agreement that he or she is, or was, a spouse of the other party, whether or not they were married. "Parent" is similarly defined as a person who acknowledges in the agreement a responsibility for the child. "Child" is a person under 19 years of age who is acknowledged to be the responsibility of a party to the agreement.

If the agreement is filed in the Provincial Court, the terms of the agreement may be subject to variation by the court as any regular order. The Supreme Court cannot vary an agreement as the Provincial Court can, however it can make an order on different terms than those set out in the separation agreement. The parties may also vary or rescind the agreement without going to court.

It is important to note that a separation agreement entered into pursuant to the Family Relations Act constitutes a "triggering event" under s. 56, entitling each spouse to an interest in each family asset as it is valued at that moment in time.

G. Why a Divorce Application may be Rejected

1. Collusion

Collusion is, simply put, both parties conspiring to obtain a divorce. A more expansive definition can be found in s. 11(4) of the Divorce Act.

Collusion is an **absolute bar** to a divorce on the grounds of cruelty or adultery.

2. Condonation

Condonation consists of forgiving a marital offence that would otherwise be a ground for divorce. There are three requirements: knowledge of the matrimonial offence by the plaintiff; forgiveness of the offence; and actual reinstatement of the relationship. A single attempt or a series of attempts at reconciliation totalling less than 90 days does **not** qualify as condonation.

Condonation is a **discretionary bar** to a divorce. If the matter is raised, the onus is on the plaintiff to disprove it.

3. Connivance

Connivance occurs when one spouse encourages the other to commit adultery or cruelty. There must be a "corrupt intention… to promote or encourage either initiation or the continuance... or it may consist of a passive acquiescence....". Keeping watch on the other spouse does not constitute passive acquiescence: *Maddock v. Maddock*, [1958] O.R. 810 at 818, 16 D.L.R. (2d) 325 (C.A.).
Connivance is a **discretionary bar** to a divorce, similar in effect to condonation.

4. Discretion of the Court

In cases of condonation or connivance, the claim for divorce will be dismissed unless, in the court's opinion, the public interest would be better served by granting the decree.

The court may also reject an application for divorce where: a divorce is pending in another jurisdiction; a marriage certificate or registration of marriage has not been provided; there are defects in the application materials; or there are defects in the form of draft order provided with the application. The court registry is very particular about the content and form of both the applications materials and the draft order, which may result in the rejection of the application before it gets to a judge.

5. Divorce Will Not Be Granted Until Child Support Is Settled

In a divorce proceeding, it is the duty of the court to satisfy itself that "reasonable arrangements" have been made for the support of any children of the marriage, typically having regard to the Child Support Guidelines. If such arrangements have not been made, s. 11(1)(b) of the Divorce Act requires the court to stay the granting of the divorce.

When stepchildren are involved, the court will determine child support requirements for a stepfather or stepmother on a case-by-case basis. The definition of "child of the marriage" in s. 2 of the Divorce Act is broad enough to encompass children for whom one spouse "stands in the place of a parent".

H. Other Points to Note

1. Jurisdiction to Vary Proceedings

Section 5(1) of the Divorce Act allows a court other than the court of original jurisdiction (that is, the court which originally made the divorce order) to vary a divorce order if:

- one of the former spouses is habitually resident in the province; or
- both former spouses accept the jurisdiction of the court.

2. Adjournment for Reconciliation

Where at any stage in a divorce proceeding it appears to the court from the nature of the case, the evidence, or the attitude of either or both spouses that there is a possibility of the reconciliation of the spouses, s. 10(2) of the Divorce Act allows the court to adjourn the proceedings to give the spouse an opportunity to reconcile. The court can also, with the spouses' consent, nominate a marriage counselor, or in special circumstances, some other suitable person to assist a reconciliation.

3. Alteration of Effective Date of Divorce

Under s. 12 of the Divorce Act, a divorce takes effect on the thirty-first day after the day on which the judgment granting the divorce is rendered. The 31 days allow for the appeal period to expire. The court may order that the divorce take effect before this if it is of the opinion there are special circumstances and the spouses agree that no appeal from the judgment will be taken. The impending birth of a child and remarriage are generally **not** considered compelling reasons to shorten the appeal period. However, one may file an appeal waiver to remarry sooner.

4. Maintenance Order After Divorce Has Been Granted

Under s. 15 of the Divorce Act, for the purposes of child support, "spouse" means either a

male or female who are married to each other (s. 2(1)) and includes "former spouse" as well. This means that a former spouse may be able to obtain an order for maintenance after the divorce has been granted.

5. Mediation

A form of mediation for separating couples is provided by the Family Justice Counsellors of the Ministry of Attorney General. It is intended to steer people out of the court system. Similar to the small claims process, if the two parties come to an agreement through mediation they may choose to sign a binding contract after the process. There are offices throughout B.C., which can be located using the blue pages of the telephone book under B.C. Corrections Branch, or Family Court: Probation and Family Court Services. The service is confidential and free.

6. Rule 60E: Judicial Case Conferences

In cases where relief other than a simple divorce is sought in the Supreme Court, Rule 60E of the Rules of Court (British Columbia) requires that a judicial case conference (JCC) be held before a party to a contested family law proceeding delivers a notice of motion or affidavit in support of an interlocutory application to the other party. The purpose of a JCC is to help the parties to come to an agreement on some or all of the matters at issue, to identify the issues that are in dispute and those that are not, explore alternatives to litigation, to schedule disclosure, discoveries, the exchange of documents, and to schedule interim applications and the trial date. JCCs may be heard by either judges or masters and are set for one hour.

7. Divorce Law and First Nations

Special concerns arise in cases involving First Nation Peoples registered under the Indian Act, R.S.C. 1996, c. 23, s. 68. The Indian Act sets out guidelines for and definitions of Aboriginal people, and defines who is eligible for "status". Only "status" people are affected by the legislation under the Indian Act. One spouse's treaty payment may be directed to the other "where the Ministry is satisfied he deserted his spouse or family without sufficient cause, conducted himself in such a manner as to justify the refusal of his spouse or family to live with him, or has been separated by imprisonment from his spouse and family" (Indian Act, s.68). As well, reserve land allocated by a certificate of possession cannot be dealt with in the same manner as a matrimonial home as the rules in the Family Relations Act do not apply to reserve land. However, in such cases, the court may ask that the spouse in possession of the reserve land pay cash compensation to the other spouse (*George v. George* (1997), 30 B.C.L.R. (3d) 107). Keep in mind that most provincial laws apply to Aboriginal people and reserve land, unless they are in direct conflict with the Indian Act. Further, a court will almost always take the cultural identity of the children into consideration when making an order for custody; see e.g. *D.H. v. H.M.*, [1999] S.C.J. No. 22, and see *Van de Perre v. Edwards*, [2001] S.C.J. No. 60.

I. Availability of Divorce Services in B.C.

1. Legal Aid

Legal Aid will provide extremely limited assistance to those who meet their income requirements. Clients must also have a risk or history of family violence, or a risk or history of child abduction, to be eligible for this service.

2. LSLAP

LSLAP will aid in filing uncontested divorces once all corollary relief is arranged. Clients can expect to pay fees for filing and service of documents, or may seek to apply for indigent status.

3. Lawyers

All lawyers will expect an initial payment from their client. The amount of the initial retainer will vary depending on the lawyer's hourly rate and his or her estimation of the complexity of the case.

The cost of a simple, uncontested divorce begins at approximately $1,000 and up. Clients should compare rates before choosing a lawyer. Advise clients to use the Lawyer Referral Service (604) 687-3221 or 1-800-663-1919. The first half-hour will only cost $25, with the lawyer charging his or her standard rate thereafter.

To minimize costs when retaining a lawyer, clients should be advised to:

- negotiate the cost of legal services in advance, so they do not come as a surprise;
- personally collect all necessary documentation rather than pay the lawyer to do it;
- call the lawyer only when imparting necessary information (every phone call costs money);
- use Family Court and Supreme Court resources (such as Family Justice Counsellors) if appropriate;
- ask for regular or scheduled billing to monitor escalating legal costs;
- carefully read all correspondence sent by the lawyer; and
- treat the lawyer as a professional.

4. Divorce Services

These organizations often specialize in the mass production of divorces with minimally qualified staff. Our position is that clients should generally be advised **not** to use these services, as it is almost impossible to distinguish the reputable from the disreputable. The cost of this type of service can range from $550 and up.

NOTE: Clients who are considering using one of these services should be **warned about**: divorce financing arrangements, which may involve sharp money practices; "quickie divorces", which involve obtaining a foreign divorce decree and may not be valid in Canada; and hidden costs.

5. Do-It-Yourself Divorce

It is quite possible for parties to a divorce proceeding to work through their own divorce with the help of a "do-it-yourself" divorce kit, such as the one published by Self-Counsel Press, (604) 986-3366. Most major book and stationery stores sell the kits, which include a guide and a package of the required forms. The guide is also available from the Vancouver Public Library. The forms cost $18.95. Self-Counsel Press offers a typing service that charges $107.00 for divorces not involving children, and $160.50 for divorces involving children. The ease with

which the divorce may be accomplished varies depending on the grounds for divorce and the difficulty of proof.

Clients who want to claim for anything more than a simple divorce should be advised to consult a lawyer. Clients should be discouraged from giving up claims to make the process simpler.

V. UNCONTESTED DIVORCES

A. Required Documents

If LSLAP is assisting a client or the client is trying to do the divorce on his or her own, the following information details the basic documents that he or she will need. A person handling his or her own divorce is advised to get a copy of the documents and instructions from Self-Counsel Press.

1. Marriage Certificate

Any official, government-issued form of marriage certificate or registration of marriage is accepted. It can be either the short or long form, or a card. However, it **cannot** be a church-issued document, marriage license, or slip of paper attesting to the celebration of the marriage. In some areas of the world (e.g. South American, Latin American, African, and Asian nations), it may be difficult to obtain an official government document.

If the marriage certificate is in a language other than English, an official certified translation must be provided. Clients who require translation can be referred to Mosaic Translations, which can be reached at (604) 254-0469, or to the Society of Translators and Interpreters of B.C., at (604) 684-2940. Marriage certificates in French must also be translated.

Clients who were married in Canada can request a copy of their marriage certificate for about $27 (in BC) from the Department of Vital Statistics.

2. Photograph of the Spouse

Clients must provide a recognizable photograph of the spouse. The photograph is for service purposes and will not be returned.

3. Copies of Any Court Orders or Separation Agreements

These documents can be attached to the divorce affidavits as exhibits.

If the client or spouse had previously started a divorce action, he or she must provide a filed copy of the Notice of Discontinuance that authorized discontinuance of that action.

If a separation agreement is the only document signed between the parties that involves custody, access, and maintenance of the children (i.e. if there are no court orders), the agreement may be filed in either the Provincial or the Supreme Court and enforced as a court order (Family Relations Act, ss. 121 and 122).

B. Joint or Sole Application

LSLAP will only do sole applications. The original Writ of Summons, Statement of Claim and three additional copies will be required: the original for filing at the registry, two copies for service, and one as a personal record. See **Section V.H: Service**, below.

A joint application is quicker and less expensive than a sole application, as well as less complicated, since the Writ of Summons and Statement of Claim need not be served (Rules of Court, r. 60.12.c). However, lawyers may require both parties to seek out independent legal advice. This could increase expenses.

C. Filling Out the Writ of Summons and the Statement of Claim

The Registry is extremely scrupulous, and documents containing inconsistencies or omissions will be rejected. This could cost the client valuable time. Clients should be advised to check and re-check every document, especially dates and the spelling of names.

Do not use abbreviations, even common abbreviations such as "n/a" or "a.k.a" or even "B.C.". Answer every paragraph in full – e.g. in paragraph 20, write, "There are no such children of the marriage" rather than "n/a".

If at any time, one party is aware of errors in the supporting documents (such as the certified copy of registration of marriage), the true facts as that party knows them must be included in the document with a note stating that it is incorrect. This is because the party requesting the divorce must swear an affidavit as to the correctness of the documents and the statements contained therein.

D. Style of Proceedings

The style of proceedings should use the names of both parties as they appear on the certificate or registration of marriage. What is important is that the name on the actual marriage certificate is used, even if the certificate shows a typographic error. If a party's name is different than what is shown on the marriage certificate, the style of proceedings should show the name the party presently uses and "also known as" (or "formerly known as," as appropriate) the name on the certificate.

E. Backing Sheets

The backing sheet is the last page of the entire document, placed backwards so the documents can be easily identified when folded. All documents filed at the Registry require backing sheets.

F. Statement of Claim

For sections that give alternatives for answers, cross out the answers that do not apply. For entire sections that do not apply, delete them in their entirety or write "Not applicable".

1. Part A: Particulars of Parties

The sections that are not applicable should be crossed out. Addresses must be accurate. Do not use post office boxes.

2. Part B: Relationship of Parties

Only paragraphs 8 to 11 are relevant to a divorce proceeding, unless there are concerns about evidence establishing that the parties are spouses, in which case the evidence being used should be set down in question nine.

3. Part C: Children

The sections that are not applicable should be crossed out. Under the Divorce Act and the Family Relations Act, children who are over the age of majority but whose illness leaves them

unable to leave the care of a parent or whose attendance of a post-secondary institution leaves them financially dependent on their parent may be considered a dependent child.

4. Part D: Other Proceedings and Agreements

Any separation agreements or financial agreements determining any matters related to the dissolution of the marriage should be noted here. Details such as the date of the agreement, the matters resolved, and whether or not the agreements are still in effect should be set down, but the more specific details of the agreement do not need to be set out.

5. Part E: Divorce

The reasons for the breakdown of the marriage must mention the specific section number of the Divorce Act under which the divorce is sought. If the breakdown of the marriage is due to separation, the commencement of the separation date should be noted.

6. Part F: Custody, Guardianship, and Access

The particulars regarding care of the children should mention the care of any children during the marriage, and since the separation. The schooling, health and special expenses of the children should be included, as well as details on how support would be paid, and by what guidelines the support was decided.

7. Part G: Support or Maintenance

Information regarding the financial position of either party should include a brief job description, the annual salary, and the value of any capital (i.e. car, real property).

8. Part H: Property

If one of the parties wishes to obtain more than the presumed 50 percent of the family assets, details and reasons should be set forth here. **Only a lawyer should deal with property issues.**

9. Part I: Other Relief

Other types of relief that may be sought under the Family Relations Act include orders restraining or protecting persons and property.

10. Summary of Relief Sought

A list of the parts in the Statement of Claim in which relief is sought and a summary of the relief requested should be set here.

G. Child Support Affidavits

Whenever there are children of the marriage, a Child Support Affidavit must be filed. Even if the matter of custody, etc. is to remain in the jurisdiction of the lower court, a judge is still required to satisfy him or herself that reasonable arrangements have been made for the care of the children, hence the requirement for financial information. It is imperative that all income, expenses, assets, and liabilities be listed on the affidavit. If a third party (i.e. a common law spouse, grandparents, etc.) will be assisting the custodial parent financially, this information should also be provided.

H. Service

Service is only required if the client is making a sole application.

Clients should be advised that they **must** have a third party serve their divorce papers. Clients who choose to use a professional service should provide the server with a photograph of the spouse. The server should be told to take down the spouse's driver's licence number. Taking these steps will ensure that the court does not question the validity of the service.

If the defendant's address is not known, the client should write letters to friends and family members to try to locate him or her. The client might also want to consider hiring the services of a skip tracing agency. This takes extra time, but will avoid the additional costs associated with a substitute service application.

In a substitute service application, the client must make an extra application to obtain permission to serve the defendant in a way other than that normally required by the Rules of Court. The client may also incur the cost of publishing notices in a local newspaper and or the Gazette, which could cost anywhere between $60 and $200, depending on the order given. Other options include posting a copy of the substitution service order and the pleadings in the court registry, mailing them to the defendant's last known address by registered mail, or serving an adult in the house where the defendant is believed to reside.

I. Costs

Clients should always double-check the following court fees because they tend to change:

- Ordering a marriage certificate or registration of marriage: $27 for couples married in B.C. It can be ordered by mail or in person. Refer to www.vs.gov.bc.ca/marriage/certificate.html for more information.

- Court fee to file the Writ of Summons and Statement of Claim: $208.

- Fee for Serving the Writ of Summons and Statement of Claim on the defendant: varies depending upon where the defendant lives. The average fee is $75. Process Server Fees for the Lower Mainland can run from $50 for 4 attempts, plus $20 for an affidavit, or $70 to $100 all inclusive. For other parts of B.C. or Canada, it can cost up to $200 for all attempts. If LSLAP is assisting a client with their divorce, we can provide the service within the Lower Mainland for $50-$75, depending on the location of the defendant. Fees outside the Lower Mainland are to be determined on a case by case basis.

- Notarization: between $25 and $50, if the affidavit is already completed.

- Final application fee: $62.

- Fee to apply for a certificate of divorce: $31.

NOTE: There is no fee to file a separation agreement in Provincial Court. There is a fee of $62 to file a separation agreement in the Supreme Court.

J. Approximate Length of Time for Divorces

Simple divorces, with or without children, take approximately two to three months to complete, or four to six weeks in the case of joint applications. Substitute service divorces take longer, an additional one or two months depending on the terms of the order for substitute service.

VI. SIMPLE DIVORCE PROCEDURE: STEP BY STEP

If LSLAP is representing the client, clinicians should complete the Uncontested Divorce Student Interview Guide. Obtain the original marriage certificate (plus translation if appropriate) and a photograph of the spouse. The family law legal assistant and Supervising Lawyer will complete the application.

NOTE: If the client is representing themselves, the client is responsible for purchasing the Self-Counsel Press divorce guide and forms. The instructions and steps for filling out the forms and filing them, etc. are included in the kit. Whenever possible, encourage the client to use LSLAP as it is considerably easier for the client.

A. Sole Application

Step 1: Collect all necessary documents: i.e. the marriage certificate, copies of court orders or agreements regarding custody, access, and maintenance of the children.

Step 2: The client fills in the Writ of Summons and the Statement of Claim.

Step 3: The client fills in the Registration of Divorce form, available at the registry.

Step 4: The client should then go to the nearest Supreme Court, and bring the original and three copies of the Writ of Summons and Statement of Claim, the original marriage certificate or the certified copy of the marriage registration, and $218 in cash, money order, or cheque, payable to the Minister of Finance.

Step 5: In the sole application process, the client must then arrange for the court-stamped Writ of Summons and Statement of Claim to be served on the defendant.

Service by a friend: The friend should know the defendant, but not be involved in the divorce in any way. When the friend serves the defendant, the friend should ask whether the defendant is Mr./Ms. X, and ask for identification. It would be helpful, although not mandatory, to give the friend a picture of the defendant. The friend will then have to swear an affidavit of service, and the friend will have to say how he or she identified the spouse (Rules of Court, r. 60.20).

Service by a Process Server: Process Servers are listed in the Yellow Pages. They require the addresses of the defendant, home and business, the telephone numbers, and a photograph of the defendant. They will also need two copies of the Writ of Summons and the Statement of Claim, one for the spouse, and one to staple to the affidavit of service. LSLAP has a process server to serve in the lower mainland.

Substitute Service: Evidence of efforts to find the defendant will be required before an order for substitute service can be granted. Some methods of finding the defendant are:

- calling or writing to relatives (usually the most successful);
- advertising in a local newspaper;
- writing to the Superintendent of Motor Vehicles to see if any vehicles have been registered in his or her name. The client should ask whether any fees will be incurred before proceeding;
- asking the local police if they have any information on his whereabouts, although they are usually reluctant to help;
- using a credit bureau or collection agency; or
- asking friends of the defendant about his current address.

Step 6: Once the time for the defendant to file a Statement of Defendant has expired, the spouse applying for the divorce must swear an affidavit. The affidavit will need to be sworn before a notary public, the registry staff ($31), or a lawyer. The time limits for filing a defence or Counterclaim, are:

- within B.C.: 21 days;
- Canada: 35 days;
- U.S.A.: 42 days;
- anywhere else: 56 days; and
- in the case of a substitution service order, such time as the order provides for the filing of a Statement of Defence or Counterclaim.

Step 7: If there are any children, a child support affidavit must be filled out and sworn before a notary public, the registry staff, or a lawyer.

Step 8: The plaintiff applies for the divorce order. This requires:

a) a requisition requesting an order that the parties be divorced;

b) a draft order;

c) the original of the affidavit of service complete with all exhibits;

d) a blank Registrar's Certificate of Pleadings;

e) a requisition requesting a search for any statement of defence or counterclaim;

f) an affidavit in support of the application, sworn after the time for the defendant to file a Statement of Defendant has expired, which includes proof of the allegations made regarding the breakdown of the marriage; and

g) a child support affidavit, if there are children.

Note that when the divorce is based on adultery or cruelty, proof of the adulterous or cruel conduct must be filed in affidavit form. Proof of adultery might consist of the defendant admission to the adulterous conduct. Proof of cruelty will usually consist in the affidavits of third parties, or letters from treating physicians, psychologists or psychiatrists attached to an affidavit as exhibits.

NOTE: If a Statement of Defence or Counterclaim have been filed, the defendant has chosen to contest all or some of the relief sought and the client should be advised to see a lawyer immediately.

Step 9: If the court is prepared to make the order sought, the order will be available at the court registry four to six weeks after the application is filed. Clients should simply call the registry to see whether their order is ready rather than attending in person. Clients will require photo ID to pick up their divorce order.

Step 10: Thirty-one days after the divorce order has been granted (the date shown on the front of the divorce order), the client may apply to get a Certificate of Divorce by filing two copies of the requisition requesting a Certificate of Divorce. The fee is $31. Note that it is not always necessary to obtain a Certificate of Divorce.

B. Joint Application

In the joint application process, all the required documents are filed at once. All required affidavits except one of the supporting affidavits may be sworn ahead of time. At least one of the supporting affidavits **must** be sworn and filed after the other materials are filed.

Step 1: Complete Steps 1 to 3 above. Both parties will be required to sign the Writ of Summons and Statement of Claim.

Step 2: Complete all of the documents listed in Step 8 above, **except** for: one affidavit in support of the divorce application; the affidavit of service, and the requisition asking the registrar to search for a Statement of Defence and Counterclaim.

Step 3: One or both parties attend court to apply for the divorce order. This requires:

a) a requisition requesting an order that the parties be divorced;

b) a draft order;

c) a blank Registrar's Certificate of Pleadings;

d) one affidavit in support of the application, sworn after the time for the defendant to file a Statement of Defendant has expired, which includes proof of the allegations made regarding the breakdown of the marriage; and

e) a child support affidavit, if there are children.

A second affidavit in support of the application must be sworn and filed after the Writ of Summons and Statement of claim have been filed. That affidavit can be sworn at the court registry immediately after the filing of the other materials.

Step 4: Complete Steps 9 and 10 above.

C. Special Problems

1. Serving Divorce Papers Outside Canada

In circumstances where:

- the defendant in a divorce action is living outside Canada; and
- is willing to go to the Canadian Consulate office nearest to where she or he lives in order to accept service,

the Consul will serve the defendant at that office, for a fee. However, keep in mind that this form of service requires the defendant's cooperation, as she or he must be willing to attend at the consular office personally when notified by its staff to do so.

To comply with the requirements of this form of service, the client must forward service documents to the Consulate:

- a copy of the Writ of Summons and Statement of Claim;
- a partially completed Affidavit of Service;

- Exhibit "A" to the Affidavit of Service (i.e. a copy of the Writ and Statement of Claim); and

- Form 6: Endorsement from the Registry.

The client may then serve the documents outside of Canada. The Department of Authentication of Documents will help serve the documents. Their mailing address is:

Foreign Affairs and International Trade Canada
Legal Advisory Division (JLAC)
125 Sussex Drive
Ottawa, Ontario K1A 0G2

This office in Ottawa will in turn forward the documents to the appropriate consulate office. The charge will be billed to the client at the end, and is usually $50.

If the defendant is **not** willing to go to the consulate office to be served, the Department of External Affairs will **not** arrange service. In these cases, the client must find a friend or relative in that country who is willing to serve the respondent.

2. Foreign Language Marriage Certificates

Foreign language marriage certificates must be accompanied by a certified English translation. Certificates in French must also be translated. MOSAIC Translations will translate marriage documents. The minimum charge for this service is $35. It should be noted that foreign marriages might be considered valid if the evidence shows that the marriage is valid in the foreign country. The Society of Translators and Interpreters of B.C. also translates marriage certificates: (604) 684-2940.

3. Amending a Document

Under Rule 24 of the Rules of Court, a party may amend his or her pleadings. A party may amend an originating process or pleading issued or filed by the party at any time with leave of the court, and, subject to Rules 15(5) and 31(5):

- once without leave of the court, at any time before delivery of the notice of trial or hearing; and

- at any time with the written consent of all the parties.

Unless the court otherwise orders, where a party amends a document under sub rule (1), a new document, being a copy of the original document but amended and bearing the date of the original, shall be filed.

Unless the court otherwise orders, service on a party of an amended originating process or pleading shall be required if the original has been served on that party and no appearance has been entered or, in the case of a third party notice, no statement of defence has been filed.

Unless the court otherwise orders, where a party amends a document under subrule (1), the party shall deliver copies of the amended document to all the parties of record within seven days after its amendment and, where service is required under subrule (4), the party shall serve copies on the persons required to be served as soon as reasonably possible and before taking any further step in the proceeding.

Where an amended Statement of Claim, Counterclaim, or third party notice is served on or delivered to an opposing party, the opposing party, if he or she has already delivered a

Statement of Defence, may amend that Statement of Defence under the following conditions:

- the opposing party must amend the Statement of Defence only with respect to any matter raised by the amendments to the Statement of Claim, Counterclaim, or third party notice; and

- the period for filing and delivering an amended Statement of Defence to an amended Statement of Claim is 14 days after the amended pleading is delivered. Where a party does not deliver an amended Statement of Defence as provided in sub rule (8), the party shall be deemed to rely upon his or her original Statement of Defence.

D. Contested Actions

If the plaintiff's action is contested, the client should retain a lawyer, or at least seek a lawyer's advice, before proceeding. However, there are some situations where it is possible for the defendant to file a Statement of Defence without contesting the divorce application. For example, the defendant can speak to access without a contested action ensuing, but a maintenance or custody issue would definitely result in a contested action, and a considerable wait for trial.

E. "Quick" Divorces

If there are special circumstances such that the parties would both agree to a quick divorce, the defendant can waive the waiting period after service by filing an answer, and then both parties sign a waiver of appeal. However, this will only speed up the procedure by a few weeks as the appeal period is 31 days.

It should be noted that the court might not advance the date of divorce merely because of an impending birth or marriage. The court must be "of the opinion that by reason of special circumstances the divorce should take effect earlier," and the spouses agree not to appeal the decision: Divorce Act, s. 12(2). The courts have interpreted "special circumstances" very strictly, and grant a quick divorce in exceptional cases only, e.g. where the immigration status of the plaintiff's fiancée is in jeopardy, but not in the case of pregnancy or ordinary remarriage.

NOTE: LSLAP will not assist clients who are seeking a quick divorce.

VII. ALTERNATIVES TO DIVORCE

A. Annulment

An annulment differs conceptually from a divorce because a divorce terminates a legal status, whereas an annulment is a declaration that the parties' marital status never properly existed.

A declaration of nullity may be obtained for two types of marriages:

- void marriages, which are null and void *ab initio*; and

- voidable marriages, which are valid until a court of competent jurisdiction grants a declaration of nullity (although such a declaration has the effect of invalidating the marriage from its beginning).

The difference between a void and voidable marriage is less important in matrimonial proceedings in British Columbia than it once was, as the Family Relations Act makes no distinction between the two and Part 5 of the Act applies to both. For purposes other than the Family Relations Act, the distinction may still be relevant.

A marriage is void *ab initio* if:

- either of the parties was, at the time of the marriage, still married to another party;
- one of the parties did not consent to the marriage;
- the parties are related within the bonds of consanguinity; or
- the formal requirements imposed by provincial statute (such as the B.C. Marriage Act) are not fulfilled.

Misrepresentation is a ground for annulment only where the misrepresentation leads to a mistake about the identity of the other party or as to the nature of the marriage ceremony.

A voidable marriage is valid until one of the parties to it obtains a declaration of nullity. The declaration must be obtained during the parties' joint lives, and is not available if the parties are already divorced. In Canada, a marriage may be voidable in the following circumstances:

- either party is impotent or otherwise unable to consummate the marriage (as opposed to unwilling to consummate the marriage, which may constitute cruelty but does not render the marriage voidable (see *Juretic v. Ruiz* (1999), 126 B.C.A.C. 196 (C.A.)); or
- a party is under 14 years of age.

These are common law rules.

NOTE: If a marriage is found to be void, this does not affect the property claims that a party might have. Pursuant to s. 56 of the Divorce Act, the matrimonial regime still applies in this situation.

B. Judicial Separation

The court can no longer grant a judicial separation. Judicial separation was formerly used to sever the legal obligations and liabilities between a married couple without terminating the marriage, when a spouse's religion forbade divorce.

VIII. ASSETS

A. General

The division of property on marriage breakdown is dealt with in Part 5 of the Family Relations Act. The Act creates a basic presumption of equal entitlement to family assets, real and personal property that is ordinarily used for a family purpose. Part 6 deals with the division of pensions. These two parts of the Act do not apply to common law relationships, although common law partners can contract into the property provisions of the Act.

The rights of the parties to family assets may be resolved by agreement, mediation or litigation. All litigation relating to property must be dealt with at the Supreme Court level. The Provincial Court does not have the jurisdiction to deal with assets.

NOTE: LSLAP does not assist clients who need help with the division of assets.

B. Legislation

1. Divorce Act

The Divorce Act does not deal with property division. The specific rights and obligations of parties to a divorce are set out in the Family Relations Act.

2. Family Relations Act

Part 5 of the Act deals with the division of matrimonial property between married spouses upon the breakdown of a marriage. The Act establishes a presumption that both spouses are entitled to an equal share of all family assets. This presumption crystallizes when one of the following four "triggering events" occurs:

- a separation agreement (not defined in the Act). A separation agreement which has not been filed in court still qualifies as a triggering event;
- a declaratory judgment of the Supreme Court under s. 57, that the spouses "have no reasonable prospect of reconciliation";
- an order for dissolution of marriage; or
- an order declaring the marriage null and void.

Once a triggering event occurs, each spouse is presumed to own an undivided one-half interest in every family asset as a tenant in common (s. 56).

Actions for the division of property under the Act must be commenced within two years following divorce. To be safe, the claim should be commenced within two years of the triggering event. If an application is made after two years, a lawyer should also bring an action in constructive or resulting trust.

Until one of these triggering events occurs, only the titled spouse can deal with assets and property not specifically bound by a written agreement between the spouses. However, a third party entering into a property transaction may require assurance that a non-owning spouse's latent contingent interest is not likely to spring up or that it has been waived, and that spouse may be required to endorse or guarantee the transaction or to sign a waiver. Refer to s. 64 of the Family Relations Act.

C. Types of Assets

1. Family Assets

A family asset is defined by s. 58(2) of the Family Relations Act as "property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose". This suggests a functional test that determines whether the asset was "ordinarily used" and for a "family purpose". It also includes assets expected to be used for a family purpose. The term "property" is not defined in the Act and it has been given an expanded definition.

2. Savings

A savings account "ordinarily used for a family purpose" is also a family asset, even when it is in the name of one spouse, and drawn upon only by that spouse. With family assets such as

family savings accounts or pensions, there is a presumption of equal entitlement.

3. Pensions and RRSPs

Rights under an annuity, pension, home ownership, or registered retirement savings plan are considered family assets, including each party's Canadian Pension Plan (C.P.P.) credits: Family Relations Act s. 58(3)(d). In *Murray v. Murray*, (12 April 1979), Vancouver 5936/D832457 (B.C.S.C), the husband had an RRSP and his wife contributed to a teacher's RRSP of lesser value; the court added the assets of the two plans at the time of separation, and each spouse was entitled to a half share of this total; the husband paid his wife the deficiency between the value of her plan and her half-share entitlement.

NOTE: British Columbia is one of the few provinces that allow spouses to enter into a written agreement to waive the equalization of their pensionable credits under the C.P.P.

4. Real Property

It is often necessary to take early steps to secure the title to real property when there is a separation. This is particularly so where property is registered in the name of only one spouse, and there is a risk of that party disposing of or encumbering the property, or where judgments are likely to be registered against one party's interest, which might prejudice the other party. Under s. 67 (1) of the Family Relations Act, one may request an automatic restraining order to prevent the sale of family assets including real property.

There are several ways of protecting a spouse's interest.

a) Certificates of Pending Litigation and Caveats

Caveats and Certificates of Pending Litigation are warnings to potential purchasers and establish claim priority over the property from the day the Caveat or Certificate of Pending Litigation is filed. This document will defeat the presumption of claim priority given to the bona fide purchaser for value. Entitlement to a certificate of pending litigation is limited. See the Land Title Act, R.S.B.C. 1996, c.250 and Annotated Land Title Act by Gregory and Gregory for the procedure and forms.

b) Land (Spouse Protection) Act*, R.S.B.C. 1996, c. 246*

This Act applies where a party has elected not to commence legal proceedings, but needs to protect his or her interest in real property. It provides an alternative to a Certificate of Pending Litigation for a married spouse (not common law) where the "property" was the "matrimonial home". The Act allows a charge to be placed on land that will prevent disposition of the property without the written consent of the applicant for the charge (refer to the Land (Spouse Protection) Act and the Land Title Act for the registration procedure). Note that this only applies while the parties are legally married. The charge may be struck out on the death of, or final divorce from, the applicant.

Registration of a charge by one spouse under the Land (Spouse Protection) Act prevents the other spouse from selling or encumbering his or her share, but is not protection against a creditor who could obtain an order for sale of the house. So long as you are legally married to your spouse, one may file against the property without the other spouse's notice or consent, in order to prevent the transfer of the property.

c) *Registration of a Notice Under the Land Title Act*

A spouse who is a party to a marriage agreement or a separation agreement may file a notice in the Land Title Office regarding any lands to which the agreement relates (Family Relations Act, s. 63). This applies to married spouses only.

The information required in the notice includes the names and addresses of the spouses, the legal description of the land, and the provisions of the agreement relating to that land. The Registrar may then register this notice in the same manner as a charge on the land.

Once the notice is registered, there can be no subsequent registration of a lease, mortgage, transfer, etc., unless both spouses or former spouses sign a cancellation or postponement notice in the prescribed form. A spouse or former spouse may apply to the Supreme Court for an order to cancel or postpone a notice where the other party to the agreement cannot be found after reasonable search, or unreasonably refuses to sign a cancellation or postponement, or is mentally incompetent.

The use of notice will also extend to mobile homes (Family Relations Act, s. 63(6)).

d) *Rules of Court*

Generally, Rule 43 of the Rules of Court governs legal remedies for joint tenants. Where a dispute arises, an application can be made to the Supreme Court to settle the matter, but clients should be advised that a court action is costly and a negotiated settlement is generally to their advantage because courts have a wide discretion to distribute matrimonial property under Rule 43. For example, a court could order the sale of property at a time when the housing market is poor, resulting in a low sale price. Sometimes, a spouse should consider selling his or her interest in a property to the other spouse.

e) *Limitation Period*

A former spouse is always considered a "spouse" within the meaning of the Family Relations Act (s.1) for the purpose of proceedings to enforce or vary an existing order. However, where an entirely new order is sought, the parties cease to be "spouses" within the meaning of the Act after 2 years has passed since the order granting the divorce was made. This distinction has engendered a debate as to whether there is a limitation period for the redistribution of property "between spouses" under the Family Relations Act. See *Staires v. Staires* (1991), 34 R.F.L. (3d) 376 (B.C.S.C.) and *Tatlock v. Tatlock* (1992), 71 B.C.L.R. (2d) 194 (S.C.). The Supreme Court of Canada partially addressed the issue in *Stein v. Stein*, [2008] 2 S.C.R. 263, 2008 SCC 35, para. 12: "...the [Family Relations Act] does not place any temporal limits on the division of assets. Nor does it state that once assets have been subject to an initial division, a reapportionment cannot occur at some point in the future."

Practically speaking, since a court order granting a divorce will usually include provisions respecting the division of property, it would be somewhat uncommon to make an initial application for the division of property after the divorce. Should the issue arise however, clinicians are advised to carefully review both the case law, and s.1 of the Act. Clients should be advised to bring applications for the division of property within 2 years of the divorce.

f) Interim Relief

A court may order temporary occupation and possession of the family residence and its contents by just one spouse (Family Relations Act, s. 124). A court may also restrict access by the other spouse (s. 126) and postpone the rights of the other spouse to sell or otherwise dispose of the property (s. 125). These provisions also apply to common law couples.

5. Business Assets

The Family Relations Act divides assets into "family," "business," and other "assets". Property owned solely by one spouse and used primarily for business purposes, where the other spouse has made no direct or indirect contribution to the acquisition of the property or the management of the business, is excluded from division under the s. 59(1) of the Act. However, it can be difficult to have something declared a business asset. The contribution test is set out in s. 59(2), which states that an indirect contribution includes "savings through effective management of household or child-rearing responsibilities" by the non-owning spouse. If, for example, a mother stays home to care for the couple's child, savings made possible through her efforts over the cost of comparable child care arrangements are very likely to be sufficient to satisfy this requirement. (That said, the court will often deviate from the 50/50 apportionment where one spouse has contributed only indirectly to the asset).

NOTE: The court will not inquire too closely into the effectiveness of household management.

The Family Relations Act also attempts to protect family assets from being hidden behind corporate veils. Thus s. 58(3) extends the definition of family assets to include a share in a corporation or an interest in a trust owned by the spouse where the corporation or the trust owns property that would be a family asset if owned directly by the spouse. Also included is property subject to a power of appointment by a spouse that, if owned by the spouse, would have been a family asset.

6. Ventures

The s. 58 definition of family assets also includes a spouse's right, share, or interest in a "venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse." In one case, the Supreme Court of British Columbia held that the wife had contributed indirectly to her husband's garage business by going without benefits at home so the earnings from the operations could be reinvested in the business. She also assisted the business by taking phone messages for her husband, and by travelling with her husband to Vancouver to pick up parts and equipment (*Money v. Money* (1982), 33 B.C.L.R. 280). See also *O'Keeffe v O'Keeffe*, (2002) BCSC 337.

D. Reapportionment of Assets

While there is a presumption in favour of equal distribution of family assets, s. 65 of the Family Relations Act gives the Supreme Court power to reapportion the distribution if it is satisfied that it would be unfair to divide the assets equally. B.C. Courts have given this section a fairly wide interpretation.

The only factors the court can consider are set out in s. 65:

1. the duration of marriage (the general presumption of the Family Relations Act has been in favour of equal distribution, especially in the case of a long marriage), and of the period of living separate and apart;

2. when the property was acquired or disposed of, and whether it was an inheritance or a gift to one spouse;

3. what each spouse needs to become economically independent and self-sufficient; and

4. "any other circumstances" relating to the acquisition, care, use, etc. of the property, or to the "capacity and liabilities of a spouse". The latter refers to family debts. The decision in *Mallen v. Mallen*, [1992] B.C.J. No. 649 (B.C.C.A.) confirms that debt is only dealt with at the s. 65 stage of the analysis regarding the distribution of family assets.

There is case law on each consideration that should be consulted.

"Any other circumstances" of the last consideration is clearly a catch-all phrase, and reviewing "capacity and liabilities" of a spouse coupled with the policy of ensuring that spouses become "economically independent and self-sufficient" confers on the B.C. courts a wide discretion to reapportion. The Supreme Court is also empowered under s. 65 to consider "other property" not covered by s. 56 or the marriage agreement: see *Hefti v. Hefti* (July 7 1998), Vancouver CA022776 (B.C.C.A.).

Note that the courts will determine any entitlement to and quantum of spousal support after the assets have been divided, as the division of assets may accomplish part or all of the goals that spousal support is intended to accomplish.

E. Use of Assets

The court can award one spouse exclusive use of assets pending further agreement between the parties or a court order. This can include large assets such as a home and car; or smaller assets as may be required to operate a business, or for the departing spouse's television, computer, books, for example.

F. Unmarried Couples

Unmarried couples will rarely end up with as much compensation as married couples. When couples marry, they make a choice to opt into the property provisions of the Family Relations Act and the responsibilities contained therein. A couple who elects not to marry is similarly deprived of the other benefits of the Act, such as the presumption to an equal interest in all property owned by either or both spouses: see *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84 (S.C.C.).

The courts will recognize an equitable interest of a common law spouse in all the property and assets acquired by the couple through the joint efforts of the two spouses, although registered in the name of the other spouse (i.e. a constructive trust). The scope of constructive trusts was greatly expanded in *Peter v. Beblow* (1993), 3 W.W.R. 337, 77 B.C.L.R. (2d) 1, in which the court found a constructive trust arising from the contributions made by homemaking and childcare services, which allowed for the inclusion of money that would otherwise be paid for such services to be used as mortgage payments. Claims in trust may be constructive, resulting, or express. Constructive trusts are the most common type of trust claim, where the court imposes a trust to remedy the unjust enrichment of one party at the deprivation of the other.

However, there are limits, and a court will not interfere where the elements of constructive trust are not present. A causal connection must be found to exist between the contribution made and the property in question. Refer to a general text for a more comprehensive description of the elements of constructive trust.

IX. SPOUSAL AND CHILD MAINTENANCE

A. General

Maintenance is the financial support one person provides for another person (adult or child). This support is meant to provide for that person's reasonable needs (i.e. food, clothing, shelter, education, and medical care). Spousal maintenance is intended to pay for basic living expenses and is highly discretionary. In contrast, child maintenance is an obligation acquired through parenthood; it is mandatory with firm guidelines. Child support always takes precedence over spousal maintenance if a party's ability to provide financial support is limited.

An application for maintenance may be made under either the Family Relations Act or the Divorce Act, but it is essential to look into the standards, limitations and other important differences between the Acts. The parties may also agree on the issue of maintenance and incorporate their agreement into a written document (a separation agreement), which may have the legal status and force of a personal contract. An agreement is not completely determinative of the issue however; the court will make orders superseding the provisions of an agreement in order to bring the obligations of parties in line with the requirements of statute.

In making an order for spousal maintenance, the court will not look to the conduct (or misconduct) of the parties, but will consider the "condition, means and other circumstances of each" in making an order. Nevertheless, in *Leskun v. Leskun*, [2006] S.C.J. No.25 (S.C.C.), the court held that the **effect** of spousal misconduct on the other spouse's ability to achieve self-sufficiency should be taken into consideration. In some cases, the court will refer the matter to the registrar who holds an independent inquiry into the spouses' assets, income liabilities, etc., and then recommends a "reasonable" maintenance payment. This recommendation does not become an order until a judge confirms it. Arrangements for spousal support can be made as part of a separation agreement, granted at the time of a divorce or, if no order for maintenance is made or denied at the time of divorce, within a reasonable time thereafter. Because of the way "spouse" is defined under the Family Relations Act, initial applications for spousal maintenance under this Act must be brought within 2 years of the order granting divorce, or within one year of the date of separation for common law relationships.

Orders for child support are almost always fixed according to the schedule of support payments set out in the Child Support Guidelines, which are based on the payer's gross income and the number of children for whom support is being paid.

The court will not grant a divorce if there are not reasonable arrangements made for child support (Divorce Act, s.11). The level of child support is based on the income of the non-custodial income and is set out in the Federal Child Support Guidelines.

B. Courts

Both the Supreme Court and the Provincial Court have the powers to grant or vary maintenance orders under the Family Relations Act, but only the Supreme Court can grant or vary maintenance orders under the Divorce Act. Only the Supreme Court can grant interim relief under the Divorce Act or the Family Relations Act.

1. Provincial Court

The Provincial (Family) Court is often the most accessible court to lay litigants. It can deal with applications for maintenance made under the Family Relations Act, as well with variation of previous Provincial Court child or spousal support and arrears of child or spousal support orders. Applications can be made at certain Provincial (Family) Courts for a Supreme Court Hearing.

2. Supreme Court

The Supreme Court can order interim relief under the Divorce Act or Family Relations Act or make an order for maintenance upon the granting of a divorce order. If a Supreme Court order for maintenance is made under the Divorce Act, that order ousts any provincial statutory jurisdiction in that matter. While obtaining interim relief from the Supreme Court is more expensive than obtaining a Provincial (Family) Court order, it can be faster if the application is urgent or if the party wishes to proceed *ex parte* (without notice to the other side).

C. Enforcement

1. Family Maintenance Enforcement Act (R.S.B.C. 1996, c. 127)

This Act, passed in 1988, gives the provincial government extensive powers to collect maintenance arrears, including:

- a Notice of Attachment (s. 17);
- 12-month garnishing orders (s. 18);
- Attachment Orders (s. 24); and
- Attachment of money owing by the Crown (s. 25) including Income Tax refunds and Employment Insurance benefits directly from the Federal Crown.

Any person, who receives a Maintenance Order or Separation Agreement that has been filed in court, may voluntarily register with the program. In addition, all recipients of B.C. Benefits income assistance, or other social assistance, such as day-care subsidies, must enrol in the program if the Director of Income Assistance requires that they do so.

2. Reciprocal Enforcement

If properly filed in British Columbia, a maintenance order from another jurisdiction is enforceable under the Family Maintenance Enforcement Act. All other Canadian jurisdictions have similar legislation and will enforce B.C. orders on registration in their courts. Many foreign jurisdictions will also enforce B.C. orders; see the table of reciprocating states in the Court Order Enforcement Act, R.S.B.C. 1996, c. 78.

3. Variation of Orders

Spousal support orders may be varied where there have been changes in the needs, means, capacities and economic circumstances of each party (Divorce Act, s. 17(4.1), Family Relations Act s. 96(1)). The court may also reduce the amount of maintenance to a spouse where it finds that the spouse or former spouse "is not making reasonable efforts" to become self-sufficient (Family Relations Act, s. 96(4)).

There may also be a variation in child support levels. Child support levels will change with a change in income, which is virtually automatic when one makes an application in court. Provincial Court orders made in other Canadian jurisdictions and in certain reciprocating foreign states may be varied under the Interjurisdictional Support Orders Act, S.B.C 2002, c. 29. The Act creates a system where an application is made through the filing of prescribed documents and filed with the Reciprocals Office in British Columbia, which is responsible for transmitting the documents to the originating jurisdiction for adjudication.

Support orders made under the Divorce Act may only be varied through the provisions of ss.

17, 18 and 19. In this process, someone seeking to change a support order made in another Canadian jurisdiction must apply to the courts of B.C. for a provisional order. The provisional order is sent to the originating jurisdiction for a second hearing to confirm the order. Unless the order is confirmed, the provisional order has no effect.

4. Agreements

The court can enforce written agreements that provide for the payment of child or spousal support. Under ss. 121 and 122 of the Family Relations Act, a written agreement concerning support may be filed in the Provincial Court and in the Supreme Court. Once filed, the agreement has the effect of a court order for enforcement purposes.

D. Spousal Maintenance

The fundamental question in determining spousal maintenance is whether the division of assets in a divorce has satisfied spousal support requirements.

1. Legislation

a) Divorce Act

Section 15.2 of the Divorce Act creates an obligation to support a spouse. However, s. 15.3(1) directs the court to give priority to child maintenance in any application for child and spousal maintenance under the Divorce Act. Essentially, income should be allocated to child maintenance, with reference to the Federal Child Support Guidelines, and to spousal maintenance with whatever income remains.

b) Family Relations Act

Any person may apply under Part 7 for a maintenance order on his or her own behalf (s. 91). The Attorney General may designate persons to make an application on behalf of a parent or a spouse, s. 91(2). Section 89 of the Family Relations Act sets out the obligation to support a spouse. The definition of "spouse" in the Act includes common law couples that have cohabited for not less than two years and where an application is brought within one year after the relationship terminated.

While s. 93(3) of the Act allows for lump sum payments, for charging property with payment under an order, for a contingent payment or a varying payment, some case authority holds that a periodic stream of payments may be the most equitable form of payment.

c) Spousal Support Advisory Guidelines

The final version of the Spousal Support Advisory Guidelines (SSAG) was published in July 2008. The SSAG do not have the force of law and are not expected to become law.

The SSAG set out two basic mathematical formulae for determining the quantum and duration of spousal support when a person's entitlement to receive support is established: the "with children" formula when the parties have dependent children, and the "without children" formula when child support is not being paid. The "without children" formula is relatively simple, however the "with children" formula cannot be completed without the assistance of a computer program (refer to

www.justice.gc.ca/eng/pi/pad-rpad/res/spag/ex.html).

While the SSAG have no regulatory effect and are merely "informal", and "advisory", they are nevertheless being used by the courts and the bar.

2. Principles of Spousal Support

a) General

Spousal support is calculated after the division of the assets. The question becomes whether the need is still there after the assets have been divided. The purpose of spousal maintenance is to relieve economic hardship resulting from the marriage or its breakdown. Most recent court decisions have focused on the effect of the marriage in either impairing or improving each spouse's economic prospects. While both the Divorce Act (in s. 15.2(6)) and the Family Relations Act (in s. 93(4)) refer to the objective of self-sufficiency, this is only one of the factors that a court will consider. For example, in cases where a spouse has health issues or lacks marketable skills due to a prolonged absence from the work force, a court may find it is unrealistic to expect a spouse to be self-sufficient. See *Moge v. Moge*, [1992] 3 S.C.R. 813; see also *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

b) Factors considered

While the underlying principles may be the same, the Divorce Act and the Family Relations Act differ slightly in the factors they direct the courts to consider.
Section 15.2 of the Divorce Act directs courts to consider the condition, means, need and other circumstances of each spouse, including:

1. the length of time the spouses cohabited;

2. the functions performed by each spouse during cohabitation; and

3. any order, agreement or arrangement relating to support of either spouse.

Section 89 of the Family Relations Act refers to the obligation to support the other spouse based on:

1. the role of each spouse in their family;

2. an express or implied agreement between them that one has responsibility for the support of the other;

3. any custodial obligations if there is a child;

4. the economic circumstances of each spouse; and

5. the ability, capacity and reasonable efforts made by either spouse to become self-sufficient.

3. Issues Related to Spousal Support

a) Employment and Income Assistance and Spousal Support

As part of the Family Maintenance Program, spouses applying for Employment

and Income Assistance will be required to sign a document allowing the ministry to take steps necessary to obtain spousal support on their behalf. The ministry will do this regardless of any understanding regarding support that may exist between the spouses.

b) Taxes and Spousal Support

Spousal support is treated by the recipient as taxable income. The spouse who pays support is entitled to deduct the amount from income tax. The spouse who receives support is required to declare it as income, in contrast to child support which has no income tax consequences. The spouse paying support may 'gross up' the amount of support to account for taxes, making this spouse responsible for paying income tax. It is essential that support payments be identified as such in court orders and separation agreements if the payor is to be able to claim a deduction. As a rule, oral or informal agreements are not sufficient to establish the status of payments as spousal support.

Other tax issues can arise if payments are made through a corporate account or if the payor has a lower tax burden than usual (i.e. aboriginal spouses or U.S. residents).

E. Child Maintenance

1. General

Child support is intended to cover most of a child's day-to-day expenses. The minimum amount of child maintenance payable is determined by the Federal Child Support Guidelines, which set maintenance levels based on the payor's income and the number of children to be supported. Several web sites, including J.P. Boyd's helpful site, offer online child maintenance calculators (see **Section I.B: Resources on the Internet**, above).

The court may also provide for "special or extraordinary" expenses in a Child Support Order (see s. 7 of the Federal Child Support Guidelines), in addition to the basic child support order, requiring payment for other expenses such as child care, health related expenses (e.g. orthodontic treatment, hearing aids, prescription drugs, speech therapy, contact lenses and professional counselling), expenses for child care in order to maintain employment (see *Bially v. Bially* (1997), 28 R.F.L. (4th) 418 (Sask. Q.B.)), and expenses for extracurricular activities.

Expenses for extracurricular activities must be reasonable having regard to the parents' means, but need not be restricted to a special talent of the child. "Extraordinary" is also determined by what would be extraordinary in a household with a similar income; it depends on the lifestyle of the family.

2. Legislation

a) Divorce Act

An order for child maintenance made under the Divorce Act has effect throughout Canada (s. 14). Under s. 17(1) of the Divorce Act, any court of competent jurisdiction, as defined by s. 5, can vary, rescind, or suspend an order.

Children born within the marriage and adopted children are treated equally under the Divorce Act. However, some controversy remains as to whether a stepchild, for whom the respondent stood *in loco parentis*, qualifies for maintenance under the Divorce Act. Child support will be assessed in light of the biological parents' support obligation.

b) Family Relations Act

Under the Family Relations Act, the obligation to support a child (s. 88) extends to a stepparent, and by the s. 1 definition of "parent", this may include a person who cohabits with the parent of a child as a common law partner and contributes to the support and maintenance of the child for a period of not less than one year (including during the period of pregnancy).

Factors to be considered by the court in granting maintenance can be found in the guidelines that apply to the Divorce Act and the Family Relations Act. Liability for support by one parent does not alter the liability of the other parent, or that of subsequent persons who come to stand *in loco parentis*.

Section 93(5)(e) allows recovery for the prenatal care of the mother or child and for the birth of the child.

Section 95(1) of the Family Relations Act gives the court jurisdiction to presume the paternity of a child where a man denies he is the father of a child.

The Federal Child Support Guidelines have now been incorporated into British Columbia's Family Relations Act. Therefore, if a parent seeks a child maintenance order they will fall under the same guidelines.

c) Child Support Guidelines

The Child Support Guidelines are federal regulations that determine the amount of child support owing, and vary from province to province. The guidelines establish how much child support must be paid based on the payor's income and the number of children for whom support is to be paid. For more information refer to s. 88 of the Family Relations Act or the resources listed at the end of the chapter.

F. Obligation to Support a Parent (Parental Support)

Obligations to support a parent are set out in s. 90 of the Family Relations Act; here, "child" is defined as an adult child of a parent, and "parent" is defined as a father or mother dependent on a child by reason of age, illness, infirmity, or economic circumstances. The child is liable to support the parent, having regard to the other responsibilities, needs, and liabilities of that child.

X. CUSTODY, GUARDIANSHIP AND ACCESS

A. General

Disputes over custody of minor children are often the most difficult issues to resolve during the breakdown of a marriage or other relationship. While custody of a child is never decided absolutely and irrevocably, the decision about who gets interim custody is particularly important because courts do not like to change custody arrangements unless it is necessary. Children usually stay with the parent who has provided primary care in the past and who can spend the most time with them. Sometimes, courts will order joint custody on an interim basis so that neither parent's position is prejudiced.

In all cases, the **best interests of the child are paramount** (Divorce Act, s. 16(8); Family Relations Act, s. 24).

In addition to custody, courts can also make decisions regarding guardianship of minor children. Guardianship gives a parent or other person "a full and active" role in determining the course of a child's life and upbringing (see e.g. *Charlton v. Charlton*, [1980] B.C.J. No. 22). There is considerable overlap

between the two, but it is useful to note that while having custody usually includes having guardianship, the reverse is often not true.

The case law on custody and guardianship has developed to the point where there is a presumption in favour of joint custody and joint guardianship (although there is no legislative presumption). A parent seeking sole custody will generally have to show that there is a serious defect in the other person's parenting skills, that the other person is geographically distant, or that the parents are utterly unable to communicate without fighting before the court will consider granting such an application.

B. Legislation

1. Divorce Act

The Divorce Act only speaks of access and custody. Under s. 16, the Supreme Court may make an order for custody. This order will supersede any existing Family Relations Act orders, which cover custody, access, and guardianship, and can be registered for enforcement with any other Superior Provincial Court in Canada. The Supreme Court can also grant interim custody before a divorce action is heard.

The Divorce Act applies only to married couples. Under the Act, the person making the application for custody must have been "habitually resident" in the province for at least one year prior.

2. Family Relations Act

Whereas the Divorce Act deals solely with custody and access, the Family Relations Act deals with both custody and guardianship. Under the Family Relations Act, Divorce Act orders for custody are presumed to include guardianship. "Any person" may apply for custody and guardianship of a child (s.16). The Act requires only that the child is "habitually resident" in B.C. at the time of the application for the court to have jurisdiction to hear an application for custody or guardianship.

C. Courts

1. Supreme Court

The Supreme Court has jurisdiction to deal with all matters relating to custody, guardianship and access to children, pursuant to the Divorce Act, the Family Relations Act, and the Child, Family and Community Service Act. This includes orders restraining contact or entry to the matrimonial home.

The Supreme Court has *parens patriae* jurisdiction over all children in the province. In operation, this can allow the court to transcend the statutory letter of the law in the best interests of the child.

A written agreement about custody or guardianship may be given the force of a court order under ss. 121 and 122 of the Family Relations Act if it is filed in court.

An order made under the Divorce Act can be registered for enforcement in any other province's Supreme Court registry.

2. Provincial Court

The Provincial Court has jurisdiction to deal with all matters relating to custody, guardianship

and access to children, pursuant to the Family Relations Act, and the Child, Family and Community Service Act. This includes restraining orders but does not include orders restraining entry to the matrimonial home.

A written agreement about custody or guardianship may be given the force of a court order under ss. 121 and 122 of the Family Relations Act if it is filed in court.

D. Custody

In the absence of a court order or a written agreement, custody of a child remains with the person with whom the child usually resides. If two or more persons claim custody under this head, the person who usually has the day-to-day personal care of the child has legal custody rights under the Family Relations Act (ss. 34(2)(c) and (d)). One must bear in mind that the Act does not touch on day-to-day life until it is invoked, usually by filing a lawsuit or by making an application.

When application for a custody order is made, the court may impose any terms or conditions in a custody order it deems to be "in the best interests of the child" (Family Relations Act, s. 35). A person or persons who has custody rights under a court order may exercise those rights to the exclusion of all other persons (s. 34(2)(a)).

1. Factors in Awarding Custody

The factors that the court must consider in determining the "best interests of the child" are set out in s. 24 of the Family Relations Act and at s. 16 of the Divorce Act. These factors include the child's health and emotional well-being, his or her education and training and the love, affection and similar ties that exist between the child and other persons such as relatives and family friends. If appropriate, the views of the child will be considered. For a custody order relating to a teenager to be practical, it must reasonably conform to the wishes of the child (*O'Connell v. McIndoe* (1998), 42 R.F.L. (4th) 77 (B.C.C.A.), *Alexander v. Alexander* (1988), 15 R.F.L. (3d) 363 (B.C.C.A.)).

Other factors have emerged through the common law, including a preference that siblings remain together and a willingness to look into the character, personality and moral fitness of each parent. However, there is no presumption against the separation of siblings (*P. (A.H.) v. P. (A.C.),* 1999 BCCA 203). The welfare of the child is not determined solely on the basis of material advantages or physical comfort, but also considers psychological, spiritual, and emotional factors (*King v. Low,* (1985), 44 R.F.L. (2d) 113 (S.C.C)). The court will take into account the personality, character, stability, and conduct of a parent, if appropriate (*Bell v. Kirk* (1986), 3 R.F.L. (3d) 377 (B.C.C.A.)).

Agreements between parties regarding custody do not oust the court's jurisdiction. An agreement is important, but only one of several factors to be taken into consideration when determining the best interests of the child. The degree of bonding between child and parent is also taken into consideration. The biological link does not outweigh other considerations, but when all other factors are equal, the custody of the child is best served with the biological parents (*L. (A.) v. K. (D.),* 2000 BCCA 455; *H. (C.R.) v. H. (B.A.),* 2005 BCCA 277).

Race and aboriginal heritage are relevant considerations, but neither is determinative of custody alone. The importance of race differs in adoption cases, where it may be given more weight because the court is making a decision about the child's exposure to his or her race or culture (*Van de Perre v. Edwards*, 2001 SCC 60). Aboriginal heritage is to be weighed along with other factors in a determination of a child's best interests (*H. (D.) v. M. (H.)*, [1997] B.C.J. No. 2144 (QL) (S.C.)).

Clients may wish to vary a custody order. The threshold for a variation of a custody or access order is a material change in the circumstances affecting the child. There is no legal

presumption in favour of the custodial parent, although that parent's views are entitled to respect. The focus is on the best interests of the child, not the interests and rights of the parents (*Gordon v. Goertz*).

Section 15 of the Family Relations Act allows the court to order an assessment by a psychologist of each party's parenting abilities and relationship with the child. These reports are particularly important where the dispute over custody is bitter and unlikely to settle. A s. 15 assessment provides the court with an independent and neutral expert opinion. In cases where expert evidence would assist the court, the court should order a s. 15 report (*Gupta v. Gupta*, 2001 BCSC 649).

The Family Relations Act contains presumptions about custody and guardianship when one parent is absent (ss. 27 and 34). These sections of the Act allow for the lone parent to make decisions in a child's life absent a second parent.

2. Types of Custody Orders

a) Interim Orders

An interim order is a temporary order made once the proceedings have commenced but before the final order is pronounced. Courts will usually make interim custody orders while an action in divorce is underway, with an eye to the child's immediate best interests. Courts tend to favour stability, so an interim order is likely to favour the party with custody at the time of the marriage breakdown. This is also why an interim order in your client's favour may be of substantial weight in determining a final custody order.

b) Sole Custody

Sole custody, in which one parent provides the primary residence and is mostly responsible for day-to-day care, can be granted in cases where the parents request such an arrangement, where they live far apart, or where relations between the parties are so poor as to preclude cooperation.

c) Joint Custody

In joint custody, both parents have custody of the child. While the child may reside primarily with one parent, the parents cooperate in raising the child, acting as both joint custodians and joint guardians of the child.

d) Shared Custody

Shared custody is a form of joint custody in which the child spends an almost equal time with each parent, often switching homes on a frequent basis, every few days or once a week. Usually, this requires that the parents live near one another and have good communications skills and that the child is able to adapt to living in two homes.

e) Split Custody

On rare occasions, courts will order siblings to live with separate parents. This is usually a drastic solution, ordered only after a Family Relations Act s. 15 report is submitted to the court.

3. Other Custody Issues

a) Consent Orders

Where there is agreement on the terms of maintenance or custody provisions, but no written agreement, a consent order may be made by the court (Family Relations Act, s. 10) if the written consent of the party against whom the order is to be enforced has been obtained. The order can extend only to the terms consented to.

b) Enforcement of Custody Orders

Where a custody order is in force, the court may make an order prohibiting interference with a child. The court may further order sureties and/or documents from the person against whom the order is made, and require that person to report to the court for a period of time (Family Relations Act, s. 38).

Also available are Police Officer Enforcement Clauses, in which a police officer is given the authority to enforce a custody order.

A child abducted and taken elsewhere within the province will be returned to the rightful custodian. Abduction is an offence under s. 128 of the Family Relations Act with a possibility of criminal proceedings (Criminal Code, R.S.C. 1985, c. C-46, ss. 280-281). The Criminal Code makes it an offence for a non-custodial parent to abduct a child. Where a custody order is in effect, abduction amounts to contempt of court.

c) Parental Mobility

Issues of parental mobility may arise in conjunction with custody issues. That is, one parent may wish to relocate away from another parent with whom they share custody. In *Gordon v. Goertz*, [1996] 5 W.W.R. 457 (S.C.C.), the Supreme Court of Canada set out the basic principles. Once the parent applying for the change meets a threshold requirement of demonstrating a material change in the circumstances affecting the child, the court is required to embark on a fresh inquiry into what is in the best interests of the child. Factors to be considered include: the desirability of maximizing contact between the child and both parents, the disruption to the child, and the child's views.

One v. One. 2000 BCSC 1584 identifies the following list of factors to be considered in determining whether a proposed move is in a child's best interests: i) the parenting capabilities of and the child's relationship with parents and their new partners; ii) employment, security and prospects of the parents and, where appropriate, their partners; iii) access to and support of extended family; iv) the difficulty of exercising the proposed access and the quality of the proposed access if the move is allowed; v) the effect of the move on the child's academic situation; vi) the psychological and emotional well-being of the child; vii) the disruption of the child's existing social and community support and routine; viii) the desirability of the proposed new family unit for the child; ix) the relative parenting capabilities of either parent and the respective ability to discharge parenting responsibilities; x) the child's relationship with both parents; xi) the separation of siblings; xii) and the retraining or educational opportunities for the moving parent.

E. Access

Unless a parent poses a risk to the safety or well-being of the child, he or she will usually be allowed access or visiting rights. Courts can make an order for access and may view a custodial parent who denies access as acting against the best interests of the child.

NOTE: It is important to note that access is a distinct and separate issue from child maintenance. **Denial of access is not grounds to withhold maintenance; nor is a failure to pay maintenance grounds for withholding access.**

1. Factors Considered in Making an Access Order

The overriding principle remains the **best interests of the child**. The courts will not be bound by the wishes of the child. The courts will look into several factors in making access orders. These include:

- The age of the child: older children will be allowed longer visits, but courts will also consider the wishes of children over 12 who may not wish to see the non-custodial parent;
- Distance between homes: if the distances are great, courts may order longer stays;
- Conduct of the non-custodial parent: access can be denied for reasons such as alcoholism, abuse, past attempts to abduct the child, or attempts to alienate the child from the custodial parent;
- Health of the non-custodial parent: if health problems limit the non-custodial parent's ability to care for the child, access may be limited;

2. Types of Access Orders

a) Interim Orders

After making an interim custody order, a court will often grant access on an interim basis. Usually, such an order will favour the status quo, so as to minimize disruption for the child.

b) Specified and Unspecified Access

Specified orders set out the times and places at which the non-custodial parent must have access to the child. Specified orders are generally preferred. Unspecified access is less common and is ordered when the parents are willing to accommodate one another.

c) Conditional Access

Courts may impose requirements, such as not smoking or using drugs or alcohol in the presence of the child. If the parent fails to meet the condition, access may be denied.

d) Supervised Access

Courts may order visits to be supervised by a designated third party if there are concerns about abuse, abduction, mental and physical handicaps or attempts to

alienate the child from the custodial parent. It is up to the custodial parent to demonstrate that access should be supervised.

F. Guardianship

Guardianship may be the most important aspect of any legal arrangements concerning the care and control of the children. Guardianship encompasses the whole bundle of rights and obligations involved in parenting a child, including making decisions about the child's school, moral instruction, religion, health care, dental care, extracurricular activities, etc.

When they are still together, parents are presumed to be joint guardians, playing a "full and active role" in the upbringing of the child (see e.g. *Charlton v. Charlton*). Upon marital breakdown, this can change either by agreement, by order of the court, or by the operation of s. 27 of the Family Relations Act, which defines the sole and joint guardianship of parents in various situations.

Parents can also appoint a guardian in a will. If the parents are both dead or have abandoned the child, the Public Guardian and Trustee becomes the child's guardian.

1. Kinds of Guardianship

a) Sole Guardianship

The parents or a court may decide that one parent should be the sole guardian. This effectively strips the other parent of any role he or she might have in raising the child. This is an extreme step, taken only when one parent has been shown to be either uninterested in or incapable of proper parenting.

b) Joint Guardianship

A court will order or the parents will agree to joint guardianship, setting out the party's duties to one another in some detail. The standard arrangement, set out below, is known as the Joyce Model, a set of rules frequently incorporated in court orders and separation agreements:

The parties are to share joint guardianship of the child, defined as follows:

a) the parents are to be the joint guardians of the estate of the child;

b) in the event of the death of either parent, the remaining parent will be the sole guardian of the person of the child;

c) the parent who has the primary responsibility for the day-to-day care of the child will have the obligation to advise the other parent of any matters of a significant nature affecting the child;

d) the parent who has primary care will have the obligation to discuss with the other parent any significant decisions which have to be made concerning the child, including significant decisions concerning the health (except emergency decisions), education, religious instruction, and general welfare of the child;

e) the parent who does not have primary care will have the obligation to discuss the foregoing issues with the parent and each parent shall have the obligation to try to reach agreement on those major decisions;

f) in the event that the parents cannot reach agreement with respect to any major decision despite their best efforts, the primary care parent shall have the right to make such decision;

g) the other parent shall have the right to seek a review of any decision which that parent considers contrary to the best interest of the child; and

h) each parent will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.

G. Other issues

1. Child Abduction

a) Criminal Code

Sections 280 to 285 of the Criminal Code deal with the offences of abduction. Section 282(1) provides that:

> Everyone who, being the parent, guardian or person having the lawful care or charge of a person under the age of 14 years, takes, entices away, conceals, detains, receives or harbours that person in contravention to the custody provisions of a custody order in relation to that person made by a court anywhere in Canada with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person of the possession of that person is guilty of an indictable offence (maximum 10 years imprisonment)... or an offence punishable on summary conviction.

Section 283 creates a similar offence for circumstances in which there is no custody order.

NOTE: Students should be especially careful when giving advice in custody disputes to avoid inadvertently giving advice that may lead to the commission of these offences.

If there is evidence that a parent may abduct a child, or if there is evidence that visits are very "disturbing and harmful", access may be denied. See *Re Sharp* (1962), 36 D.L.R. (2d) 328 (B.C.C.A.).

b) Child Abduction Convention

The Hague Convention on the Civil Aspects of International Child Abduction enables a person whose custody rights have been violated to apply to a "Central Authority" (each party to the convention must create such a body) for the voluntary return of the child, or to apply for a court order. Keep in mind that not every country is a signatory to the Hague Convention. Applications can be made either in the person's jurisdiction or in the jurisdiction to which the child has been abducted.

Each Central Authority has several tasks:

i) to discover the whereabouts of the child;

ii) to take precautions to prevent harm to the child;

iii) to encourage voluntary return of the child or some other agreeable arrangement;

iv) to facilitate administrative processes; and

v) to arrange for legal advice where necessary.

It appears that the Convention applies where the parents are formally separated and the child has been in the sole custody of one parent.

Finally, it should be noted that the Central Authority does not decide the merits of any custody order. It is merely an enforcement agency.

A federal coordinator of the Department of Justice deals with abductions to France, Switzerland, Portugal and Canada. The contact number is (613) 995-6426.

If the child has been taken to another jurisdiction, contact the Department of External Affairs, 125 Sussex Drive Ottawa, K1A 0G2. Attention: J.L.A. The contact number is (613) 995-8807.

A further resource in the case of abductions and violations of custody orders is the office of the Child Youth and Family Advocate, 600-595 Howe Street, Vancouver, B.C. The contact number is (604) 775-3203.

2. Child, Family and Community Service Act

Under the Act, a Director or member of the municipal or provincial police forces can apprehend any child under the age of 19 years when the child is believed to be in need of protection or care. Section 6 lists conditions justifying temporary protective custody under this Act.

Within seven days after the child's removal, a Director must attend Supreme or Provincial Court for a presentation hearing. The Director must, if possible, inform the child, if 12 years of age or over, and each parent of the time, date, and place of the hearing. If the situation warrants it, a hearing may result in temporary (or permanent) custody of the child being given to the Director or some other agency (see **Chapter 5: Children and the Law**).

XI. ADOPTION

A. Legislation

1. Adoption Act, R.S.B.C. 1996, c. 5

The Adoption Act governs adoptions in B.C. The Act provides for the licensing of adoption agencies, which, in addition to the Director of Adoption, exclusively provides for the facilitation, matching, adoption planning, pre-placement assessment, placement services, and post-placement counselling and assessments for adoptions in B.C.

The Adoption Act enables any adult person to apply to adopt a child, or to adopt another adult person. Under ss. 5 and 29, one or two adults may apply to adopt a child. This allows unmarried couples, including same sex-couples, to apply to adopt.

For all purposes, an adopted child becomes the natural child of the adopting parent(s). The Adoption Act states that the rights are those of a child born in lawful wedlock to the adopting parent(s), and the existing parents of the adopted child cease to be the child's parents.

Two legal exceptions under the Act are:

a) an adopted First Nations child does not lose status, rights, privileges, disabilities, and limitations acquired under the Indian Act and other Acts (s. 37(7)); and

b) adoption adds a prohibited degree of consanguinity for the purpose of marriage or laws relating to incest (s. 37(4)).

The adopted person takes the given names specified in the adoption order, and the surname of the adopting parents, unless the court orders otherwise (s. 36).

An adoption effected under the law of some other jurisdiction is valid in B.C. as though it had been made under B.C.'s adoption legislation (s. 47).

Under the Adoption Act, s. 63(1), birth records may be disclosed to both birth parents and adult adoptees. The Reunion Registry facilitates reunions and disclosure of records. The Act provides for filing of non-disclosure vetoes and no-contact vetoes (ss. 65 and 66). Furthermore, openness agreements are recognized by statute (s.59) and may be entered into by the adoptive parents, the birth parents, and others with a relationship to the child, after consents to adoption have been signed.

B. Procedure

1. Consent

Section 13 of the Adoption Act requires that no adoption order may be made without the written consent of:

- the child, if 12 years of age or over; children aged between 7 and 11 must be interviewed to ascertain whether they understand the meaning of adoption, and their views on the proposed name changes;
- the birth mother; to be valid, the child must be at least 10 days old at the date of the mother's written consent;
- the father; and
- any person appointed as the child's guardian; where a child is a permanent ward of the Superintendent of Family and Child Services, the Superintendent, as guardian, must consent.

The court may dispense with the need for consent from some of these parties. Parental consent may be dispensed with if it is in the best interest of the child or if the person has abandoned or deserted the child, cannot be found, is incapable of giving consent, has persistently neglected or refused to contribute to support he or she is liable for, or is a person whose consent ought, in all the circumstances of the case, to be dispensed with (s. 17). The consent of a child over 12 years of age can only be dispensed with if the child is not capable of giving an informed consent (s. 17(2)).

The consent shall be supported by affidavit of the person consenting and of the witness to the consent. Each affidavit must state that the effect of the consent and of adoption was fully explained to the person consenting, and that he or she signed the consent freely and voluntarily. The affidavit of the witness must support this. Preferably; the witness to the consent should be the lawyer or notary public who explains the effect of the consent and adoption.

No one, other than the child to be adopted, may revoke his or her consent without showing that it is in the child's best interests.

2. Notifying the Director of Adoption

The Director of Adoption is designated under the Family and Child Service Act, and appointed by the provincial government. A person wishing to apply to adopt must notify the Director of Adoption in writing of his or her intention (Adoption Act, s. 31) at least six months before filing the application unless:

- the child has been placed in a licensed adoption agency;
- the child is related to the applicant by blood; or
- the applicant is the child's stepparent.

The Director of Adoption then makes an inquiry and files a report with the court before the hearing date. Not less than 21 days before the date fixed for the hearing of the application or an application to dispense with consent, the applicant must give a copy of the application with a notice of the date of hearing to the Superintendent or licensed adoption agency.

The court may dispense with the times needed for the notices where the Superintendent's report shows good cause that the waiting period is not necessary to protect the interests of all parties (s. 6(9)).

Potential adoptive parents must notify either the Director of Adoption or the adoption agency as soon as possible before the child is received in their home, and then in writing within 14 days after the child is received. Prior notice is required to allow the adoption agency or the Director of Adoption to receive or provide information to and from the natural and adoptive parents. Such information may include providing alternatives to the birth parents, doing a pre-placement assessment of the adoptive parents, counselling adoptive children if necessary, and ensuring that children over 12 have given an informed consent.

Under s. 33, a post-placement assessment must be made by either the Director of Adoption or the adoption agency, providing a recommendation on whether the adoption should be made or not, or whether insufficient information is available to make the determination.

3. Adoption by the Child's Blood Relatives or Stepparents

The Director of Adoption does not need to be notified or make a report where an adult husband and his wife apply together to adopt a child of either of them, or where a blood relative of a child applies to adopt the child, unless the applicants conduct towards the child has shown a need for the making of an adoption order (s. 7(1)).

In the case of stepparent and blood relative adoptions, the application may not be made until the child has lived with, and been in the custody of, the applicant for at least six months prior to the application, except by order of the court. The court may still order a report from the Superintendent. Where a report from the Superintendent is not necessary, the material filed in support of the application should inform the Superintendent:

- whose care the child has been under since birth;
- in the event that the natural parents were married, consent of both parents or proper reasons for the omission of such consent;

- how long the applicants have been married;
- the ages and occupations of the applicants;
- whether or not either of the applicants have any other children living with them;
- that the applicants have the ability to bring up, maintain and educate the child; and
- any unusual circumstances relevant to the application.

4. Where all Parties Have Consented to Adoption

If all of the necessary consents have been obtained, no notices need be given and the application is made under Rule 10(2) of the B.C. Rules of Court (Supreme Court). The real application is thus the Requisition made to the registry and all other documents can be "the material on which the application is founded".

5. Where a Consent is Not Obtained

Where a consent is not obtained, Rule 10(2) cannot be used and an application must be made to the court to dispense with consent.

Since it is preferred that the petition not contain requests to dispense with consents, the applicants should file, with the petition, a Notice of Motion and supporting affidavit under Rule 44 asking that such consent be dispensed with. This involves appearing in chambers. For the motion to be granted there can be no person whose "interests may be affected" by the adoption order.

The Notice of Motion can be set for hearing on the same date as the Petition for Adoption. Separate orders would be filed, with the order dispensing with the consent being entered first and the Order of Adoption second. This, of course, would all be subject to the ruling of the judge hearing the application.

NOTE: Each document should have a separate backing sheet.

6. Revocation of Consent

Fraud, undue influence, or duress may invalidate consent. In the absence of such defect with the agreement, the court may only revoke consent if it is in the best interests of the child.

Consent may be revoked in writing before the child is placed (Adoption Act, s. 18). The birth mother may revoke within 30 days of the child's birth regardless of the child's placement. The child may revoke consent at any time before the order is made (s. 20). After the child has been placed, subject to the above, consent may be revoked only by court order and only if it would be in the best interests of the child. The application for revocation of consent must be made before the granting of the adoption order (s. 22).

7. Checklist for Filing an Adoption

The applicant should include:

- the petitioners' affidavit;
- petition;

- front page;
- second page: facts when no Superintendent's report required;
- second page: facts when Superintendent's report is required;
- consent of parent to adoption;
- affidavit of witness to parent's consent;
- affidavit of parent's consent to adoption;
- requisition to have adoption heard in chambers;
- Notice of Hearing of petition;
- sample Requisition re: Desk Order for Adoption;
- sample Desk Order for Adoption (no hearing necessary); and/or order after hearing in chambers.

XII. NAME CHANGES

A. Legislation: Name Act, R.S.B.C. 1996, c. 328

The instructions for changing a surname are outlined in the Name Act. The procedures for changing a first name are much less formal and are not set out in legal rules (see **Section XII.C: Changing a First Name**, below). The Department of Vital Statistics provides a name change package complete with forms and instructions. They can be reached in Vancouver at (604) 660-2937.

Note the court decision in *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835 which declared ss. 3(1)(b) and 3(6)(b) of the British Columbia Vital Statistics Act unconstitutional. These sections prevented a father from having the registration of the child's surname altered, violating the father's rights under s. 15(1) of the Canadian Charter of Rights and Freedoms.

B. Changing a Surname

1. General

Any person may apply to change his or her own name.

a) At the Time of Marriage

A person may elect to:

- retain the surname he or she had immediately before marriage;
- use the surname he or she had at birth; or
- use the surname of his or her spouse by marriage.

b) A Parent with Custody of an Unmarried Child

A parent with custody may change the surname of their child. He or she must submit written consent of:

- the child if the child has attained the age of l2 years;
- the other parent, if living; and
- the applicant's spouse if the application is to change the child's surname to that of the applicant's spouse.

A parent with custody of an unmarried child may allow that child to informally use any surname he or she wants, and that child may be registered in grade one under that name. No consent from the other parent is necessary in this case. A parent may apply to change a minor child's name legally. It is also possible to apply for a change of name if the other parent:

a) isn't paying maintenance for the child;

b) hasn't exercised access of the child for over one year; **and**

c) the whereabouts of the other parent are unknown.

c) A Widowed Person

A widowed person may apply to change their surname. The applicant must submit a death certificate, or if the death occurred in British Columbia they may state date and place of death and name of spouse.

d) A Divorced Person

A divorced person may, upon divorce, go by the name listed on his or her birth certificate.

2. Eligibility

To be eligible to change his or her name under the Name Act, a person must be:

a) an adult; or

b) if a minor, must be a parent having custody of his or her children;

and:

a) must have lived in B.C. for at least three months; **or**

b) must have resided in the province for at least three months immediately prior to the date of application (s. 3).

3. Procedure

NOTE: A change of name application can be included in the writ and Statement of Claim filed in divorce proceedings to avoid the procedure described below.

a) When the Applicant Has Already Assumed the Name

Sometimes the name to be legally adopted is one that has already been informally assumed. The assumed name should be indicated when preparing the application form. For example: "...change my name from John Doe, known as Henry Smith, to Henry Smith".

b) Publishing Notices of Intention

A person who wishes to legally change his or her name is no longer required to publish a notice of intention.

c) Making the Application

When making application for a change in his or her surname or given name, or both the surname and given name, the applicant must insert his or her name in full in the notice of application for a change of name.

Application for a legal change of name must be accompanied by:

i) the birth certificate, landed immigrant identification card or Canadian citizenship certificate of the applicant, and others included in the application;

ii) a marriage certificate where the change affects the name of a married man or woman (not required for persons married in British Columbia);

iii) any required consents, as above;

iv) proof of custody from applicants who have been divorced, respecting any children included in the application who were born prior to the divorce;

v) the statutory fee of $137, and $27 for each additional individual; and

vi) proof of death from widowed applicants respecting any children included in the application.

NOTE: Information can be obtained from the Division of Vital Statistics (Vancouver telephone: (604) 660-2937) regarding other related procedures such as a bride's election of surname at marriage, and changes of name resulting from adoption, legitimisation of birth, dissolution of marriage, or due to improper registration of the birth originally.

C. Changing a First Name

1. Eligibility

Anyone may change his or her first name. However, minors should be advised that they must obtain the written consent of their parents to do so.

2. Procedure

The client does not need to go through the application procedures necessary for changing a surname. The client can start using another first name at any time.

All identification – including credit cards, driver's license, social insurance card, school records (where applicable), health care cards, bank accounts, and birth certificates – should be changed to the first name being used. This can be done by contacting the relevant organizations and filling out a Change of Name Form.

Usually, the client's former first name will become a middle name instead.

XIII. COURT PROCEDURES

A. Supreme Court

The Supreme Court is the only court that hears actions under the Divorce Act. Under the Family Relations Act, the Supreme Court has both statutory and inherent jurisdiction to decide all maintenance, division of property, custody, and access matters. Therefore, all Family Relations Act issues can be incorporated into a divorce action.

All Supreme Court procedures are governed by the Rules of Court. Unless a client is familiar with these rules and able to strictly adhere to the formal procedures, this person should appear in Supreme Court with representation.

Actions are started when a petitioner files a Writ of Summons and a Statement of Claim. Matters may be decided through interlocutory applications or by trial. Interlocutory applications are hearings held in chambers. No witnesses are called. Instead, all evidence is taken from sworn affidavits. If the judge or master is satisfied with the credibility and substance of the evidence presented, then an interim order can be granted. A final order may be obtained at trial or by way of a summary trial on affidavit evidence if there are no serious issues of credibility.

B. Small Claims Court

Clients can enforce agreements concerning the division of assets between persons in a common law relationship and between those in other relationships in Small Claims Court. See **Chapter 22: Small Claims Procedure** for more details. One may be able to make a trust claim in Small Claims Court as well.

C. Provincial (Family) Court

1. Jurisdiction

Provincial (Family) Court has jurisdiction under the Family Relations Act over matters of custody, access, maintenance and guardianship, subject to the jurisdiction of the superior courts and the federal government. Provincial (Family) Court has jurisdiction over the enforcement of maintenance orders whether made in Supreme Court or Provincial (Family) Court (*Butler v. Butler* (1981), 27 B.C.L.R. 268 (B.C.C.A.)) and has original jurisdiction to make maintenance orders and to vary or rescind its own orders. Provincial (Family) Court can also make, vary, rescind, or enforce its own custody/access orders, but does not have the power to make orders regarding occupancy of the family home (*Polglase v. Polglase* (1982), 1 S.C.R. 62). Where the Supreme Court has made an order respecting custody, access, maintenance, or child support, Provincial (Family) Court will be unable to vary that order, although the court can enforce the order.

The Provincial Court offers free counselling and mediation services to family members considering separation or divorce. The Family Justice Counsellors (who may also be probation officers) will try to help the parties reach agreement on contentious matters.

2. Contacting Provincial (Family) Court

Clients should phone Provincial Court (and ask for the Family Court Division) in advance to arrange an interview. An Intake Officer will speak with the client, and if the problem is something the Provincial Court deals with, the client will be assigned to a Counsellor and an appointment will be arranged.

For a list of Family Courts in the Lower Mainland, see **Chapter 23: Referrals**.

3. Family Justice Counsellors

Clients should be advised that Family Justice Counsellors are not lawyers and do not necessarily know what the client's rights and obligations are. Clients should seek legal advice before signing any agreement.

The Family Justice Counselling Service helps people seeking remedies for their family problems through the court or through counselling and mediation services. The aim of the counsellors is not reconciliation. Where a couple indicates a willingness to restore the marriage, they will be referred to a marriage counsellor. There are also clerks who help clients understand and implement child support guidelines.

Counselling is non-adversarial. The counsellors are impartial third parties who will assist both spouses in coming to an out-of-court settlement, although the counsellors are not of a uniform quality and expertise. After gathering minimal information, the Counsellor will normally send a letter to the other spouse to advise him or her of the situation and try to set up a meeting with the first spouse and the counsellor. All information received from a spouse is private and confidential and will not be given out except with the express permission of that person, or as required by law.

Counsellors attempt to avoid court disputes by obtaining a Consent Order. If this is not possible, pertinent details regarding custody and maintenance will be obtained, and forms will be prepared for court.

The counsellors will:

- provide information regarding the court processes, available options, and current legislation;
- offer conciliation and mediation services;
- investigate the matters under dispute;
- help with court applications and general preparation for court; and
- screen for family violence situations and direct parties to the appropriate services.

The client can choose to avoid the counselling service and appear in court directly. The counsellor to whom the client has been assigned will still offer assistance with the application forms, etc. The Family Justice Counsellors can be reached at (604) 660-6828 (Vancouver) or (604) 660-8636 (Burnaby).

Family Justice Counsellors deal exclusively with issues of children and support. In limited circumstances, and for clients with assets or debt less than $25,000, a Family Justice Counsellor can mediate an agreement.

4. Provincial (Family) Court Proceedings

a) Application to Obtain an Order

Most proceedings in Provincial Court are commenced by filing an Application to Obtain an Order (Form 1). The application commences an action in Provincial Court, and requests a specific remedy. The application can be filed at either the court registry or in a family justice registry. For procedure see Provincial Court Family Rules.

The application must be filed with the registry, and must be personally served on the respondent by someone other than the applicant unless the judge orders otherwise. The following documents must be served with the filed copy of the application when it is served on the respondent:

- a blank reply form (Form 3);
- a blank financial statement form (Form 4), if the applicant is seeking an order for child, spousal or parental maintenance or a variation of child, spousal or parental maintenance; and
- a filed copy of the applicant's financial statement and applicable documentation under Rule 4 (2), if applicable.

b) Reply

The respondent must file a reply within 30 days of being served with a copy of the application, or a default judgment may be sought in favour of the applicant. If the respondent disagrees with the remedy sought, he or she should be advised to obtain legal counsel to dispute the applicant's claim.

The respondent must:

- complete a reply in Form 3, following the instructions on the form;
- file that reply, together with three copies of it, in the registry where the application was filed; and
- if applicable, file the original and three copies of the respondent's financial statement and applicable documentation referred to in Rule 4 (2)(b).

In the reply, the respondent may:

- consent to one or more of the orders in the application;
- disagree with anything claimed in the application, stating the reasons for the disagreement;
- apply to the court for child access, spousal maintenance, or a restraining order prohibiting interference under the Family Relations Act; and/or

- apply to the court for an order to change existing orders or agreements.

c) Family Justice Registries

Family Justice Registries are designated by Rule 1 of the Provincial (Family) Court Rules. Under the definitions in the Rules, "family justice registry" means the Vancouver (Robson Square), Surrey, Rossland, Nelson or Castlegar registry. Under Rule 5, at these registries, the parties will be obliged to comply with additional requirements before the application is heard. Both parties will meet with a Family Justice Counsellor, and both will be obliged to attend a parenting after separation program. If a settlement cannot be reached with the assistance of the counsellors, the matter will be referred to court.

d) First Appearance

If the application is filed with the court registry, the clerk must serve the parties with notice of the time and place they are to attend court for a first appearance to fix a date for the hearing of the application. Note that this notice is titled "Trial Notice" although the matter is set for a fix-date hearing.

e) Pre-Trial Conferences

The parties may be ordered to hold a pre-trial conference during which the judge may rule on any issues not requiring evidence, make an order, discuss the procedure that will be followed at trial, order that certain evidence be produced, or make arrangements for disclosure of one party's evidence to the other.

f) Family Case Conference

A judge may order a family case conference, or one may be requested. The conference is informal and off the record. The meeting is between the relevant parties and a judge and is intended to reach a settlement. Note that the judge has the authority to make orders whether or not the parties agree to the order.

g) Witnesses

Witnesses are summoned to the court by subpoena. However, a subpoena is not necessary if the witness is prepared to appear in court voluntarily. If a subpoenaed witness does not appear in court, a warrant may be issued for his or her arrest. To require the attendance of a witness, a party must complete a subpoena in Form 15, and serve a copy of the subpoena on the witness personally at least seven days before the date the witness is required to appear.

In Provincial (Family) Court, the person who subpoenas the witness is responsible for that witness' reasonable estimated travel expenses.

h) Affidavit Evidence

At trial, evidence may be given orally or by sworn affidavit. Evidence may be given by affidavit at a trial or hearing only if permission is granted by a judge, either on application brought by notice of motion under Rule 12 or under Rule 8(4)(g). This evidence must be in Form 17.

i) Notices of Motion

Three copies of a notice of motion must be filed in the court registry and one copy must be served on the other parties at least three days before the date for hearing the notice of motion in court when a party wishes:

- an interim order to be made (Family Relations Act, s. 9);
- to file documents in another registry;
- to have a pre-trial conference;
- to cancel a subpoena;
- an order to produce documents;
- an order requiring that paternity tests be taken;
- to use another method of service;
- to settle the terms of an order;
- to extend a time limit;
- to change or cancel an *ex parte* order;
- to have a file transferred;
- to have disclosure; or
- to obtain directions on procedures not in the Provincial (Family) Court Rules.

j) Trial

Provincial (Family) Court trial is an adversarial proceeding. Clients are there to give the judge enough facts so that he or she can make a decision about the application. However, the judge often gets involved in the presentation of evidence, especially where one party is not represented by counsel.

k) Procedure for Enforcement of Custody Orders

An Application Form (Form 21) and copy of the custody order must be filed in the registry.

l) Procedure for Enforcement of Maintenance Orders

The most effective and simplest method of enforcing Maintenance Orders is to register with the Family Maintenance Enforcement Program. For more information call or write the Enrolment Office, Box 5789, Victoria, B.C., V8R 6S8; telephone: (250) 356-8889, toll-free: 1-800-663-7616.

m) Orders

Orders come into effect on the day that they are made, unless the judge orders otherwise. If the party in whose favour the order is made is unrepresented, a clerk must prepare the order. Otherwise the favoured party's lawyer will prepare the order.

If there is a dispute about the terms of an order, a party may apply to a judge to have the dispute settled. Once an order is signed and approved, it must be given to the court registry to be signed by the judge and filed with the court. Otherwise, the order is not enforceable. At any time, a judge may correct an accidental clerical error in an order.

n) Compliance with Provincial (Family) Court Rules

If any of the Provincial (Family) Court Rules (British Columbia) are not complied with, the judge may disregard the incorrect procedure or order, order the hearing or trial to continue as if the respondent were absent, or give any direction he or she thinks is fair.

APPENDIX A: GLOSSARY

ANNULMENT
A judicial pronouncement declaring a marriage invalid. Although it is commonly thought that an annulment has the same effect as if the marriage never took place, it is still possible to divide property under Part 5 of the Family Relations Act.

APPLICANT
Person seeking a court order. In Provincial Court, the parties are called the applicant and the respondent, but they are plaintiff and the defendant under the Family Relations Act and the Divorce Act.

CHILD
Under the Divorce Act: a "'child of the marriage' is a child of two spouses or former spouses who... is under the age of majority and who has not withdrawn from their charge, or is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life".
Under the Family Relations Act: "a person under the age of 19 years" (Family Relations Act, s. 1(1)). However, for the purposes of child maintenance "includes a person who is 19 years of age or older and, in relation to the parents of the person, is unable because of illness, disability, or other cause, to withdraw from their charge or to obtain the necessaries of life" (Family Relations Act, s. 87).

Under the Adoption Act: "an unmarried person under the age of 19 years".

CUSTODY
Caring for a child on a day-to-day basis. Custody can be either sole or joint.

DECLARATORY JUDGMENT
A judgment given by the court in the form of a declaration, such as a s. 57 (Family Relations Act) declaration that there is no possibility of reconciliation.

DEPENDANT
Anyone who relies on another to support him or her.

SERVICE *EX JURIS*
When the person to be served is outside the province.

FILING
As in filing pleadings, affidavits, property and financial statements, etc. in court. A document is filed at the court registry and forms part of the court record.

GUARDIANSHIP
Involves the right to be consulted on matters relating to the child's upbringing, such as religion, education, extracurricular activities, social environment, etc. Please note that the definition of guardianship varies between the Family Relations Act and the Divorce Act.

INTERIM ORDER
An order that is granted prior to the making of a final order. The order is good until a further order of the court or agreement between the parties is made. The final order will not automatically be the same as the interim order. An interim order to determine custody and asset management while the matter is still in dispute is common in many divorce proceedings.

INTERIM *EX PARTE* ORDER
A temporary order made when one party is not present by reason of lack of notice. This order is usually only granted in an emergency, such as the kidnapping of a child.

JUDICIAL SEPARATION
A decree by the courts that does not affect the couple's marital status, it simply acknowledges the union's disintegration. More expensive than a divorce and hardly ever used.

IN LOCO PARENTIS
Where someone who is not the biological parent of a child steps in and takes over all the duties and responsibilities of a parent for that child. This commonly includes stepparents.

PETITIONER
The person who presents a petition to start an action in a court or legislature. There is no longer any such thing as a divorce petition. Now there is a specialized writ and Statement of Claim.

RESPONDENT
Person against whom a court order is sought. In Provincial Court, the parties are called the applicant and the respondent, but they are called the plaintiff and the defendant under the Family Relations Act and the Divorce Act.

SERVICE
The act of delivering a document (i.e. a summons) to a person.

SPOUSE
The definition of spouse is changing under pressure from recent court rulings. It is wise to check the legislation for any recent changes.

Divorce Act: "either of a man or woman who are married to each other".

Family Relations Act: either a legally married spouse or "a man or woman not married to each other, who lived together as husband and wife for a period of not less than two years" and who made an application under the Act within one year of separation. Same-sex partners are now viewed as common law spouses provided the marriage-like relationship lasts for at least two years and the application for relief is commenced within one year of separation. The definition of "stepparent" includes a same-sex partner who also qualifies as a same-sex spouse (see s. 1 of the Family Relations Act regarding the definition of spouse).

Estate Administration Act: under s. 85, parties must have cohabited for two years AND the claiming spouse must have been maintained AND the two years must run immediately preceding the death or a person who is united to another person by a marriage that, while not legal, is valid at common law.

Wills Variation Act: the definition includes:

a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or,

b) a person who has lived and cohabited with another person, for a period of at least two years immediately before the other person's death, in a marriage-like relationship, including a marriage-like relationship between persons of the same gender.

SUBSTITUTED SERVICE
When an applicant, for a good reason, cannot serve the respondent/defendant personally because that person cannot be found, the court may make an order providing for service in some other way (i.e. by letter, advertisement, or service on a relative).

WRIT OF SUMMONS AND STATEMENT OF CLAIM
Documents that must be filed to commence most formal proceedings in the Supreme Court, for divorce and corollary relief.