

# UNIT 5: FAMILY LAW



# UNIT TERMINOLOGY

## A

ab initio  
 access  
 Addendum Agreement  
 adoption  
 Adoption Order  
 adultery  
 Affidavit of Service  
 affinity  
 Amending Agreement  
 Amendment Agreement  
 annulment  
 Answer  
 applicant  
 Application (Divorce)  
 Application to Obtain an Order  
 arbitration  
 arbitrator  
 Assessment  
 Assisted Reproduction Agreement  
 at-risk family member

## B

bigamy  
 binding decision  
 biological mother  
 birdnesting  
 birth mother  
 business assets

## C

case conference  
 Central Registry  
 of Divorce Proceedings  
 Certificate of Divorce  
 Certificate of Marriage  
 chattels  
 child abduction  
 child maintenance  
 child support  
 childnapping  
 claimant  
 closed mediation  
 co-respondent

cohabitation  
 Cohabitation Agreement  
 collusion  
 common-law partner  
 common-law relationship  
 condonation  
 Conduct Order  
 connivance  
 consanguinity  
 Consent Order  
 corollary relief  
 Counter-Petition  
 Counterclaim  
 custody

## D

de facto custody  
 defendant  
 defended divorce  
 Desk Order  
 Divorce Order  
 doctrine of paramountcy  
 domestic violence  
 duress

## E

estoppel  
 excluded property

## F

FRO  
 family adoption  
 family assets  
 family debts  
 Family Maintenance  
 Enforcement Program  
 family property  
 Family Responsibility Office  
 family violence  
 Federal Child Support Guidelines  
 Final Order

## G

government wardship

grossed up  
 guardian ad litem  
 guardianship

## I

independent legal advice  
 Interim Order  
 interlocutory applications  
 intestate

## J

joint custody  
 Joint Notice of Family Claim

## L

legal capacity  
 legal custody  
 legal separation  
 limitation date  
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## M

MEP  
 Maintenance Enforcement Program  
 marriage breakdown  
 Marriage Contract  
 Marriage Licence  
 married spouses  
 master  
 matrimonial home  
 mediation  
 mediator  
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 motions

## N

non-consummation  
 non-custodial parent  
 non-family adoption  
 Notice of Family Claim  
 Notice of Intent to Defend  
 null



open mediation  
 Order for Substituted Service  
 Order for Substitutional Service



parenting coordination  
 parenting coordinator  
 parenting time  
 paternity  
 perfected Agreement  
 person named  
 Petition for Divorce  
 petitioner  
 physical cruelty  
 plaintiff  
 Pre-Nup  
 Pre-Nuptial Agreement

Protection Order



recital  
 Registration of Divorce Proceedings  
 Registration of Marriage  
 relationship counselling  
 Reply  
 respondent  
 Response to Family Claim  
 Restraining Order



separation  
 Separation Agreement  
 shared custody  
 spousal maintenance  
 spousal support  
 spouse

Statement of Claim for Divorce  
 supervised access



Temporary Order  
 Trial Record



undefended divorce  
 unmarried couple  
 unmarried spouses



varying an Order



waiver  
 "Whereas" clauses

## INTRODUCING FAMILY LAW & RELATIONSHIPS

### FAMILY LAW

**Topics** Family law covers such topics as:

- Marriage
- Pre-Nuptial Agreements
- Marriage Contracts
- Family property and assets
- Cohabitation Agreements
- Separation
- Separation Agreements
- Family violence
- Divorce mediation
- Undefended and defended divorces
- Name changes
- Child support, access, and custody
- Guardianship and parenting
- Child abuse
- Adoption.

**Basic Terms**

If you are not familiar with some of these terms, don't worry they will be explained as you progress through this unit. However, there are six terms that you need to know straightaway: custody/guardianship, access/parenting time, child support, spouse, spousal support, and family assets.

**Custody/  
 Guardianship**

The parent who is granted **custody** (referred to as **guardianship** in some provinces) of the children of the marriage or relationship is responsible for the care and upbringing of the children. Nowadays, many parents have **shared custody**, sometimes called **joint custody**, of their children; i.e., the children spend periods of time with each of their parents and, during that time, the parent who has custody is responsible for the children's care and upbringing. The parent who does not have custody is often referred to as the **non-custodial parent**.

<b>Access/ Parenting Time</b>	<b>Access</b> (referred to as <b>parenting time</b> in some provinces) refers to the right of the non-custodial parent or other person to visit the children of the marriage or relationship.
<b>Child Support</b>	The money paid by the non-custodial parent to the custodial parent or other person for the day-to-day care and upkeep of the children; e.g., food, clothing, school supplies, etc. is called <b>child support</b> or <b>child maintenance</b> .
<b>Spouse</b>	The term <b>spouse</b> has varying definitions. Under the federal <i>Divorce Act</i> a spouse is "either of two persons who are married to each other." Under provincial laws, the definition is often expanded. For example, under the current B.C. <i>Family Law Act</i> , "spouse" means a person who is married to another person or who has lived with another person in a marriage-like relationship for a period of at least two years. The marriage-like relationship may be between persons of the same gender.
<b>Spousal Support</b>	When a couple separate, the person with more money may have to support the other. This payment is called <b>spousal support</b> or <b>spousal maintenance</b> .
<b>Family Assets</b>	The term <b>family assets</b> or <b>family property</b> refers to property owned by one or both parties to a marriage (or relationship) that is used by the family as a whole. Examples of family assets are the family home, car, boat, summer cottage, etc.

The majority of family law deals with resolving the issues when a couple's relationship ends, including who will care for the children, whether support should be paid, who will keep which property, and who will pay any debts. These legal issues that arise when a relationship ends are often messy and fraught with emotion.

It is important to keep in mind that family law is dynamic. It is constantly being revised to meet the requirements of today's society. For example, with the advent of same-sex marriages in Canada, the definition of marriage was updated from "the voluntary union for life of one man and one woman..." to "... the lawful union of two persons..." In the case of child custody, the traditional granting of custody to one parent is, more and more, being replaced with joint custody, where appropriate.

The definition of "parent," while traditionally presumed to be the birth mother and biological father has also undergone change. If assisted reproduction has occurred, the term "parent" may include a surrogate mother, an egg or sperm donor, or up to two people who intend to have a child.

If you are pursuing business law or entrepreneurship studies, you may be wondering why you would need to have any knowledge of family law matters. Well, as many business owners have discovered to their chagrin, when family relationships break down, it is not unusual for a spouse or a partner to try to make a claim against business assets and/or future business earnings. So, the more information you have about family law, the better prepared you will be.

So, let's start by looking at family law jurisdiction and legislation.

## **JURISDICTION & LEGISLATION**

Many people who are unfamiliar with family law find it difficult to understand who has jurisdiction over what. The following information from Ontario may help you to see how where you live in a province may determine which court handles various family law matters.

In some communities in Ontario, the Family Court of the Superior Court of Justice, deals with all family matters:

- Divorce
- Child custody
- Child access
- Division of family property
- Adoption
- Child protection.

In other communities in Ontario, the Superior Court deals with:

- Divorce
- Divorce plus child custody, child access, or child/spousal support as part of the divorce
- Division of family property

and the Ontario Court of Justice deals with:

- Requests for child/spousal support (with no divorce)
- Issues relating to child custody or access (with no divorce).

While this may all seem rather overwhelming, once you start working in family law, it will fall into place very easily. If in doubt, ask!

Most family matters are governed by provincial laws. The exception to this is divorce, which is governed by a federal law called the *Divorce Act*, R.S.C. 1985, c. 3 (2<sup>nd</sup> Supp.).

The names of the provincial acts dealing with family matters vary from province to province; however, the name of the act usually indicates its content; e.g., *Marriage Act*, *Family Law Act*, *Family Maintenance Enforcement Act*, *Change of Name Act*, *Age of Majority Act*, *Adoption Act*, etc.

Some Act names are rather general; for example, the British Columbia *Infants Act*, R.S.B.C., 1996, c. 223 covers, among other things, the legal capacity of children to enter into legally binding contracts. Another example is the *Parental Liability Act* S.B.C. 2001, c. 45 which stipulates that parents whose children are convicted of causing damage or loss of property may be held responsible for loss up to a maximum of \$10,000.

Sometimes both federal and provincial laws apply to a specific family law matter. A case in point is marriage.

While the federal government enacts laws relating to marriage, the provincial governments enact laws concerning the administration of a marriage. For example, the federal government can enact laws relating to a valid marriage, such as requiring that both parties be of sound mind, whereas a provincial government can enact laws relating to how, when, and where Marriage Licences can be obtained, the legal age for marriage; etc.

As you may recall, where you live in Ontario determines which court handles various family law matters. In British Columbia, as in some other provinces, it is legislation and the type of family law relationship that determines which court handles a specific family law matter. For example, the British Columbia Provincial (Family) Court handles:

- Guardianship of children under the *Family Law Act*
- Parental responsibilities, parenting time, and parenting contact under the *Family Law Act*
- Child support
- Spousal support
- Court Orders protecting people and property
- Parentage of children, including assisted reproduction.

The *Family Law Act* applies to unmarried couples, unmarried spouses, and married spouses. These terms will be explained shortly.

The Supreme Court of British Columbia handles:

- Divorce
- Custody and access under the *Divorce Act*
- Child support
- Spousal support
- Division of family property and family debt under the *Family Law Act*
- Court Orders protecting people and property
- Court Orders under both the *Divorce Act* and the *Family Law Act*.

The *Divorce Act* applies only to married spouses. However, if married spouses have started a divorce proceeding, other family members may use the Act to ask for court orders relating to the children provided that the court gives the family members permission to do so. As you will notice, both the *Divorce Act* and the *Family Law Act* deal with the care of children, parenting schedules (access and custody), child support, and spousal support.

Because of a constitutional rule called the **doctrine of paramountcy**, the *Divorce Act* is considered to be superior to the *Family Law Act*. This means if a client is entitled to ask for a child and/or spousal Court Order under the *Divorce Act*, a lawyer will normally make an application under that Act.

Now let's move on to look at various family law relationships and the documents that protect these relationships.

## **FAMILY LAW RELATIONSHIPS**

There are three types of family law relationships:

1. Unmarried couples
2. Unmarried spouses
3. Married spouses.

**Unmarried Couples** An **unmarried couple** can probably best be described as being in a boyfriend/girlfriend relationship, but does not preclude a same-sex relationship. The individuals may have lived together for a *short time* or been in a *short-term* relationship (not living together). The most common family law problems arise when these couples have a child.

**Unmarried Spouses** **Unmarried spouses** are not legally married. Most provincial family laws define unmarried spouses as being couples who have lived together in a loving relationship for at least two years (or less if they have had a child together).

**Married Spouses** **Married spouses** are couples who are legally married and whose marriages have been registered with the government where they were married.

## **COHABITATION**

If one person is living with another to whom she or he is not married, the law defines the relationship as **cohabitation** or as being a **common-law relationship** (unmarried couple or unmarried spouses). Some federal legislation such as the *Income Tax Act* and the *Old Age Security Act* use the term **common-law partner** (a person cohabiting with another for at least one year).

Generally, when unmarried couples separate they do not have the same rights as unmarried spouses or married spouses when it comes to the division of property purchased while they were living together. Nor do they have the right to share in the increase in value of any property brought into the relationship. However, things get a little more complicated if, say, one party has contributed to the property owned by the other party. For example:

Mr. A has made half the mortgage payments on the house that Ms. B owns. Unless Ms. B agrees to pay Mr. A back in some manner, Mr. A may have to go to court to get back his contribution to "the family home."

Other issues may arise if Mr. A and Ms. B have children (their own or adopted), or Mr. A does not have enough money to support himself. If Mr. A and Ms. B cannot negotiate an agreeable settlement, then they will have to go to court and seek **relief** – ask a judge to decide and issue a Court Order for, say, child support.

For the above reasons, and others, many couples, as well as groups of people who live together, protect their rights by having a **Cohabitation Agreement** or **Living-Together Agreement**.

## COHABITATION AGREEMENTS

The parties to a Cohabitation Agreement should seek **independent legal advice** (each party has a different lawyer) and exchange financial information. In order for the Cohabitation Agreement to be valid, each signature must be witnessed.

A Cohabitation Agreement may set out:

- day-to-day financial arrangements: who pays for what
- day-to-day family arrangements
- who owns the property bought while living together
- how the property will be divided if the relationship ends
- how much support will be paid if the relationship ends
- who has to move out of the residence if the relationship ends.

A Cohabitation Agreement cannot include child custody or access. These matters can be decided only when the relationship ends.

If either or both parties are business owners, then the Cohabitation Agreement needs to address how business assets will be divided if the personal relationship ends.

If a common law couple subsequently decides to marry, then the Cohabitation Agreement becomes the Marriage Contract unless the couple decides otherwise.

## PRE-NUPTIAL AGREEMENTS

A **Pre-Nuptial Agreement**, often called a **Marriage Contract** or a **Pre-Nup**, is usually prepared and signed prior to a couple marrying; however, there is nothing to stop a couple making a Marriage Contract once they are married.

The general intent of a Pre-Nuptial Agreement is to establish exactly what each party is bringing to the marriage, what they expect during the marriage, and what will happen should the marriage end.

Some people are very adamant that they do not need a Pre-Nuptial Agreement. They love their partner and there is no reason to even think about marriage breakdown. However, in reality, things can, and do, go wrong in relationships - however unforeseen those things may be prior to marriage. If there is a Pre-Nuptial Agreement both parties know what their obligations are and, in many instances, the existence of such an Agreement prevents a great deal of acrimony if the marriage ends.

As far as the law is concerned, in most jurisdictions a marriage is regarded as an equal economic partnership. If the marriage ends:

- the value of the property acquired by the couple during marriage plus the increase in the value of property brought into the marriage will be divided 50:50 (there are exceptions to this)
- one party and the children of the marriage may be entitled to financial support
- each party has an equal right to stay in the family home, often referred to as the **matrimonial home**.

If a couple decides that they would prefer different arrangements to those stipulated by their provincial laws, then they will have to exchange financial information, seek independent legal advice, and prepare a Pre-Nuptial Agreement. Such an Agreement has major implications for the future, so it is critical that the couple think carefully about their decisions.

The following are some provisions that might be included in a Pre-Nuptial Agreement:

- What each person expects from the other during the marriage
- What property is being brought into the marriage, its value, and who owns it
- How property will be divided should the marriage end
- How support payments will be made should the marriage end

- Plans for the religious upbringing and education of any children from this marriage or a previous marriage.

Generally speaking, a Pre-Nuptial Agreement may not contain promises (should the marriage end) about child custody and access, or change any laws that stipulate that each party has an equal right to live in the family home.

As with a Cohabitation Agreement, a Pre-Nuptial Agreement or Marriage Contract needs to address the division of business assets, if necessary.

Now that you have some knowledge of Cohabitation and Pre-Nuptial Agreements, let's focus on marriage and what it means in the eyes of the law.

## **DEFINITION OF MARRIAGE**

Since the June 10, 2003 decision of the Ontario Court of Appeal in *Halpern et al. v. Attorney General of Canada et al.*, there has been lively debate in Canada about the definition of marriage and what it means.

In the above-mentioned appeal, Halpern held that the common law definition of marriage as "the voluntary union for life of one man and one woman to the exclusion of all others" violated s. 15(1) of the *Canadian Charter of Rights and Freedoms*. Accordingly, s. 2 of the *Civil Marriage Act*, S.C. 2005, c. 33 now reads: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."

Sections 91 and 92 of the *Constitution Act, 1867* divide the powers regarding marriage, the solemnization of marriage, and divorce between the federal and provincial governments.

The federal government has legislative powers over marriage and divorce, and the provinces have legislative powers over the solemnization of marriage and property and civil rights in their province. As a result, the federal government enacted various laws, one being the *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46. Under s. 2(1) of this Act, "Subject to subsection (2), persons related by consanguinity, affinity or adoption are not prohibited from marrying each other by reason only of their relationship"; but subsection (2) states which relationships make a marriage invalid: "No person shall marry another person if they are related lineally, or as brother or sister or half-brother or half-sister, including by adoption."

**Affinity** refers to the relationship a person has to the blood relatives of a spouse and **consanguinity** means relationship by blood – genetic relationship.

## **LAWFUL MARRIAGE**

### **Conditions**

Several conditions must exist for a marriage to be considered lawful. These conditions include that the parties to the marriage are:

- of marriageable age\*
- free from duress or threats
- free to marry - not already married
- mentally competent - of sound mind\*
- able to understand that they are participating in a marriage ceremony.

\*Often referred to as having **legal capacity**.

Failure to meet any of these requirements does not mean that the marriage is invalid; however, grounds for divorce or annulment of the marriage may exist. A marriage that is unlawful is void ab initio. **Ab initio** means from the beginning.

### **Marriage Licence**

A **Marriage Licence** or special permit must be obtained before a marriage ceremony takes place.

### **Marriageable Age**

Each province has its own minimum age requirements for marriage, both with and without parental consent. Most provinces allow marriage at age 18 without parental consent, except British Columbia, Newfoundland, and Nova Scotia, where the age is currently 19. In most



provinces individuals aged between 16 and 18 may marry, provided that they have parental consent. Under 16s normally require court consent.

**Marriage under Duress** Currently the accepted common law definition of marriage is "the voluntary union for life of two persons to the exclusion of all others." Voluntary is the important word. Marriage cannot be imposed on someone.

Each party to a marriage must freely consent to the marriage. This means that neither party must marry under duress. **Duress** refers to someone exercising force - not necessarily physical - to compel another person to do something. The element of fear is important in duress. For example, for duress to be proven, a person must have frightened one of the parties to the marriage sufficiently that she or he is unable to make a voluntary choice to marry.

For a court to annul a marriage on the grounds of duress, the party's emotional stability, age, and intelligence are taken into account. In addition, the time the duress was exercised is examined. For example, if the time between the alleged duress and the marriage ceremony is substantial, the court may not consider a claim of duress to be valid.

**Annulment** If a marriage is not or cannot be consummated (the couple does not have sexual intercourse because of a physical inability - male spouse is impotent or female spouse sterile going into the marriage), the marriage may be declared **null**. **Annulment** is a legal term that means that a marriage is no longer valid and never was valid in the eyes of the law. A marriage may also be annulled if the legal requirements of a marriage or the legal capacity of the parties were not met; e.g., one spouse was already married. The act of going through a marriage ceremony with one person while married to another person is known as **bigamy**. Annulments are extremely rare because they are costly and often difficult to prove (especially on the grounds of non-consummation).

**Non-Consummation** In establishing the grounds of **non-consummation**, the Honourable Mr. Justice B. M. Davies in his Reasons for Judgment in *J.G. v. S.S.S.*, 2004 B.C.S.C. 1549, wrote:

"The applicant must establish on a balance of probabilities that:

1. there has been no consummation of the marriage;
2. the refusal to consummate has been persistent and is not due to obstinacy or caprice;
3. the applicant has an invincible aversion to sexual intercourse with the specific spouse;
4. the applicant's invincible aversion to sexual intercourse with that spouse has been brought about by circumstances that have resulted in a "paralysis of the will" that is consistent with incapacity; and
5. the applicant's incapacity may be based upon normal, predictable reactions that need not be expressed in pathological terms."

No review of family law relationships is complete without referring to adoption.

## **ADOPTION**

Adoption is a family relationship matter.

Many couples want a family; however, if they cannot conceive, then adoption is a possibility.

**Adoption** is the procedure of obtaining an **Adoption Order** to transfer custody and guardianship from the child's **birth mother**, sometimes called the **biological mother**, to the adopting parents. When the transfer has taken place, the child becomes the child of the adoptive parents and the adopted child ceases to be the child of the person who was his or her parent before the Adoption Order was made.

In Canada, the provinces have jurisdiction over adoption. This means that there are many different laws and procedures.

The following are some of the current provincial acts governing adoption:

Province	Act
Alberta	<i>Child, Youth and Family Enhancement Act</i>
British Columbia, Manitoba, Newfoundland & Labrador, Northwest Territories, Nunavut, Prince Edward Island, Quebec	<i>Adoption Act</i>
New Brunswick	<i>Family Services Act</i>
Nova Scotia, Ontario, Yukon	<i>Child and Family Services Act</i>
Saskatchewan	<i>Adoption Act 1998</i>

The law does distinguish between **family adoption** (child adopted by a relative or step-parent) and **non-family adoption** (child adopted by an unrelated person).

In some provinces, there are still age restrictions for adopting parents; e.g., must be over 25 years of age but not more than 40 years of age; but other previous bars have gradually been lifted as provinces handle challenges to their adoption laws. For example, same-sex couples now have the right to adopt a child.

There are two main ways in which an adoption takes place:

1. The custody and guardianship of the child to be adopted is transferred from the birth mother to the provincial government, often referred to as **government wardship**. It is usually the Ministry of Children and Family Development (or similar name) that assumes this role. The child is then placed with the adopting parents.
2. The child to be adopted is placed directly with the adopting parents under the supervision of an adoption agency. There is no provincial government involvement.

Depending upon the province, if all paperwork is in order, an Adoption Order may be obtained without a court hearing; however, the critical element is the paperwork. Adoption is a minefield of consents, documents, and deadlines.

See page 171 for a precedent of an Adoption Order. Notice that this Order was made before a judge in chambers.

Note: Adopted children have the same child support rights and claims as natural children. It is important to keep this in mind, especially when family business ownership and claim matters arise.

Many couples before considering adoption opt for some form of assisted reproduction, so the law has had to keep up with the scientific advances in this area.

## **ASSISTED REPRODUCTION**

The federal *Assisted Human Reproduction Act*, S.C. 2004, c. 2 covers the scientific and commercial aspects of assisted reproduction. For example, it is illegal to create a human clone, to sell sperm or eggs, or to pay a surrogate mother for her services (she may be compensated for her expenses).

The penalties for violations under certain sections of this Act are currently up to a fine of \$500,000 and, for certain contraventions, up to ten years in prison.

As a surrogate mother is deemed to be a parent of the child, each province's family law legislation allows intended parents and the surrogate mother to sign an **Assisted Reproduction Agreement** (prior to conception of the child) stipulating that the surrogate mother will not be a parent of the child in the eyes of the law.

Most provincial legislation also makes it clear that egg and sperm donors are not considered parents. This is important because donors are not liable for child support. Having said that, egg and sperm donors can agree to be parents but doing so makes them liable for child support should the situation arise. In essence, a child could have five parents.

## TEST YOUR KNOWLEDGE 1

Read the following sentences. Select the correct legal term(s) from those listed in the parentheses.

1. The parties to a Cohabitation Agreement should seek independent (annulment, common law recognition, legal advice, division of assets).
2. The act of going through a marriage ceremony with one person while married to another is known as (illegal capacity, bigamy, affinity, ab initio).
3. Under the (law of paramountcy, doctrine of superiority, law of superiority, doctrine of paramountcy), the *Divorce Act* is considered to be superior to any provincial family law legislation.
4. Most family matters, except divorce, are governed by (independent, provincial, municipal, federal) laws.
5. (Consanguinity, Affinity, Duress, Annulment) refers to someone exercising force to compel another person to do something.
6. A (Pre-Nuptial, Cohabitation, Family Law, Separation) Agreement establishes what a couple is bringing to a marriage.
7. (Custody, Support, Access, Adoption) refers to the right of the non-custodial parent to visit the children of the marriage or relationship.
8. An adoption where the custody and guardianship of the child to be adopted is transferred from the birth mother to the provincial government is often referred to as government (stewardship, access, placement, wardship).
9. The legal term that means a marriage is no longer valid and never was valid in the eyes of the law is (annulment, affinity, null, consanguinity).
10. The parent who is granted (access, custody, support, maintenance) of the children of the marriage or relationship is responsible for the care and upbringing of the children.

## INITIATING THE SEPARATION PROCESS

### RELATIONSHIP COUNSELLING

When problems arise in a marriage or relationship, some couples seek relationship counselling. **Relationship counselling** involves a professional counsellor helping the couple to recognize, reconcile, and manage problem areas. Quite often the issues are resolved and the marriage or relationship continues. However, if the issues cannot be resolved, then steps have to be taken to initiate a separation.

### SEPARATION

It is important to remember that a separation is not a divorce. A **separation** means that a couple are living separate and apart but they are still married. Separation does not necessarily mean that a spouse has physically moved out of the family home. Provided that one spouse has declared the relationship over and the spouses have acted as such (not slept together, etc.) then the law considers the couple separated.

When a couple separate, there are issues relating to children, family assets, debts, etc. that have to be resolved. Sometimes a couple will have an informal arrangement (often verbal) relating to these issues. However, circumstances change, and what may initially seem a good idea turns

out to be a major problem at a later date. A better solution is for a couple to put their decisions in a written Separation Agreement; however, couples do not need to have any legal document in place in order to separate.

## **SEPARATION AGREEMENT**

A **Separation Agreement** is a written legal contract, signed by both parties (both signatures must be witnessed) that sets out the terms of the separation, including custody and guardianship of children and division of family assets - even who gets to keep the family dog! A Separation Agreement does not have to cover all of the couple's family law issues. It may cover some of them and leave the court to decide on the rest.

While it is not mandatory to have a Separation Agreement, it is important to have all decisions in writing. Even if the separation is amicable, nobody knows what the future holds. If there is a Separation Agreement in force, then all parties know "the rules of the game" and they are obligated to honour the terms of the Agreement.

Some people use the term **legal separation**, meaning that the couple have signed a Separation Agreement. However, in most provinces, there is no such thing as a legal separation. If a couple decide to separate, they can do so without documentation.

**Format** A Separation Agreement is formatted like any other Agreement. The parties are listed in the heading and this is followed by the preamble or "Whereas" clauses. The "**Whereas**" clauses, sometimes called the **recital**, set the stage for the agreement and state the:

- date of the marriage
- date of the separation
- names of the children
- names of the parties' employers
- details of the real property (houses, land, etc.)
- general purpose of the Separation Agreement.

**Clauses** While each Separation Agreement is unique, there are many standard clauses that apply to most separations. These include:

- The general terms of the separation
- Debt responsibility and credit:
  - ◆ Details of outstanding debts (credit cards, mortgages, loans)
  - ◆ Who will be responsible for paying the debts
  - ◆ How debts incurred after separation but before divorce will be handled
- Custody and guardianship of children
  - ◆ Who the children will live with
  - ◆ Who will have access (parenting time) rights
  - ◆ How much child support will be paid
  - ◆ When the child support will end
- Spousal support
  - ◆ The amount of the support
  - ◆ When the support will end
  - ◆ Whether the right to support will be waived forever
- Assets and personal property division
  - ◆ How the family assets will be divided
  - ◆ How any business assets will be divided \*
  - ◆ Which spouse will stay in the family home
  - ◆ Whether the family home will be sold
  - ◆ Who will maintain the family home until it is sold
  - ◆ How the proceeds will be divided
- Pension plans
  - ◆ How pensions, Registered Retirement Savings Plans (RRSPs), etc. will be divided, if at all

- Rights under the provincial family law legislation
- Releases
- Estates
- Disclosure and independent legal advice
- Reconciliation.

\* **Business assets** are assets relating to a company or corporation that are not used for family purposes but are owned either wholly or in part by one spouse. Business assets are not usually subject to division between spouses; however, a court may decide that business assets should be taken into account when dividing the family assets.

See page 172 for a precedent of a Separation Agreement. Look carefully at all the provisions. Can you find all the clauses mentioned above?

**Special Terms** There are several terms in this Agreement with which you may be unfamiliar: intestate, estoppel, chattels, and waiver.

**Intestate** refers to dying without having made a Will.

**Estoppel** is a rule of law that basically says Person X cannot deny or support a set of facts one time and then, when Person Y has taken action based on those facts, turn around and change his or her mind to benefit him- or herself.

**Chattels** are items of movable property; for example, furniture, boat, car, etc.

To **waiver** or waive means to intentionally give up the right or claim to something.

**Processing the Agreement** It is critical that parties to a Separation Agreement obtain independent legal advice so that they fully understand the terms and conditions to which they are agreeing.

Sometimes a Separation Agreement is amended several times until both parties and their lawyers are entirely satisfied with the terms and wording. Once that point is reached, several **original** copies of the Separation Agreement are signed and witnessed. Note: An Agreement that has been signed by both parties is called a **perfected Agreement**. Each party receives an **original** signed copy of the Separation Agreement for their permanent records. The lawyers also keep copies of the Agreement.

In certain provinces, if a Separation Agreement contains provisions regarding custody, guardianship, and access (parenting time), the Agreement is filed in the Provincial Court. Once the Separation Agreement has been filed with the court, often with an accompanying document such as a Consent to File Agreement, the provisions of the Separation Agreement have the same force and effect as if a judge had ordered the custody, guardianship, and access.

If a Separation Agreement contains provisions relating to real property, then it may be registered in the local land title or registry office. In some provinces, a Notice is filed in the land title office and this is registered against the title to the property. This Notice prevents one spouse from selling the property without the involvement of the other spouse. This might happen if, say, the family home was registered in the wife's name. The husband would want to ensure that the family asset was not sold and the wife take all the proceeds instead of a 50:50 split. Obviously, much depends upon whether there is a Pre-Nuptial Agreement and the terms of that Agreement.

**Enforcement** In Ontario, if a party to a Separation Agreement wants to ensure the enforcement of the terms, then the Agreement is filed with the Ontario Court of Justice or Superior Court of Justice (Family Court). When the Separation Agreement is registered with the court, the court issues court-stamped copies of the Agreement. The Agreement may also be registered with the **Family Responsibility Office (FRO)** especially if one party wants to have support payments enforced. The FRO works on behalf of one party to a Separation Agreement if the other party is breaking any terms of that Agreement.

Most provinces have some type of agency like the FRO. For example, in Nova Scotia, court orders for maintenance are automatically registered with the **Maintenance Enforcement Program (MEP)** that helps a parent collect child support. In British Columbia, the **Family Maintenance Enforcement Program** is a government agency that has certain authority to enforce Support Orders.

**Amending an Agreement** Any family law Agreement, including a Separation Agreement, may be amended by both parties signing a second Agreement called an **Amending Agreement**, **Amendment Agreement**, or an **Addendum Agreement**. These Agreements are usually quite short and are designed to change just a certain section of the original Agreement not rewrite it.

If a couple cannot reach agreement, they may seek mediation or arbitration.

## **MEDIATION OR ARBITRATION**

If a couple cannot reach agreement on a variety of issues, including the division of property, child custody and access, and support payments, they may turn to mediation or arbitration to solve the impasse. However, both of these avenues cost money.

**Mediation** **Mediation** is a process where a neutral third party called the **mediator** - often a social worker or psychologist - works with the couple to provide them with the "tools" to solve their own problems. The mediator's job is to listen, not take sides, and help the couple to reach an agreement. The mediator does not decide the case like a judge does, nor does the mediator impose any type of settlement as is the case with arbitration.

Mediation works best if each party knows what he or she wants and can defend their ideas without fear of intimidation; however, mediation is not appropriate in cases where there is, or has been, any sort of violence or abuse.

There are two types of mediation:

1. Open
2. Closed.

### **OPEN MEDIATION**

With **open mediation**, the mediator writes a full report on what happened throughout the mediation process. The report may contain anything that the mediator considers to be important, and that information is available to the court.

### **CLOSED MEDIATION**

With **closed mediation**, the mediator's report merely states what agreements have been reached or that no agreements have been reached.

If there is no agreement, the couple either uses an arbitrator or goes to court.

**Arbitration** **Arbitration** is a process where a neutral third party called the **arbitrator** listens to the couple and makes a **binding decision**. This means that the couple must accept, and abide by, any decisions made by the arbitrator relating to the contentious issues. Arbitrators are often former judges or practising lawyers.

In many provinces, couples are required to contact their own lawyers prior to embarking on any arbitration process. In many instances, it is the lawyers who refer the couple to arbitration because they (the lawyers) have not been able to negotiate a settlement.

**Court Involvement** If a couple decides not to seek either mediation or arbitration, they may go to court and ask the court to decide. However, court proceedings may be expensive and take a long time, so mediation or arbitration may be the better course of action.

**Parenting Coordination** **Parenting coordination** is a process (often ordered by a judge) whereby a **parenting coordinator** assists a high-conflict family to manage and implement its existing parenting agreements without going to court. Parenting coordination does not involve changing or creating parenting agreements.

Unfortunately when relationships "go sour" family violence and/or abuse may occur.

## **FAMILY VIOLENCE**

Family violence and/or abuse may be directed at a spouse, partner, or child. **Family (domestic) violence** includes physical abuse, sexual abuse, mental abuse, intimidation, harassment,

threats, stalking, property damage, etc. The *Criminal Code* does not address family violence per se but there are quite a few applicable offences; for example,

- common assault
- assault causing bodily harm
- aggravated assault
- criminal harassment (stalking)
- uttering threats.

For criminal charges to be laid against a spouse or partner, a complaint must be made to the police (normally by a 911 call). The criminal law process is then set in motion provided that there is sufficient evidence.

Quite often an arrested spouse or partner will be released with specific conditions; for example:

- not to come within a certain distance of the family home
- not to have direct or indirect contact with his or her spouse/partner
- not to go to the child's daycare or school
- to keep the peace and be of good behaviour.

These conditions can also be sought under most provincial family law legislation by means of a **Protection Order** or **Restraining Order**. Any at-risk family member or representative of an at-risk family member may apply to the court for a Protection or Restraining Order. An **at-risk family member** is an individual whose safety and security is, or is likely to be, at risk from family violence carried out by a family member.

An abused spouse may also sue his or her partner under civil law; however, such tort claims cannot be heard in Provincial Court, they must be heard in the provincial Supreme or Superior Court.

Typical family violence tort claims seek damages for:

- loss of enjoyment of life
- pain and suffering
- medical expenses
- lost wages.

Unfortunately, sometimes a spouse or partner seeks revenge by **childnapping** - wrongfully removing his or her children from their home or school, taking them out of province, etc. In some instances the parent manages to take the children out of the country. The *Hague Convention on the Civil Aspects of International Child Abduction* deals with the procedure to return abducted children to their rightful country.

## TEST YOUR KNOWLEDGE 2

Test your knowledge by answering the following questions.

1. Define the terms *waiver*, *chattels*, and *estoppel*.
2. Differentiate between mediation and arbitration in family law matters.
3. What are "Whereas" clauses and where do they appear in a Separation Agreement?
4. Are business assets usually subject to division between spouses? Explain.
5. Outline the process of parenting coordination.
6. Explain the term *perfected Agreement*.
7. Define *separation*.

8. Briefly explain what a Separation Agreement is.
9. How is a family law Agreement amended?
10. Define *family violence*.

## GOING TO COURT

### COMMENCING COURT PROCEEDINGS

Provincial court proceedings are commenced with an **Application to Obtain an Order** (or similarly named document). The person commencing the proceeding is usually called the **applicant** and the opposing party is called the **respondent**.

Supreme or Superior Court proceedings are commenced with a **Notice of Family Claim** (or similarly named document). The person commencing the proceedings is called the **claimant** and the opposing party is called the **respondent**.

If the respondent wants to answer the claims being made or make new claims, he or she prepares a **Reply** (or similarly named document) in a Provincial Court proceeding or a **Response to Family Claim** (or similarly named document) in a Supreme or Superior Court proceeding.

The outcome of the commencement of a court proceeding will be settlement out of court or going to trial.

#### **Settlement**

Courts are always keen to see settlements made rather than cases go to trial. In most provinces, a special hearing (often called a **case conference**) is set up to try to reach a settlement. These conferences, attended by the parties, their lawyers, and a judge or master, are private and off the record. A **master** is a superior court official who performs many procedural tasks that a judge does not have time to do.

The judge at a case conference often plays a significant role in pushing the parties and their lawyers to be realistic, compromise, etc. If a settlement is reached, the judge immediately makes a Consent Order.

If trial is the only avenue, the process is the same as in any other civil litigation case - documents are exchanged, examinations for discovery held, and a trial date set.

If a court proceeding involves a claim for child support, spousal support, or division of property and debts, each party must prepare financial statements (income, expenses, assets, and liabilities) and file them into court.

Either party can ask the court to make an Order about some or all of the issues raised in the court proceeding. However, it is important to keep in mind that an Order may require one or both parties to do something or not do something.

### CHILD CUSTODY, ACCESS, & SUPPORT

When a couple decide to separate, decisions concerning the children have to be made - often quite quickly.

#### **Consent Order**

If the couple can reach a mutually satisfactory agreement regarding the children then they can apply for a **Consent Order**.

#### **Temporary/ Interim Orders**

If the couple cannot agree immediately, either or both parties may make an interim application to the court under provincial law for a judge to decide the terms of a **Temporary Order** or **Interim Order** covering such issues as:

- custody of the children
- access to the children



- how much support is to be paid
- one party not harassing the other
- who can stay in the family home; etc.

Provincial Court interim applications, also called **interlocutory applications** or **motions**, are normally commenced by the applicant filing a Notice of Motion or similarly named document into court. A court-stamped copy is served on the respondent prior to the hearing date. The respondent may counter with a Reply.

Supreme or Superior Court interim applications are normally commenced by the applicant filing a Notice of Application, or similarly named document, and supporting Affidavits into court. Court-stamped copies of the documents are then delivered or served on the respondent prior to the hearing date. The respondent may counter with an Application Response outlining what she or he agrees to and opposes. In some provinces, the applicant must prepare an Application Record containing all pertinent documents for the judge or master who will be hearing the application.

You will sometimes see the term **guardian ad litem** on proceeding documents. It refers to a person who is conducting a court proceeding on behalf of an individual who has a legal disability.

The court always tries to ensure that any Order, temporary or otherwise, is in the best interests of the children; i.e., it protects the children's safety and well-being as much as possible, and considers the children's Aboriginal heritage, where applicable.

Unless there are extenuating circumstances, the Temporary Order or Interim Order remains in effect until the court can hear the couple's complete family law case; i.e., the case goes to trial.

**Conduct Order**

The court may make a **Conduct Order** to prevent misuse of the court process, to encourage settlement of a family law issue, or to manage a party's counter-productive behaviour. A Conduct Order may stipulate that the parties and/or children must attend counselling or family dispute resolution sessions, or that communication between the parties be restricted.

**Final Order**

A **Final Order** is made at the end of the trial and, as its name implies, concludes the court proceeding.

**Varying an Order**

If, over time, there is a major change in circumstances, either party to a Court Order may go back to court to ask that the Order be changed. This is known as **varying an Order**.

**Appealing an Order**

If either party does not like an Order made by a judge, he or she may sometimes appeal to a higher court; for example, a provincial Court Order may be appealed to the provincial Supreme or Superior Court under certain circumstances. However, no party can appeal an Order that she or he has agreed to.

**Child Custody/ Guardianship**

If a court is asked to decide who should have custody of the children, the judge may request an assessment by a social worker or psychologist.

The social worker or psychologist interviews the parents and the children to obtain a complete picture of what is happening and what would be in the best interests of the children.

On occasion, the social worker or psychologist may also interview other family members (such as grandparents) and/or teachers.

An **Assessment** is a written report for the court that recommends where the children should live, with whom the children should live, and when the other parent may have access to the children.

The parent having custody of the children has the right to make decisions about their care, upbringing, and education unless there is a Court Order or Separation Agreement that states otherwise.

Unless one parent is unable to communicate with the other, most judges will grant an Order for joint custody which means that both parents have the right to make important decisions on behalf of their children.

If a couple separate but do not have a Separation Agreement or a Court Order, the parent with whom the children are living has **de facto custody**. When the couple sign a Separation

Agreement or obtain a Court Order stipulating the custodial parent, then that parent has **legal custody** of the children.

Sometimes you will see the term guardianship used. Under the federal *Divorce Act*, all rights of guardianship are lumped in with custody. If a person has custody of the children, he or she also has guardianship of those children. However, under some provincial legislation, guardianship can be separate from custody; i.e., one parent may have custody but both parents have guardianship. Confused yet? Well, here is an example that may help:

Under provincial law, a parent with custody can make day-to-day decisions such as which summer camp to send his or her children to without consulting the other parent. However, a major education or upbringing decision such as to enrol the children in a French immersion school must be made by both parents as guardians.

In some provinces, the term custody has been replaced with the term guardianship.

In many situations, children of separated parents spend part of their time in their mother's home and part of their time in their father's. This moving back and forth can be quite disruptive to the children. There is one unique solution that lawyers and judges often call **birdnesting**. This is not a legal term per se. It refers to the children remaining in the family home and the parents moving from their individual homes to the family home at designated times. Of course, this situation means that the family has to maintain three homes: the family home, the mother's home, and the father's home. The upside is that the children stay in the home and neighbourhood they have grown up in and where all their belongings and friends are located.

**Child Access/  
Parenting  
Time**

Non-custodial parents have the right to spend time with their children unless the court decides that such an arrangement is not in the best interests of the children; for example, if there is a fear that the non-custodial parent will harm the children or not return them at the end of the access period. Failure to return children is considered **child abduction** and is a serious crime with serious consequences.

If there is any question about the safety of the children, the court may order supervised access only. **Supervised access** means that there must be another person present whenever the non-custodial parent has access to the children. This other person might be a friend, relative, social worker, etc.

If a Court Order for custody or access is not obeyed, the court may require the parent(s) to come to court and explain why. If there is no good reason presented for disobeying the Order, the court may fine the non-compliant parent or send her or him to jail.

In some family law cases, the custodial parent will try to deny child access to other family members such as grandparents. When this occurs, the person denied access may apply to the court for a ruling.

See page 183 for a precedent of a Request for Child Contact. This request is from the children's grandmother.

**Child  
Support**

Parents, whether married or not, have a joint responsibility to support their children financially. The custodial parent has to cover the children's day-to-day expenses for food, clothing, etc. The non-custodial parent (the one who has the children for the least amount of time) normally has to pay child support, sometimes called child maintenance, each month to help cover the children's expenses until the children reach the age of majority. The payments may extend beyond the age of majority if a child is ill, disabled, or studying full-time at college or university.

Child support has nothing to do with access (parenting time or contact), custody (guardianship), or whether the individual has been a good or bad parent.

Each province has a set of Guidelines (either the same as, or based on, the **Federal Child Support Guidelines**) for the amount of child support a non-custodial parent has to pay. These Guidelines are based on income and the number of children that need to be supported. The court has the right to order that child support is higher or lower than the Guidelines. For example, a higher amount might be ordered if a child has special healthcare expenses; or a

lower amount might be ordered if the non-custodial parent would suffer undue hardship if required to pay the Guideline amount.

In many provinces, the parent paying support has to report his or her income each year to the parent receiving child support. If there is a change in income at any time that affects the payment or amount of payment of child support, then the couple will need to go back to court to have the Child Support Order amended.

If the parent paying support is a tax-exempt payor; for example, a "status Indian" under the federal *Indian Act* living on a reserve, then his or her income may be **grossed up** to account for this tax advantage. So a tax-exempt payor earning \$30,000 may have his or her income grossed up to \$42,000 to be on a par with non-tax-exempt individuals.

Parents have a legal obligation to support their children financially even if the parents have never married nor lived together. Sometimes, there is a question of paternity. **Paternity** refers to being the biological father of a child. A man who believes a child is not his, or who will not accept paternity, may be ordered by the court to have a paternity test to prove or disprove that he is the father.

Child support for step-children is a rather murky area. If a step-parent has treated a child as his or her own then, in all likelihood, a judge will order child support should the step-parent and the biological parent separate.

In addition to obtaining court rulings relating to child custody, access, and support, a couple may also seek a decision on spousal support.

## **SPOUSAL SUPPORT**

When married or unmarried spouses separate, the spouse with more money may have to help the other spouse to meet his or her living expenses and/or compensate the spouse for economic decisions made during the relationship; e.g., staying at home to raise the children. This payment is known as spousal support or spousal maintenance. It is important to keep in mind that spousal support is not automatic: the need has to be proven.

Sometimes a couple can agree on spousal support amounts and terms and document it in their Separation Agreement. However, if agreement cannot be reached, then the matter will have to go to the court for a decision.

When spousal support matters come before the court, the judge considers past, present, and future circumstances, including:

- how long the couple have been together
- how self-supporting the lower income person is
- whether the lower income person has employment or re-education opportunities
- the health and age of the lower income person
- whether the lower income person has stayed at home to look after the children, aging parents, or a family member with a disability.

Quite often the judge will also add a cost-of-living adjustment to a Court Order so that support payments will automatically keep up with the cost of living.

Generally speaking older individuals are paid spousal support until both parties receive pensions and/or CPP (Canada Pension Plan). Younger individuals have an obligation to become financially independent, so spousal support may be ordered for a shorter or a specified length of time.

Spousal support is usually paid each month but it may be paid in a one-time lump sum.

Spousal support is normally calculated using the Spousal Support Advisory Guidelines. These Guidelines are not law but they are used frequently by both lawyers and the courts.

There are time limits for asking for spousal support. A married spouse must ask for support within two years of divorce and unmarried spouses with two years of separation.

Yet another reason to go to court is to seek a ruling on division of property and debt.

## **DIVISION OF PROPERTY & DEBT**

When a couple separate, they have to divide their property and debt based on the family law of the province. In many instances, this can be negotiated and itemized in a Separation Agreement. However, as with other family law matters, if an agreement cannot be reached, the matter will have to go to court, a judge will make a decision, and a Court Order will be issued.

Generally, the total value of any real or personal property that married or unmarried spouses acquired during their marriage or relationship must be divided 50:50. Any increase in value (not the total value) of property brought into the marriage is divided 50:50. There are some exceptions.

**Excluded Property** There is a category of property called excluded property. **Excluded property** is property received or inherited during the relationship, that one party is allowed to keep entirely for him- or herself. For example:

- Money from a personal injury/motor vehicle accident lawsuit
- Money as a beneficiary under an insurance policy of someone who has died
- Inherited property (jewellery, artwork, house, boat, car, money, stocks and bonds, etc.)
- Gifts from anyone (other than a spouse or partner).

**Family Assets** There is a category of property called family property or family assets. Family assets are items that the family uses as a whole; for example, the family home, the cottage, the boat, etc. Family assets are normally divided 50:50; however, there are exceptions to this rule. For example, should a husband be entitled to half the value of a boat if he never set foot on it? If the couple cannot agree on whether an item is a family asset, then the matter is taken to court for a judge to decide.

The division of property outlined in a Separation Agreement does not have to be 50:50 provided that at the time of signing the Agreement both parties, with independent legal advice, agree to a different division.

Family property also includes bank accounts, investments, RRSPs, and pensions; spousal interests in a company, business, or partnership; and debts owed to a spouse.

See page 157 for information on business assets.

**Family Debts** When married or unmarried spouses separate, they are each responsible for half the family debts. **Family debts** include all debts incurred by either spouse during their relationship as well as debts incurred after separation if those debts are incurred to maintain family property.

## **TEST YOUR KNOWLEDGE 3**

Read the following sentences and then fill in each blank with the appropriate term or phrase.

1. The family home is an example of \_\_\_\_\_ property.
2. If a couple does not have a Separation Agreement or a Court Order, the parent with whom the children are living has \_\_\_\_\_ custody.
3. Under the federal *Divorce Act*, all rights of \_\_\_\_\_ are lumped in with custody. This is not the case under some provincial legislation.
4. A/an \_\_\_\_\_ is a written report for the court, that recommends, among other things, where the children should live.
5. When a couple separate but cannot agree straightaway on issues concerning the children, they may apply for a/an \_\_\_\_\_ Order or \_\_\_\_\_ Order covering such issues as who can stay in the family home.

6. If a couple has a Separation Agreement or a Court Order stipulating the custodial parent, then that parent will have \_\_\_\_\_ custody.
7. \_\_\_\_\_ means that there must be another person present whenever the non-custodial parent has access to the children.
8. When a couple separate, the person with more money may have to support the other. This payment is known as spousal support or spousal \_\_\_\_\_.
9. Property inherited during a relationship is referred to as \_\_\_\_\_ property.
10. \_\_\_\_\_ is the Latin term referring to a person who is conducting a court proceeding on behalf of an individual who has a legal disability.

## GETTING A DIVORCE

For a marriage to legally end, married spouses must have grounds for divorce and must obtain a divorce through the courts. Unmarried spouses do not need to get divorced.

### GROUND FOR DIVORCE

When a client approaches a law firm to handle a divorce, the divorce lawyer tries to ascertain whether the client has grounds for divorce. Under s. 8 of the federal *Divorce Act*, 1985, marriage breakdown is the only ground for divorce. **Marriage breakdown** in legal terms is defined as one-year separation, adultery, or mental/physical cruelty.

#### **One-Year Separation**

If a client wants to apply for a divorce because of a one-year separation, the lawyer must determine how long the spouses have been living separate and apart and whether any reconciliations longer than 90 days have occurred. If there have been any reconciliations with a duration in excess of 90 days, then the separation period is calculated from the date of the cessation of the last reconciliation.

Living separate and apart does not require physical separation; for example, a couple might live in the same house (but in separate rooms) for economic reasons and/or because it is in the best interests of the children.

#### **Adultery**

If **adultery** - where one spouse has had sexual intercourse with another person other than her or his spouse - has taken place, the lawyer asks the client whether she or he has any names, dates, or places of any suspected adultery or whether the adulterous spouse has admitted to committing adultery.

#### **Mental or Physical Cruelty**

If **mental or physical cruelty** has taken place, the lawyer obtains details of the alleged cruelty, often in the form of medical reports from hospital emergency room physicians, family doctors, psychologists, or psychiatrists.

Besides establishing that a client has grounds for divorce, a lawyer must also ensure that there are no bars to divorce.

### BARS TO DIVORCE

There are three major bars to obtaining a divorce:

1. Collusion
2. Condonation
3. Connivance.

**Collusion** Collusion occurs when a couple agrees to fabricate or suppress evidence or to deceive the

court in order to obtain a divorce. An example of this would be if a couple agrees to lie about their separation date in order to obtain an earlier divorce.

**Condonation** **Condonation** refers to one spouse forgiving the other for a particular act; for example, a husband forgives his wife for having committed adultery.

There are three essential elements of condonation. The innocent spouse must:

1. have full knowledge of the circumstances of the offence
2. intend to forgive the offence
3. reinstate the guilty spouse to his or her former marital position.

**Connivance** **Connivance** refers to one spouse causing or knowingly, willfully, or recklessly permitting the guilty spouse to commit adultery. The key element of connivance is that it must precede the adulterous event.

While collusion is an absolute bar to the granting of a divorce, condonation and connivance are not. This means that if condonation or connivance has taken place, the court may grant the divorce if it feels the divorce would best serve the public interest.

Once a lawyer has ascertained that there are no bars to divorce, he or she will initiate divorce proceedings provided that the spouse seeking the divorce has been ordinarily resident in the province for at least one year.

## INITIATING DIVORCE PROCEEDINGS

Under s. 9(1) of the *Divorce Act*, it is the duty of every barrister, solicitor, lawyer, or advocate acting on behalf of a party who wants to commence divorce proceedings, to discuss the possibilities of reconciliation and to provide information on available marriage counselling or guidance services. This duty does not have to be fulfilled if the circumstances are such that it would not be appropriate to do so; for example, domestic violence in the relationship.

If and when the parties have identified that they have irreconcilable differences and divorce is inevitable, it is time to start divorce proceedings.

Either spouse (or both) can apply to – petition – the court for divorce.

**Documentation** The document to commence a divorce proceeding and the names of the parties varies as shown in the following table:

Province	Document to Commence a Divorce Proceeding	Parties
Manitoba, New Brunswick	Petition for Divorce	Petitioner, Respondent
Alberta	Statement of Claim for Divorce	Plaintiff, Defendant
Ontario	Application (Divorce)	Applicant, Respondent
BC	Notice of Family Claim	Claimant, Respondent

For the purposes of this unit, we will use the terms Notice of Family Claim, claimant, and respondent.

Depending upon your family court rules, if adultery has occurred, the third party may be called the **person named**. If the third party is being sued for damages, then he or she is usually called the **co-respondent**.

As provinces continually simplify documentation and electronic court filing procedures, you need to keep up to date with any changes to your provincial family court rules and adapt accordingly.

Despite the variances in document and party names, the divorce proceeding document provides:

- personal details of the parties

- details of the marriage
- details of the children
- grounds for the divorce
- relief sought - support for the spouse and/or the children; child custody and access (parenting time) arrangements
- financial statements.

The term **corollary relief** is often used to refer to the relief being applied for in addition to a divorce; i.e., Child Custody Order, Child or Spousal Support Order.

See page 185 for a precedent of a Notice of Family Claim. As this couple do not have any children, only one Schedule is required. Notice in particular the lawyer's Certificate section on the last page. As mentioned at the beginning of this section, there has to be a discussion of reconciliation and counselling prior to commencing divorce proceedings.

Because many couples have to wait a year to apply for a divorce, they settle matters relating to child custody, access, and support; and spousal support under provincial family law. However, if this has not been done, then the couple may set out their claims for relief as part of their federal *Divorce Act* Notice of Family Claim.

**Proof of Marriage**

While the *Divorce Act* outlines the law regarding divorce, each province has its own procedural rules, some virtually standard. For example, before a Notice of Family Claim is filed in the court, the claimant must provide proof of marriage. A claimant cannot divorce someone to whom he or she is not married. Usually the claimant has a copy of the **Certificate of Marriage**; however, if he or she does not, a certified copy of the **Registration of Marriage** may be obtained from the provincial government provided the marriage took place in the province. If the marriage was solemnized outside the province or country, then application has to be made to the local authorities there.

**Registration of Divorce Proceedings**

Another standard procedure is that a Notice of Family Claim be accompanied by a **Registration of Divorce Proceedings**. This form is filed in a provincial court; however, it is transmitted to the **Central Registry of Divorce Proceedings** in Ottawa, where a check is made to ensure that duplicate divorce actions have not been commenced in other provinces.

**Filing**

Once the Notice of Family Claim has been signed by the claimant (or claimant and respondent in provinces where a **Joint Notice of Family Claim** is permitted), the Registration of Divorce form has been completed, and a Certificate of Marriage or certified copy of the Registration of Marriage has been obtained, the documentation is filed in the provincial Supreme Court, Superior Court, or Court of Queen's Bench, together with the appropriate filing fee. The court then assigns an action number and stamps the Notice.

**Service**

The claimant's lawyer arranges for service on the respondent and, in the case of adultery, sometimes on the person named or co-respondent, depending on the family court rules.

Because divorce matters come under the umbrella of civil litigation - one individual suing another - the procedures for service are the same as for any other civil litigation case.

**SUBSTITUTIONAL SERVICE**

With divorce matters it is more common for the respondent to try to evade service. It is quite normal, therefore, for a lawyer to have to make application to court for an **Order for Substituted (or Substitutional) Service**. Substituted service may be effected by means of:

- serving a close family member
- posting a copy of the Notice of Family Claim in the court registry
- placing a Notice in a local newspaper in the area in which the respondent is believed to be residing.

The rules and procedures relating to substituted service are set out in each province's rules of court or civil procedure.

See page 110 for a precedent of an Order for Substitutional Service.

When the respondent is served with the Notice, he or she has options, one of which results in an undefended divorce proceeding.

## UNDEFENDED DIVORCE PROCEDURES

**Limitation Date** When the claimant's lawyer receives an **Affidavit of Service** (see page 77) from the person who served the Notice of Family Claim on the respondent, a record will be made of the **limitation date** – the date by which the respondent must answer the Notice of Family Claim. The Notice of Family Claim stipulates the length of time the respondent has – from the time the Notice was served on her or him – to prepare either a Response to Family Claim, Answer, Counterclaim, or Counter-Petition.

**Respondent's Options** When the respondent in a divorce action is served with a Notice of Family Claim, she or he has a time limit in which to decide what to do. The limitation date is stated on the front of the Notice of Family Claim and varies from 15 – 60 days depending on the circumstances and the province. Consult your family court rules for details.

Usually a respondent seeks legal advice when served with a Notice of Family Claim; however, this is not mandatory. If the respondent agrees to the claims in the Notice of Family Claim, then she or he does nothing. This means that the divorce is **undefended** and there is little likelihood that a court appearance will be required.

**Expiration of the Limitation Date** Upon the expiration of the limitation date, if there has been no response from the respondent, the claimant's lawyer prepares the necessary documentation required by the court in order to obtain a divorce.

**Documentation** The documentation varies from province to province, however, it usually consists of:

- A Requisition asking the court for a Divorce Order
- The original Affidavit of Service, showing that the Notice of Family Claim was served
- An Affidavit of the lawyer to the effect that no Response to Family Claim, Answer, Counterclaim, or Counter-Petition was filed, served, or delivered
- If there are children of the marriage, either an Affidavit or a Statement outlining the details of access, custody, and support, as well as details of the financial situations of both spouses
- A draft of the Divorce Order being requested.

The objective behind having these Affidavits – or the information in the Notice of Family Claim – is to provide the court with sufficient data to make a decision. Since the parties to an undefended divorce do not usually have to appear in court, the information that would have been elicited in court must be provided in written form. If the court decides that there is insufficient information, or wants to question either party, then a hearing, often in chambers, is arranged.

**Best Interests of the Children** The *Divorce Act* also places the burden on the court to ensure that the best interests of the children of the marriage are always considered.

For the purposes of divorce, a child of a marriage refers to a child under the age of majority or a child of any age who is unable to look after him- or herself because of illness or disability (s. 2 of the *Divorce Act*). It is essential, therefore, that references to children in both the Notice of Family Claim and any supporting Affidavits must relate to children under the age of majority. The *Divorce Act* defines "age of majority" as "the age of majority as determined by the laws of the province where the child ordinarily resides, or, if the child ordinarily resides outside of Canada, eighteen years of age."

**Divorce Order** If the documentation presented to the court is in order and the appropriate fees paid, the court grants a divorce and issues a **Divorce Order**. This type of Order is often referred to as a **Desk Order** because neither of the parties has had to appear in front of a judge. See page 189 for a precedent of a Divorce Judgment.

Another option for the respondent is to "fight" the divorce.



## **DEFENDED DIVORCE PROCEDURES**

**Respondent's Options** If the respondent wants to dispute some relief outlined in the Notice of Family Claim or requires some clarification or minor change to, perhaps, access or custody provisions, she or he arranges for a Response to Family Claim or an Answer to be filed and delivered to the claimant or claimant's lawyer.

If the respondent wants to sue the claimant for divorce, a **Counterclaim** or **Counter-Petition** is filed in the court registry and served on the claimant.

In some jurisdictions, an **Answer** and Counter-Petition is used when the respondent wants to dispute some relief sought by the claimant and to sue the claimant for divorce. In certain circumstances, a respondent may prepare a **Notice of Intent to Defend**.

**Procedures** A **defended divorce** action follows the same procedure as any civil litigation case. A trial date is obtained, examinations for discovery are held, and a **Trial Record**, or similar document, is prepared and filed in court. Throughout this process, efforts may be made to settle out of court to prevent a trial; however, if a settlement is not forthcoming, the case goes to trial.

**Court Appearance** The claimant and the respondent appear in court. Evidence is submitted by Affidavit or by witnesses present at trial. At the conclusion of the trial, the judge presents either an oral or a written judgment.

**Divorce Order** The claimant's lawyer normally prepares the appropriate defended Divorce Order, submits it to the respondent's lawyer for approval, and then files it in court. The court then issues the Order.

## **AFTER THE DIVORCE**

Under s. 12(1) of the *Divorce Act*, the divorce takes effect on the 31st day after the day on which the judgment granting the divorce is rendered, unless special circumstances exist. The 31-day waiting period allows time for appeal.

Under some circumstances such as one party leaving the country for work or being posted overseas for military duty, a court issues a Divorce Order that is effective immediately or on a specified date prior to the usual 31-day waiting period. Under s. 12(2)(b) of the *Divorce Act*, however, the spouses must agree and undertake that they will not appeal the judgment.

As soon as the effective date of the divorce is reached, the marriage is officially dissolved and a **Certificate of Divorce** is obtained from the court registry. This Certificate, or a certified copy of it, is conclusive proof that the divorce is effective. At this time, the claimant and respondent are free to remarry if they so desire.

## **DEATH & DIVORCE**

If one spouse dies, the marriage automatically ends. The surviving spouse does not need to obtain a divorce.

## **TEST YOUR KNOWLEDGE 4**

Indicate whether the following statements are true or false by circling the appropriate answer. T = True, F = False.

1. A Registration of Divorce Proceedings form must be transmitted to the Central Registry of Divorce Proceedings in Ottawa. T / F
2. Depending on your family court rules, if adultery has occurred, the third party may be called "the person named." T / F
3. If the respondent wants to sue the claimant for divorce, a Counterclaim or Counter-Petition is prepared. T / F
4. Collusion refers to one spouse forgiving the other for a particular act. T / F

5. The limitation date is the date by which the respondent must answer the Notice of Family Claim. T / F
6. Under the *Divorce Act*, a divorce takes effect on the 30th day after the day on which the judgment granting the divorce is rendered. T / F
7. Marriage breakdown in legal terms is defined as two-years separation, adultery, or mental/physical cruelty. T / F
8. A Certificate of Divorce is conclusive proof that the divorce is effective. T / F
9. The term *corollary support* is often used to refer to the relief being applied for in addition to a divorce. T / F
10. The term *adultery* refers to one spouse having had sexual intercourse with another person other than her or his spouse. T / F

## DOCUMENTS

The following documents are illustrated for your perusal:

- Adoption Order (page 171)
- Separation Agreement (pages 172 - 182)
- Request for Child Contact (pages 183 - 184)
- Notice of Family Claim and Schedule 1 (pages 185 - 188)
- Divorce Judgment (page 189)

PREVIEW

**SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)**

Application, with consents, by MARSHA COLE and NIGEL PATRESE to adopt, under the *Children and Family Services Act*, the person whose birth is registered as 14879 by the *Registrar General of Nova Scotia*.

**ADOPTION ORDER**

**BEFORE THE HONOURABLE JUSTICE MORGAN IN CHAMBERS**

MARSHA COLE and NIGEL PATRESE filed a Notice of Proposed Adoption with the Minister of Community Services more than six months before the date of this Order. A copy of the Application for Adoption with Consent and the Affidavit in support was delivered to the Minister more than one month before the date of this Order.

The person sought to be adopted lived with the applicants for more than six months before the date of this Order.

All persons referred to in the Application have been sufficiently identified, and their ages have been correctly stated, and all persons whose consent is required have freely given consent, understanding its effects.

The Court finds that, in all the circumstances, including the circumstances under which the person sought to be adopted has been living with the applicants, it is in his best interests to be adopted by MARSHA COLE and NIGEL PATRESE.

On the motion of LAVERNE WENTZELL, as counsel for the applicants, the following is ordered:

**Application granted**

The Application of MARSHA COLE and NIGEL PATRESE who live at 26 Shore Drive, Conquerall Bank, Nova Scotia, to adopt a boy who was born on August 11, 20-- at South Shore Regional Hospital in Bridgewater, and whose birth was registered by the Registrar General of the Province of Nova Scotia as number 14879, is granted.

**Name**

The name of the person who is adopted is changed to NATHAN COLE PATRESE.

**Declaration about the effects of order**

The person who is adopted becomes, for all purposes except those stated in the *Children and Family Services Act*, the child of the applicants and they become, for all such purposes, the parents of the adopted person as if he had been born to the applicants in lawful wedlock.

\_\_\_\_\_, 20--

\_\_\_\_\_  
Prothonotary



2.

- Lot 62 – \$202,000;
- H. All the properties are unencumbered by financial charges;
- I. Shawna and Nigel wish to deal with the division of property and ancillary matters, but refer the issue of guardianship and maintenance of the Children to mediation with Family Services;
- J. Shawna and Nigel separately intend this Agreement to be:
  - a. a final settlement of their respective rights in or to the property of the other and the property held by them jointly, but not with respect to guardianship and child support for the Children; and
  - b. a full release of any right, interest, or claim that either may have upon the property of the other.

**WITNESS IN CONSIDERATION OF** the premises and the mutual covenants contained in this Agreement, Shawna and Nigel agree as follows:

**1.00 SEPARATION**

- 1.01 Shawna and Nigel shall continue to live separate and apart and be free from the control of each other.
- 1.02 Within 30 days of signing this Agreement, Nigel shall remove himself and his property from the River Road Property.
- 1.03 Neither Shawna nor Nigel shall directly or indirectly molest, annoy, or interfere with the other or friends, relatives, or associates of the other.
- 1.04 Shawna and Nigel agree that they shall not enter on the premises in which the other party shall live from time to time without invitation or consent.
- 1.05 Should Shawna and Nigel own any undisclosed asset, then such asset shall be owned as tenants-in-common, and the non-disclosing party shall save harmless and indemnify the other for any reasonable costs incurred to discover the existence of an undisclosed asset or to ascertain its value.

**2.00 DEBT RESPONSIBILITY AND CREDIT**

- 2.01 Subject to this Agreement, Shawna is solely responsible for the payment of any liabilities

3.

that she has incurred to the date of this Agreement and will indemnify Nigel and save him harmless from all claims, costs, expenses, damages, and actions which may arise in respect thereof.

- 2.02 Subject to this Agreement, Nigel is solely responsible for the payment of any liabilities that he has incurred to the date of this Agreement and will indemnify Shawna and save her harmless from all claims, costs, expenses, damages, and actions which may arise in respect thereof.
- 2.03 Except as otherwise provided in this Agreement, after the date of this Agreement, neither of Shawna and Nigel will pledge the credit of the other, contract in the name of the other, or in any way bind the other for any debts or obligations, and they will each be solely responsible for the payment of any debts and obligations they may respectively incur.
- 2.04 Except as otherwise provided in this Agreement, if after the date of this Agreement, either of Shawna and Nigel pledges the credit of the other, contracts in the name of the other, or in any way binds the other for any debts or obligations, she or he shall indemnify and save the other harmless from all claims, costs, expenses, damages, and actions in respect thereof.

### **3.00 GUARDIANSHIP**

- 3.01 Shawna and Nigel agree that the issues of guardianship and maintenance for the Children shall be referred to Family Services of Maple Ridge in an attempt to mediate such issues.
- 3.02 Should a settlement of the issues of guardianship and maintenance for the Children be resolved by mediation by Family Services of Maple Ridge, then such agreement shall be reduced to writing and filed with the Provincial Court of British Columbia.
- 3.03 Should mediation with Family Services of Maple Ridge not be successful, then either Shawna or Nigel may bring an application to either the Supreme Court of British Columbia or the Provincial Court of British Columbia for a determination of such issues.
- 3.04 Pending settlement of the issue of guardianship, Shawna and Nigel agree to retain joint guardianship of the Children and agree that joint guardianship, for the purposes of this Agreement, shall be defined as follows:
- a. they are to be the joint guardians of the estates of the Children;
  - b. in the event of the death of either of Shawna or Nigel, the other will be the sole guardian of the Children;
  - c. the parent with primary residence, who has the primary responsibility for the day-to-day care of the Children will have the obligation to advise the other of any matters of a significant nature affecting the Children;
  - d. the parent with primary residence will have the obligation to discuss with the other any significant decisions which have to be made concerning the Children, including significant

4.

decisions concerning their health (except emergency decisions), education, religious instruction, and general welfare of the Children;

- e. the parent who does not have primary residence will have the obligation to discuss the foregoing issues with the custodial parent and each parent shall have the obligation to try to reach agreement on those major decisions;
- f. in the event that Shawna and Nigel cannot reach agreement with respect to any major decision despite their best efforts, the parent with primary residence shall have the right to make such decision;
- g. the parent who does not have primary residence shall have the right, under the *Family Law Act*, to seek a review of any decision which that parent considers contrary to the best interests of the Children; and
- h. each parent will have the right to obtain information concerning the Children directly from third parties, including teachers, counsellors, medical professionals, and third party caregivers.

3.05 When the Children are in the care and control of Shawna, she shall have the final authority with respect to their discipline.

3.06 When the Children are in the care and control of Nigel, he shall have the final authority with respect to their discipline.

3.07 Shawna and Nigel covenant each with the other that neither shall remove the Children from the jurisdiction of the Province of British Columbia SAVE AND EXCEPT by consent of the other to be obtained in writing, or by direction of an Order of the Supreme Court of British Columbia.

3.08 If either of the Children requires emergency health care, the parent exercising care and control of such child shall:

- a. do all necessary things to provide for such health care; and
- b. promptly notify the other parent of the emergency.

3.09 Shawna and Nigel shall have the right to communicate with the Children by telephone, e-mail, text message, letter, or such other form of communication at all reasonable times.

#### **4.00 SPOUSAL SUPPORT**

1.01 Nigel and Shawna acknowledge that both he and Shawna have been made privy to

5.

the Spousal Support Guidelines but intend to be economically self-sufficient and independent of the other.

**5.00 ASSETS AND PERSONAL PROPERTY**

- 5.01 Shawna agrees that Lot 48 belongs to Nigel as his separate property free of any claim by Shawna or accounting for any portion of the same.
- 5.02 Shawna and Nigel agree that the River Road Property and Lot 62 are family assets to be shared equally between them.
- 5.03 Subject to paragraph 5.04, Shawna shall transfer her interest in Lot 48 to Nigel to be his separate property.
- 5.04 The River Road Property shall be immediately listed for sale, and the net sale proceeds shall be disbursed as follows:
- a. the first \$98,500 shall be paid to Shawna as her share of Lot 48, and;
  - b. the balance of the net sale proceeds shall be divided equally between Shawna and Nigel.
- 5.05 Subject to the provisions of this Agreement, Shawna and Nigel have agreed to divide their assets and personal property, with Shawna retaining the full right, title, and interest in her assets and personal property and Nigel retaining full right, title, and interest in his assets and personal property.
- 5.06 Shawna shall from the date of this Agreement keep in her possession and enjoy for her own exclusive use and benefit all such chattels from the matrimonial home as are in her possession on the date of this Agreement and Nigel hereby relinquishes and releases all his claims and interests in such chattels.
- 5.07 Nigel shall from the date of this Agreement keep in his possession and enjoy for his own exclusive use and benefit all such chattels from the matrimonial home as are in his possession on the date of this Agreement and Shawna hereby relinquishes and releases all her claims and interests in such chattels.
- 5.08 Shawna and Nigel covenant and agree to save harmless and indemnify the other, and each of them, from any claims, demands, suits, costs, and actions as may be made or brought by third parties relating to the respective properties to which they will receive title.

**6.00 PENSION PLANS and EMPLOYEE BENEFITS**

Canada Pension Plans

- 6.01 Each of Shawna and Nigel shall retain as her and his sole and separate property her and his respective contributions under the *Canada Pension Plan Act* and each of them hereby



6.

relinquishes any and all rights to apply for a share in such contributions made by the other or in the benefits payable to the other pursuant to the said Act.

- 6.02 It is the intention of Shawna and Nigel that there be no division of unadjusted pensionable earnings under Sections 53.2 and 53.3 of the *Canada Pension Plan Act* and if either Shawna or Nigel apply for a share in the other party's Canada Pension Plan, then the other is entitled to be compensated from the one so applying.
- 6.03 An application for division of the Canada Pension by either Shawna or Nigel shall be a breach of this Agreement entitling the other to seek:
- a. a permanent and interlocutory injunction to prevent the application from proceeding;
  - b. damages of twice the amount, if any, by which the Canada Pension in her or his favour is reduced as a result of the application for division; and
  - c. indemnification from the applying party to the opposing party for all legal costs and disbursements incurred to oppose the application for division.
- 6.04 Shawna and Nigel accept and acknowledge that their waivers of an interest in the other's Canada Pension Plan entitlement is a condition of their acceptance of the monetary settlement provided herein, and being fully aware of their rights pursuant to the Canada Pension Plan they freely opt for the monetary benefit to them contained in this Agreement in exchange for their compromise of any monetary claims.

Personal Pensions

- 6.05 Nigel shall retain as his separate property his respective contributions and rights to his pension with SIMON FRASER UNIVERSITY, Burnaby.
- 6.06 Shawna shall retain as her separate property her respective contributions and rights to her pension with MAORI SHIPPING CORP.

6.07 Shawna and Nigel both agree that so long as they do not remarry, they shall not change the designation of the other as the survivor under their pension plans.

Extended Benefits Plans

6.08 Each of Shawna and Nigel shall keep the other and the Children covered under their respective extended health care plans so long as each plan shall allow.

**7.00 RIGHTS UNDER THE FAMILY LAW ACT "the Act"**

7.01 Shawna and Nigel hereby acknowledge and agree that each of them has been fully informed of their respective rights, titles, and interests in, of, and to all family assets as defined in the Act as each of them acknowledges that this Agreement and the rights and obligations it grants to each of

7.

them is a complete and full settlement of all such rights, titles, and interests in, of, and to any and all property either or both of them may own or have in their possession.

7.02 In the event that Shawna or Nigel make or pursue any claim against the other, except as provided for in this Agreement, in respect of property, real or personal, communal or otherwise, whether at law or in equity, in any jurisdiction whatsoever, and without limiting the generality of the foregoing, any claims pursuant to Sections 15 and 16 of the *Divorce Act* aforesaid or pursuant to the Act, it is agreed that this contract may be pleaded as full estoppel and defence to any such claim made by Shawna or Nigel upon the other.

**8.00 RELEASES**

8.01 This Agreement is a full and final settlement of all issues, except guardianship and child support between Shawna and Nigel and all rights and obligations arising out of their marriage.

8.02 Shawna and Nigel each hereby forever discharges and releases the other from all claims at law, in equity, or by statute, including, without restricting the generality of the foregoing, the Act, the *Wills, Estates and Succession Act*, and amending Acts thereto, with respect to:

- a. spousal, but not child maintenance;
- b. property;
- c. succession rights; and
- d. any other matter arising from their relationship.

8.03 Subject to the provisions of the Agreement, neither Shawna nor Nigel shall claim interim or permanent maintenance from the other and further discharges or releases the other from all such claims.

8.04 In consideration of the mutual covenants set forth in this Agreement, Shawna has remised, released, and forever discharged, and by these presents does for herself, her heirs, executors, and administrators, remise, release, and forever discharge Nigel, his heirs, executors, and administrators of and from all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims, and demands whatsoever at law or in equity, which she ever had or now has or which she or her heirs, executors, or administrators hereafter can, shall or may have by reason for any matter, cause, or thing whatsoever existing up to the present time, SAVE AND EXCEPT from the foregoing general release, only obligations on the part of Nigel under this Agreement.

8.05 In consideration of the mutual covenants set forth in this Agreement, Nigel has remised, released, and forever discharged, and by these presents does for himself, his heirs, executors, and administrators, remise, release, and forever discharge Shawna, her heirs, executors, and administrators of and from all manner of action and actions, cause and causes of action, suits,

8.

debts, dues, sums of money, claims, and demands whatsoever at law or in equity, which he ever had or now has or which he or his heirs, executors, or administrators hereafter can, shall or may have by reason for any matter, cause, or thing whatsoever existing up to the present time, SAVE AND EXCEPT from the foregoing general release, only obligations on the part of Shawna under this Agreement.

**9.00 ESTATES**

9.01 Each of Shawna and Nigel hereto renounces and relinquishes all right, title, and interest in the estate of the other and all right to participate in, benefit from, or administer the estate of the other, and neither party shall commence any proceedings whatsoever under any statute or otherwise against the estate of the other; AND PROVIDED FURTHER that if either Shawna or Nigel shall die in the lifetime of the other, all property, if any, but for this covenant, would on her or his death go and belong to the other of them shall devolve to a person or persons to whom and in the manner in which the said property would have devolved if Shawna and Nigel and each of them had died intestate.

**10.00 DISCLOSURE AND INDEPENDENT LEGAL ADVICE**

10.01 Shawna and Nigel hereby acknowledge the following facts:

- a. they have each respectively received thorough, independent legal advice with respect to the legal effect of this Agreement and with respect to the alternatives available to her or him in lieu of signing this Agreement;
- b. they have executed this Agreement of their own free will and they were not subjected to any pressure or intimidation by the other of them or anyone else on her or his behalf; and
- c. they each have a general knowledge of the other's financial affairs and they have been fully advised as to their entitlement of discovery and other legal means by which they may obtain further information with respect to the other's financial affairs and each is satisfied, on the basis of the information which they now have, to accept this Agreement as a final settlement of any claims they may have against the other.

**11.00 RECONCILIATION**

11.01 If Shawna and Nigel at any time resume cohabitation in a husband and wife type of relationship, then the provision herein whereby they agree to live separate and apart, for the period of such cohabitation, shall be null and void, but all other provisions of this Agreement shall

9.

remain in full force and effect, unless the same is varied in writing by Shawna and Nigel, or by an Order of a Court of competent jurisdiction.

**12.00 HEADINGS AND PARAGRAPHS**

- 12.01 Paragraph headings or subheadings in this Agreement are for convenience only and shall not be considered for the purpose of interpretation or giving effect to the true meaning of this Agreement.
- 12.02 The division of this Agreement into paragraphs has likewise been made for convenience only, and such division shall not, unless the express provisions of this Agreement or the context clearly require, be considered for the purpose of interpreting and giving effect to the true meaning of this Agreement.
- 12.03 The terms "Shawna" and "Nigel" are used in this Agreement as a matter of convenience only.

**13.00 VOLUNTARY AGREEMENT**

- 13.01 Each of Shawna and Nigel acknowledges that she or he has carefully read and examined the provisions of this Agreement, knows and understands the contents and effect thereof, after receiving independent legal advice, and signs this Agreement freely and voluntarily.

**14.00 GENERAL**

- 14.01 This Agreement shall be amended only by a written agreement executed in the same manner as this Agreement.
- 14.02 If a dispute arises concerning this Agreement, it shall be governed by the laws of the Province of British Columbia.
- 14.03 Subject to this Agreement, the Supreme Court of British Columbia shall have exclusive jurisdiction over this Agreement.
- 14.04 Shawna and Nigel shall pay, execute, and deliver such further assurance, authorities, documents, and things as may be reasonably required for the purpose of carrying out and giving full effect to the covenants, agreements, and provisos herein contained.
- 14.05 Each of Shawna and Nigel shall be responsible for her or his own legal costs which she or he incurs in the negotiation, preparation, and carrying into effect of this Agreement.
- 14.06 If a dispute arises concerning this Agreement neither Shawna nor Nigel shall commence court proceedings until the parties have attempted mediation, for which they shall share equally the costs of mediation.
- 14.07 Any provision of this Agreement that is void, voidable, or unenforceable is severable and

10.

the remainder shall continue in effect.

14.08 This Agreement shall enure to the benefit of and be binding upon the parties hereto, their heirs, executors, and administrators.

IN WITNESS WHEREOF the parties have set their hands and seals on the day and year first above written, and in the Province of British Columbia.

SIGNED, SEALED, AND DELIVERED  
in the presence of:

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
SHAWNA CLODAGH HARRIS

SIGNED, SEALED, AND DELIVERED  
in the presence of:

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
NIGEL LIAM HARRIS

**DATED:**

---

SHAWNA CLODAGH HARRIS

AND

NIGEL LIAM HARRIS

---

**SEPARATION AGREEMENT**

---

JOSHUA WENTZELL  
Barrister and Solicitor  
GANDHI WENTZELL LLP  
2400 – 1055 West Georgia Street  
Vancouver, BC V6E 3R3  
Tel: 604-687-1918  
Fax: 604-687-2918  
E-mail: j.wentzell@gandhiwent.ca

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JW/HC

File No. 14,376/3

**COURT FILE NO.** FL-34567  
**COURT** PROVINCIAL COURT OF ALBERTA  
**COURT LOCATION** CALGARY  
**APPLICANT** **BLISSE CARPENTIER**  
**RESPONDENT** **MARGUERITE LAPIERRE**  
**DOCUMENT** **REQUEST FOR CHILD CONTACT**

ADDRESS FOR  
SERVICE AND  
CONTACT  
INFORMATION OF  
PARTY FILING THIS  
DOCUMENT

LEON SCHOW, Solicitor for the Applicant  
GANDHI WENTZELL, Barristers and Solicitors  
1400 Banff Place, 1018 - 101 Street  
Edmonton, AB T5J 3V4  
Tel: 780-423-0805; Fax: 780-423-1815

**I, BLISSE CARPENTIER, SWEAR/AFFIRM THAT:**

1. I am not a guardian of the children, **JANINE MARGUERITE CARPENTIER** and **PIERRE MARC CARPENTIER**.
2. My relationship to the children is grandmother.
3. My contact with the children has been interrupted by the separation of the parents which occurred on October 17, 20--.
4. The children live with their mother, **MARGUERITE LAPIERRE**.
5. I want the following contact with the children:  
Visits on Tuesdays between 4:00 p.m. and 6:00 p.m. and Sundays  
between 11:00 a.m. and 6:00 p.m.
6. I last had contact with the children on October 14, 20--.
7. I believe the contact I am applying for is in the children's best interests because the children have for the last three years spent the times listed in Paragraph 5 above with me participating

2.

in their favourite hobbies. During these times they also socialize with their cousins at my house.

8. I believe that the Respondent's denial of contact between the children and me is unreasonable because the children and I have had a continuing, positive relationship since their birth. The children have expressed the desire to all family members that they want to visit with me and their cousins as they have in the past.
9. I have the following other information in support of my application:
- (a) An Affidavit of **MICHEL ANDRE ANTON**, the children's uncle;
  - (b) An Affidavit of **MARC LUC CARPENTIER**, the children's father;
  - (c) An Affidavit of **CLARA HAWASS**, social worker.

**SWORN/AFFIRMED BEFORE ME**  
on January 15, 20--, at the City of  
Calgary, in the Province of Alberta

\_\_\_\_\_  
Justice of the Peace or Commissioner for  
Oaths in and for the Province of Alberta

\_\_\_\_\_  
BLISSE CARPENTIER



NO.  
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

CLAIMANT: DILLON JORDAN MAK

RESPONDENT: MANJU LAYLA MAK

NOTICE OF FAMILY CLAIM

This family law case has been started by the claimant for the relief set out in section 4 below.

If you intend to respond to this family law case, you or your lawyer must:

- (a) file a Response to Family Claim in Form F4 in the above-named registry of this court within 30 days after the date on which this copy of the filed Notice of Family Claim was served on you, and
- (b) serve a copy of the filed Response to Family Claim on the claimant.

If you intend to make a Counterclaim, you or your lawyer must:

- (a) file a Response to Family Claim in Form F4 and a Counterclaim in Form F5 in the above-named registry of this court within 30 days after the date on which this copy of the filed Notice of Family Claim was served on you, and
- (b) serve a copy of the filed Response to Family Claim and Counterclaim on the claimant and on any new parties named in the Counterclaim.

Orders, including Orders granting the relief claimed, may be made against you if you fail to file the Response to Family Claim within the 30-day period referred to above.

1. **Information About the Parties**

The claimant, DILLON JORDAN MAK, is the husband of the respondent, MANJU LAYLA MAK.

2. **Spousal Relationship History**

The claimant, DILLON JORDAN MAK, and the respondent, MANJU LAYLA MAK, were married on March 27, 2006, and separated on February 16, 20--.

2.

3. **Prior Court Proceedings and Agreements**

There is no prior Agreement, Court Order, or court proceeding relating to any of the claims made in this Notice of Family Claim.

4. **My Claims**

An Order for Divorce (see attached Schedule 1)

5. **Place of Trial:** Vancouver, British Columbia

6. **The Address of the Registry is:**

The Law Courts  
800 Smithe Street  
Vancouver, BC V6Z 2E1

7. **My Address for Service is:**

c/o SHIRLEY PAINE-WRIGHT  
GANDHI WENTZELL, Barristers and Solicitors  
2400 – 1055 West Georgia Street  
Vancouver, BC V6E 3R3  
Tel: 604-687-1918; Fax: 604-687-2918  
E-mail: s.painewright@gandhiwent.ca

Date: \_\_\_\_\_

\_\_\_\_\_  
SHIRLEY PAINE-WRIGHT  
Solicitor for the Claimant

NO.  
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

CLAIMANT: DILLON JORDAN MAK

RESPONDENT: MANJU LAYLA MAK

SCHEDULE 1 - DIVORCE

1. Personal Information

	Claimant	Respondent
Birthdate	20/May/1986	04/Jun/1988
Ordinarily resident in British Columbia since	20/May/1986	15/Aug/2005
Surname at birth:	MAK	DAMJI
Surname immediately before marriage:	MAK	SINGH
Marital status immediately before marriage:	Single	Widow
Place of marriage:	City: Brandon Province: Manitoba Country: Canada	

2. Grounds for my Claim for Divorce

I ask for an Order for Divorce as a result of my spouse and I having lived separate and apart since February 16, 20-- AND I confirm that we have not lived together since then.

3. I confirm that:

There is no possibility of reconciliation and there has been no collusion, as defined in Section 11(4) of the *Divorce Act*, RSC 1985, c 3 (2<sup>nd</sup> Supp), in relation to this claim for divorce.

2.

**4. Proof of Marriage**

A Certificate of Marriage or of Registration of Marriage has been filed.

**5. Children**

There are no children of the marriage as defined by the *Divorce Act*, RSC 1985, c 3 (2<sup>nd</sup> Supp).

Date: \_\_\_\_\_

\_\_\_\_\_  
SHIRLEY PAINE-WRIGHT  
Solicitor for the Claimant

**LAWYER'S CERTIFICATE (*DIVORCE ACT*, RSC 1985, c 3 (2<sup>nd</sup> Supp) S 9)**

I, SHIRLEY PAINE-WRIGHT, lawyer for the claimant, DILLON JORDAN MAK, certify that I have complied with Section 9 of the *Divorce Act*, RSC 1985, c 3 (2<sup>nd</sup> Supp), which says:

9 (1) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding

(a) to draw to the attention of the spouse the provisions of this Act that have as their object the reconciliation of spouses, and

(b) to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counselling or guidance facilities known to him or her that might be able to assist the spouses to achieve a reconciliation, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

(2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

Date: \_\_\_\_\_

\_\_\_\_\_  
SHIRLEY PAINE-WRIGHT  
Solicitor for the Claimant

**THE QUEEN'S BENCH (FAMILY DIVISION)**

St. Boniface Centre, Manitoba

THE HONORABLE )  
MADAM JUSTICE ) TUESDAY, NOVEMBER 8, 20--  
SELIGMAN )

BETWEEN:

GIBSON STEPHEN BERTHELOT,

Petitioner

- and -

MURIEL HAJDU-BERTHELOT,

Respondent

**DIVORCE JUDGMENT**

1.0 THE MATTER HAVING PROCEEDED AT THE St. Boniface Centre, St. Boniface, Manitoba R2H 2P9, at the request of GIBSON STEPHEN BERTHELOT;

2.0 THIS COURT ORDERS pursuant to the *Divorce Act* (Canada) that:

2.1 GIBSON STEPHEN BERTHELOT and MURIEL HAJDU-BERTHELOT who were married at the City of Regina, in the Province of Saskatchewan, on April 30, 2008 are divorced and, unless appealed, this Divorce Judgment will take effect and the marriage will be dissolved on the 31st day after the date this Divorce Judgment was made.

Dated \_\_\_\_\_

\_\_\_\_\_  
Judge/Deputy Registrar

THE SPOUSES ARE NOT FREE TO REMARRY UNTIL THIS DIVORCE JUDGMENT TAKES EFFECT, AT WHICH TIME A CERTIFICATE OF DIVORCE MAY BE OBTAINED FROM THIS COURT. IF ANY APPEAL IS TAKEN, IT MAY DELAY THIS DIVORCE JUDGMENT TAKING EFFECT.

Name: Prudence Yee  
GANDHI WENTZELL LLP  
Barristers & Solicitors  
Address: 400 – 2066 McPhillips Street  
Winnipeg, MB R2V 6C4

Tel: 204-694-2987  
Email: p.yee@gandhiwent.ca

## EXPAND YOUR KNOWLEDGE

1. Locate a Cohabitation Agreement or Living-Together Agreement and review its content. Discuss your findings with your colleagues.
2. Locate and review the Marriage Contract case law in *Butty v Butty*, 2009 ONCA 852 and *Verkaik v Verkaik*, 2010 ONCA 23. Discuss with your colleagues the main issue highlighted by this case law.
3. Research who is responsible for developing policy and regulations under the *Assisted Human Reproduction Act* and administering and enforcing the Act and its Regulations. Discuss your findings with your colleagues.
4. Research the facts and decisions in the *R. v Ryan*, 2011 NSCA 30 and 2013 SCC 3 duress and domestic violence cases. Discuss your findings with your colleagues.
5. Many cases relating to relocation of children are heard in the family division of a Provincial Court. Sometimes decisions from that court are appealed for a variety of reasons.  
Research the facts and decisions in the cases of:
  - *A.J.D. v E.A.E.*, 2013 BCSC 2160
  - *P.V.P. v E.P.*, 2013 BCPC 377Discuss your findings with your colleagues.
6. Find the latest Spousal Support Advisory Guidelines. Review the contents and discuss your findings with your colleagues.
7. Unconsummated, sham, and/or cultural marriages pose many questions for divorce court judges. Research the case of *Merchant v Dossani*, 2007 ABCJ 487. Discuss the facts, issues, and outcome of the case with your colleagues.