

## Family Law CAN

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## **Division of Powers**

Federal Government:

- Governs divorce (*Divorce Act*)
  - \* To end marriage bring action under *Divorce Act*
  - \* Court of Queen's Bench
  - \* How you get a divorce, on what grounds, decision making regarding children, time with children, child support, and spousal support
  - \* Requires 1 year residency in Alberta
  - \* Do not need consent of both parties to initiate a claim
- Controls the definition of marriage

Provincial Government:

- Governs who can get married within federal definition (*Marriage Act*) and the solemnization of marriage
- Governs division of matrimonial property (*Matrimonial Property Act*)
  - \* Court of Queen's Bench
  - \* Only includes married people
  - \* Alberta has not included property rights for unmarried couples so common law governs (constructive trust, resulting trust and unjust enrichment)
- *Family Law Act* applies to unmarried couples
  - \* Each province entitled to legislate regarding rights and responsibilities within a common law relationship and define what a common law relationship is
  - \* Parenting time, child support, spousal support, rights of surrogate, and contact with children filed in Provincial Court of Alberta or Court of Queen's Bench
  - \* Guardianship can only be determined in Court of Queen's Bench
  - \* If you are married and do not want a divorce can apply under this act to have spousal support, child support and time with children determined in Court of Queen's Bench or Provincial Court

## **State Recognition of the Family Unit**

**Marriage:**

- 1867: Confederation and the first federal election
  - \* Until 1917, only white men with property could vote so legislation reflected only their concerns
- 1917: *Dower Act*
  - \* Even though women were not persons, gave them life estate in the homestead
  - \* No man could transfer or sell unless wife signed away dower rights
- 1917: Alberta Supreme Court ruled that women are persons
  - \* Allowed women to own property (generally speaking white women), enter the senate, hold political office and help shape the political parameters of society
  - \* In 1929 the Supreme Court of Canada held women are persons

- 1940: Most women of color got the vote, but aboriginal women not given the right until 1960
- 1939-1945 (WWII): Women entering workforce
- Prior to 1968 there was no federal divorce legislation
  - \*Had to apply to dissolution of marriage to the Canadian senate and obtain a passage of a Private Act of Parliament
  - \*Husband could get a divorce on unproven grounds of adultery and wife was not entitled to any form of support
  - \*Husband could declare wife mentally unfit and deposit her in a sanatorium without consent or question
  - \*Wife had to prove adultery or cruelty
  - \*Women could not get custody of children
- 1968: First *Divorce Act*
  - \*Added irreconcilability as a ground for divorce (prove that the marriage was never consummated or that the other spouse deserted the family)
  - \*No divorce without trial in supreme court of the province
  - \*No concrete rules regarding time with children, custody and child support
  - \*Presumption towards award of parenting time to mother especially for young children (tender years doctrine), but mothers were not normally the money makers and there were no laws regarding child support (case-by-case, vast inequality)
- 1982: *Matrimonial Property Act*
  - \*Presumes marriage is an economic unit, divide everything equally because caregiving within the home recognized as an equal contribution
  - \*Due to major changes in the workplace and first wave of feminism
- 1985: Current *Divorce Act*
  - \*New ground, one-year separation, no-fault divorce
  - \*Guidelines for determining entitlement to spousal support, amount and length
  - \*Time with children determined solely on best interest of child test
  - \*Says right to child support but no guidelines about amount, inequality persists
- 1997: Mandatory *Federal Child Support Guidelines*
  - \*Each province has its own table with levels of income up to \$150,000 and number of children up to 6 to determine amount of child support
  - \*Base support, food, shelter, clothing, transportation, education and some recreation, is set, but provides for and leaves open to interpretation an amount that can be awarded for extraordinary expenses
- 2005: Same sex marriage
  - \*2003-2005 8 provinces and 2 territories held that the traditional definition of marriage: the union of one man and one woman to the exclusion of all others offended section 15 of the *Charter* by excluding same-sex marriage
  - \*In 2003 government put forward Bill C-38 changing definition of marriage to the voluntary union of two persons to the exclusion of all others
  - \*Questioned constitutionality in *Re Same Sex Marriage*
    - ★Is the legal capacity for marriage for civil purposes within the exclusive authority of the federal government? Yes

- ★ If so, is the proposed legislation, which extends the capacity to marry to same-sex couples consistent with the *Charter*? Yes
- ★ Does freedom of religion, guaranteed by 2(a) of the Charter, protect religious officials from being compelled to marry same-sex couples if it is contrary to their beliefs? Yes
  - ◆ Civil definition changing means justice of peace can be compelled to marry you in civil ceremony but does not impact religious ceremony
  - ◆ Provinces control solemnization of marriage and able to change provincial acts to ensure religious officials were not compelled
  - ◆ Does not contravene section 15 for a religious official to refuse
- ★ Is opposite sex marriage in Quebec consistent with the Quebec Charter an civil code? Refused to answer

### **Common-Law:**

- Different rules for people who decide not to get married
- Reasons for differentiating between marriage and common law in 1927 were paternal lineage, family responsibility and property, but the reason we differentiate now is freedom to choose
- 1927: *First Domestic Relations Act*
  - \* Dealt with people who were not married, their children, support and guardianship (custody, parenting time and child support responsibilities)
  - \* Women are automatically declared guardians (we know they are the mother), but there was question about the father so it had to be determined because of attaching implications for property and paternal responsibilities
  - \* If you were deemed a guardian of that child, that gave you responsibilities and also gave you the right to support
  - \* Before you could make an application under the *Domestic Relations Act*, you had to make an application under the *Parentage and Maintenance Act* - if determined to be father of child must pay maintenance, not repealed until 2003
  - \* Until 2000 could sue on loss of consortium (sue spouse's new sex partner for loss of ability to have sex with spouse) and breach of promise to marry
- 2003: *Adult Interdependent Relationship Act*
  - \* If you meet a number of criteria, you are deemed to have had an interdependent relationship and one or the other of you may be required to support the other
- 2005: *Family Law Act*
  - \* No more *Domestic Relations Act*
  - \* Must first prove you have an AIR
  - \* Children treated differently than children of divorce
    - ★ Under *Domestic Relations Act*, not entitled to child-support over 18, *Family Law Act* moved this to 21
    - ★ Under *Divorce Act* if you they are living at home, unable to support themselves, and going to post-secondary education, they are entitled to child support until first degree is completed
    - ★ Have to prove lineage (assumed in marriage context)

- \*New rules for guardianship, time with children, decision making and child support
- Treated as if strangers at law in regards to property - must prove contribution in some way to get a portion of the property under common law
  - \*SCC says excluding common law couples from *Matrimonial Property Act* does not infringe section 15 because it is expecting their right to choose not to get married and be bound by it and they can choose to get married at any time
  - \*ABCA trying to temper freedom to choose with responsibility
    - ★ People may not want to get married but why should that deprive them of an equal division of the property that they accrued
    - ★ Convoluted test about whether a committed family relationship is being developed (length, children etc)

Four Reasons Why Common Law Relationships Were Regulated:

1. Functional similarities between married and non-married relationships- economic dependence arising out of these relationships needed to be turned into an obligation on dissolution
2. Common law partners entitled to know what they may reasonably expect on dissolution
3. Desirable to compensate each partner for contributions to family well being
4. Desirable to alleviate pressure on social assistance

*Miron v Trudell* (1995 SCC)

- Until this case, common law relationships not considered valid for automobile insurance benefits under standard automobile policy prescribed under *Insurance Act*
- Parties lived together with children
- Mr Miron was injured as a passenger but because he was not legally married he was denied benefits under his partner's policy
- SCC said denial of benefits based on marital status is an analogous ground of discrimination
- Goal of *Insurance Act* is to sustain families when one member is injured and marital status is not a reasonable marker of a family
- Read into *Insurance Act* that spouse includes heterosexual couples who have lived together for 3 years or have a child

*M v H* (1999 SCC)

- On the dissolution of a same-sex common law relationship, M brought an application for spousal support which was denied because same-sex common law partners were not recognized under the statute
- Familial relationships are of fundamental importance and worthy of constitutional protection
- Denying same-sex couples the same rights as unmarried heterosexual couples is unjustified

*Walsh v Bona* (2002 SCC)

- Common law couple, joint tenants, with 2 children separated after 10 years
- Mr Bona retained the house, land, cottage, vehicles and pension and Mrs Walsh got only a small amount of equity in the house

- Sought declaration that *Matrimonial Property Act* of Nova Scotia was unconstitutional because definition of spouse is a man and a woman married to one another
- Three questions:
  1. Did the *Act* draw a distinction based on marital status? Yes
  2. Is marital status a ground of differentiation analogous to section 15? Yes
  3. Did differential treatment between married and unmarried people amount to substantive discrimination?
    - \* SCC said issue was whether people who enter into common law relationships are doing so on the same terms as people who enter a marriage
    - \* Ask whether exclusion of common law spouses demeans dignity
    - \* People in common law relationships may choose not to get married specifically so that they are not bound by the *Act*
    - \* Cannot assume commonality of intent within common law relationships as this diminishes individual right to choose an alternative family form
    - \* Consent to marry = consent to economic interdependency
    - \* Common law couples maintain separate property rights but may alter this by choosing to marry, enter into a cohabitation agreement or own things jointly
    - \* Decision to live together does not equate to positive intent to share assets
    - \* Better to access remedies such as constructive trust and unjust enrichment case-by-case than to impose economic interdependency on those who did not choose it
    - \* Including common law partners under the *Act* infringes freedom of choice

### **Dissolution of the Family Union:**

#### **Validity of Marriage:**

- Provincial *Marriage Act* (dictates who may perform a valid marriage and required documents for a valid marriage) and federal *Civil Marriage Act* (dictates what people must conform to in order to have valid marriage)
- Whether you get an annulment or divorce depends on validity of the marriage
  - \* Annulments now rare, common prior to 1968 when difficult to divorce
  - \* Annulment makes it as if the marriage never happened, dissolves shared property rights but not obligations as they extend to children and the legitimacy of children
  - \* Divorce simply ends a valid marriage
  - \* Can get an annulment if prove a marriage was either void or voidable
    - ★ Void- was never legal, clear, does not need court's determination
      - ◆ Action may be brought by either party before or after death or by an interested third party
    - ★ Voidable- legal until court rules otherwise, unclear, evaluate evidence
      - ◆ Action may only be brought by a party while alive
- Requirements of a valid marriage:
  1. Ability to consummate- if not, voidable

- \*If unable to consummate, the marriage is not automatically nullified, but may have action to nullify it
  - \**Civil Marriage Act* says marriage is not voidable because partners are of the same-sex
  - \*Incapacity to such an extent as to render intercourse impractical must exist at the time of marriage and may stem from a physical, mental or moral disability which is incurable
  - \**Gamungan*: Marriage voided when husband claimed that marks on his wife's face disgusted him to the point of impotency
  - \**Alsatian*: Two weeks before marriage, the husband was shot and rendered paraplegic and as a result could not have intercourse; however, marriage was not voided because where there is prior knowledge that intercourse is not possible, cannot get an annulment based on lack of consummation
2. Fall outside the prohibited degrees of consanguinity (relationship by blood) and relationship of affinity - if not, automatically void- *Prohibited Degrees Act*
  3. No prior existing marriage - if not, automatically void
  4. Consent (capacity including intoxication, no duress, no fraud, no mistake)- if not, voidable

\**Banton*:

- ★Elderly, incontinent, deaf man with cancer met and married a 31 year old waitress in his retirement home
  - ★Left everything to her in his will, and children challenged marriage
  - ★Consent is an act of will
  - ★Must be capable of understanding the nature of the relationship with its obligations and responsibilities- burden on those attacking it
  - ★Held it was a valid marriage, he understood his responsibilities because of the will he made for her
- \*Duress=fear of such force as to make a person of ordinary courage yield; mind must be so overcome with oppression there is no free choice
  - \*Determination of duress includes age, maturity, emotional state, vulnerability and the lapse of time between the ceremony and claim of duress
5. Must be of age to consent in order to have capacity- if not, void
- A marriage is valid even if it is for immigration purposes- if you are aware it is for a sole purpose, that knowledge gives you capacity to consent

**Partner Abuse:**

- Remedies:
  - \*To get Emergency Protection Order or Restraining Order from Court of Queen's Bench need to prove ongoing abuse that causes fear or harm - normally only for one year
  - \*Impact time with children- deny joint custody, decline shared or primary residence, order supervised access with specific terms
- Principles of custody and access:
  1. There is to be no joint custody where there is serious conflict between the parties

- 2. Determination of parenting time is to be determined solely on best interests of children test
- 3. The maximum contact principle in the *Divorce Act* is only one factor
- Linda Neilson report: cases where partner abuse is present do not appear to conform to legal principles- why?
  - \*Majority of abuse cases do not enter court system, reach own solution, and many of those that do are settled so cases which get to judge do not reflect norm
  - \*Many judges believe claims of partner abuse are overinflated
  - \*People believe if abuse did not happen to children it is irrelevant
  - \*Many abusers get primary residence because abused spouse will give it up to get away or the court will determine the abuser is the more stable parent
  - \*Access almost always given, assume contact is a right
  - \*When asking for a divorce, do not have to prove 1 year separation but do have to prove abuse so lawyer's often go with 1 year separation as it is easier
  - \*Lawyers do not want to inflame settlement agreements by mentioning abuse
  - \*Evidentiary issues, courts cannot make a determination of fact based on competing affidavits
  - \*Judges may see reports of abuse as unreliable if history of consent orders for shared access/parenting
  - \*At trial when claims of abuse are omitted in verbal testimony but had been included in prior affidavits the conclusion is often that the early claims are false

#### *R(P) v R(V)*

- Wife sought a restraining order for her son and the court held it should be permanent
- Test: Has the applicant established that the respondent poses a legitimate risk of harm to the applicant or person's under the applicant's care as a result of the respondent's behaviour?
- Applicant has burden to prove respondent's behaviour with objective evidence

#### *Burbage v Burbage*

- Court denied wife's claim for divorce on grounds of cruelty because found her evidence to be exaggerated
- Test: Cruelty alleged must be of such a nature and kind as to render the conduct intolerable to a reasonable person and involve serious and weighty matters

#### *I(A) v I(D)*

- Wife seeking divorce on grounds of cruelty
- Judge said husband was more convincing because he gave his evidence calmly and maturely whereas the wife was angry and agitated
- Wife's objective witnesses gave exact same story- did not believe
- Cruelty is question of fact and plaintiff bears onus
- Almost impossible to prove cruelty where the other side denies it and there's no objective evidence

### **Qualifications to Claim Under Divorce Act:**

- *Quigly*: Must be an ordinary resident in the province in which you are claiming for one year (daily aspects of your life must occur within that province)
- One year separation- living separate and apart
  - \**Enman v McCaferty*: As long as spouses occupy separate bedrooms, do not have sex, do not perform domestic duties for one another, communicate little, eat separately and do not do any activities together, the fact they occupy the same house does not mean they are not living separate and apart

### **Spousal Support**

- *Hickey v Hickey*: Standard of review for support orders- will not be overturned unless the reasons disclose an error in principle or a significant misapprehension of the evidence or the award is clearly wrong
- Discretionary
- Intended to recognize the family as an economic unit
- Can be compensatory for any economic disadvantage that occurred during the marriage or as a result of its breakdown or non-compensatory (needs-based)
- Can also be contractual whereby a settlement is agreed upon by the parties
- *Divorce Act* and *Family Law Act*
- Three parts:
  1. Prove entitlement
  2. Determine the quantum (amount)
  3. Determine duration over which support will be paid
- May be interim or final
- Spousal Support Advisory Guidelines:
  - \* Not mandatory/binding
  - \* Do not determine entitlement just a guideline for quantum
- Determined after child support and in consideration of what one may receive as matrimonial property
- May be monthly (tax deductible by payor, taxable to payee) or in a lump sum (not taxable or deductible)

### *Divorce Act:*

- 15.2: The court may make an order requiring a spouse to pay a lump sum or periodic support (interim or final) that the court deems reasonable considering all the factors
- 15.2(4): Factors:
  - A) Length of the marriage
  - B) Functions formed by each spouse during cohabitation or marriage
  - C) Any arrangement, order or agreement relating to support of either spouse
- 15.2(5): Spousal misconduct: no-fault, usually do not consider conduct of either spouse within the marriage
- 15.2(6) Objectives:

- A) Recognize any economic advantage or disadvantage arising from the marriage or its breakdown
- B) Apportion financial consequences of caring for children over and above child support
- C) Relieve any economic hardship on the spouses on the breakdown of marriage
- D) Promote economic self-sufficiency of each spouse within a reasonable time period
- Child support given priority

*Family Law Act:*

- Establish adult interdependent relationship- lived together 3 years or had children
- Section 58: Factors for spousal support: the same as the divorce act, but there are three more:
  - \*Any legal obligation of a spouse having to support another under an order
  - \*Extent to which any other person living with the spouse who has the support obligation contributes to household expenses and thereby increases the ability of the individual to provide support
  - \* Extent to which any person who lives with spouse who is asking for spousal support contributes to the expenses of the household and thereby reduces the financial need of that spouse
- Section 59: Misconduct: conduct that a) arbitrarily or unreasonably precipitates, prolongs or aggravates the need for support or b) arbitrarily or unreasonably affects the ability of the spouse having the obligation to pay support to pay support is relevant
- Section 60: Objectives- same as *Divorce Act*
- Can do it immediately upon acquiring residence
- Child support is given priority

Entitlement:

- First part is technical: marriage must be valid, must be able to apply under *Divorce Act* or meet criteria under *Family Law Act*
- Second part is based on a case-by-case factual analysis

Varying Support:

- In the 80s and 90s many wives were agreeing to settle for spousal support of short duration in exchange for custody but would later attempt to have this changed
  - \**Pellic Trilogy*: Causal Connection Test- In order to get more support must prove a material change in circumstances which is causally connected to the marriage and need must also be related to the marriage
    - ★This test was erroneously applied to initial applications for spousal support where there had been no agreement in the first place
      - ◆Idea was that following dissolution of marriage spouses should be free to start new lives without ongoing contingent reliability
      - ◆For spousal support to be awarded had to show inability to become self-sufficient was connected to the marriage

**Compensatory:**

### *Moge v Moge*

- In 1973, Mrs Moge was awarded primary residency and received child and spousal support
- In 1987 she was laid off and spousal support was increased to \$200/month
- In 1989 Mr Moge obtained an order terminating support but the Court of Appeal reinstated spousal support at \$150/month and Mr Moge appealed
- SCC said labeling a marriage modern or traditional does not help with the objectives of the act
- Intended to deal with economic consequences of a marriage and its breakdown
- Focus on effect of marriage on hindering or improving spouses' economic prospects
- Spouses entitled to share economic benefits of marriage
- No longer merely look at means and needs, idea is that resources are shared equally in marriage and one of those resources is income flow
- Cannot apply a single objective to determine entitlement, different marriages have different consequences
- Long term marriages with children have different consequences than shorter marriages without
- May be the case where spouses cannot reasonably be expected to achieve self-sufficiency
- All four objectives must be applied and no objective is paramount
- After divorce spouse has obligation to contribute in a manner commensurate with ability
- Spouses may continue to suffer economic disadvantages of marriage breakdown while others reap the benefits, and a compensatory model will require long term support
- Women often contribute to the home in a non-monetary way and even when they work outside the home they often sacrifice career advancement and this works during the relationship because advantages and disadvantages are shared
- Belief is that the role of the payee has allowed the payor to advance while sacrificing her own advancement which creates an income capacity that is held by the payor which is an asset of the marriage and it should be shared long after separation in longterm marriages
- Objectives seek to put the entire family in a position which is as close as possible to the position they were in before the marriage breakdown
- Marriage does not automatically entitle you to support
- Look to differences in standard of living between the spouses as indicative of the advantages and disadvantages to each spouse in the marriage
- Longer the marriage, greater the presumption towards equal standards of living on dissolution
- Mrs Moge's long term responsibility for children after separation impacted her ability to earn so as to trigger the application of the objectives of the act
- Failed to become economically self-sufficient notwithstanding her efforts
  
- Longterm, traditional marriages: generally looking at indefinite support and greater presumption towards equalizing income because payee generally made sacrifices for payor
- Short, traditional marriage with children who are not all in school: look at length of time until children are all in school and length of time necessary for payee to do necessary training and transition into a full time position in the workforce in determining duration
- Modern marriages where both parents worked but payee took time off to care for children are more difficult and these are usually compensated by way of an unequal division of matrimonial property and not spousal support

### **Needs Based or Non-Compensatory:**

- Needs, means and circumstances of the parties
- May be awarded in the interim where one party does not have a job at all or does not have a job which adequately covers his or her expenses, but may also be awarded as final
- Looks at economic consequences of the breakdown and tries to put each party in equal circumstances
- Look at what each spouse earns and what each spouse needs by way of budget (should reflect reasonable needs, a scaled down account of what was enjoyed in marriage)
- Need might not arise from the roles during marriage but from some other disadvantage such as illness, lay off, job market, a decision to change careers and get new education during marriage that was ongoing etc

### *Bracklow v Bracklow*

- 3 forms of support: compensatory, needs based or contractual
- When the parties married, the husband knew the wife had health issues
- The wife left a job with full benefits with the consent of the husband to take on a management position
- New job was stressful and her health deteriorated so he told her to leave her job and she did
- Never worked after October 1991 due to repeated hospitalization for psychiatric illness
- For first two years of marriage she earned 2/3 of household's income but after her health deteriorated the husband became the sole earner
- Divorced in 1995
- She was living on disability and unlikely to ever work again
- Awarded interim spousal support of \$275/month which was later increased to \$400
- SCC was left to consider: what happens when a divorce, through no fault of the marriage itself, leaves one spouse capable of self-sufficiency and the other incapable? Yes, a healthy spouse must support a sick spouse even though the inability to maintain self-sufficiency came as no fault of the relationship
- Spouses owe each other the mutual duty of support, this creates mutuality and interdependence that exists even after the breakdown of the marriage
- Two competing models of support:
  - \* Social Obligation Model
    - ★ Support's purpose is to replace lost income spouse used to enjoy as party to marriage
    - ★ Not just about the loss, marriage is about interdependence that does not just cease when the marriage ends
    - ★ Backs non-compensatory support
    - ★ Artificial to think that upon marriage breakdown people regain autonomy
  - \* Independent Model
    - ★ Each party to the marriage is an independent actor
    - ★ Spousal support is intended to provide a clean break where one spouse compensates the other for any loss or economic cost of the marriage
    - ★ Backs compensatory support

- ★ Once restitution is made, each party can move on
- Court must strike a balance between the two models
- Where not possible to determine economic loss of disadvantaged spouse courts will consider needs and standard of living together with the ability to pay
- Condition, means, needs and other circumstances of the spouse is the preamble to some of the annunciated factors in the divorce act and this gives the power for needs based orders
- Third and fourth objectives of the Act are difficult to confine to a purely compensatory model
  - \* Economic hardship arising from breakdown of the marriage could encompass health and career disadvantages as well as the fact that the spouse who formerly enjoyed income support is now without it
  - \* Supporting economic self-sufficiency may not be tied to compensatory support, may be tied to ill health or disappearance of work
  - \* Permitting an award to ill or disabled spouse acknowledges the goal of equitably dealing with the economic disadvantages of a marriage or its breakdown
- No single factor to determine quantum it is fact specific

#### *Chutter v Chutter*

- Couple quit their jobs to open a water slide business together
- On divorce, each received \$4 million in assets
  - \* The husband got the business while the wife got the house, RRSPs and shares
- Despite longterm marriage in which wife decided to stay home and care for the child, and also helped with the business, there is no compensatory support awarded by trial judge
- Trial judge said the assets addressed any economic disadvantage because she could tap into them for money
- Court of Appeal decided differently and said overarching principle is doctrine of equitable sharing
- Compensatory support is based on an independent model of marriage and once what is paid is owed, obligation is over
  - \* Recognizes losses incurred by assuming primary parenting responsibilities which often results in lower earning capacity
  - \* Longer marriage = greater presumption towards equal standards of living
- Non-compensatory support is based on the basic social model - a mutual interdependence is created during marriage that is not easily unwound
  - \* Intended to narrow gap between means and needs and need alone may suffice
  - \* Need is relative to standard of living enjoyed during marriage and also accounts for standard of living of each spouse post divorce
  - \* Self-sufficiency relates to ability to maintain a reasonable standard of living assessed based on the standard one enjoyed during marriage
  - \* Even though she is earning \$49,000 when we look at differences in income and standards of living, we see that Mrs Chutter has not established self-sufficiency based on what she had before
- Trial judge made a mistake, by asking the wife to use her capital assets to augment her income, she was asked to do something that Mr Chutter was not

- While no evidence that she missed promotion or further opportunity as a dental assistant does not mean that her future prospects for financial success were not diminished
- Also failed to consider that both parties quit their jobs to start this business which is now the source of the husband's income and retaining it gave him many business opportunities she does not have
- Resumption of a career post marriage does not preclude a finding of economic disadvantage
- Entitled to compensatory support because her income earning capacity was reduced while his was advanced by the mutual decision to stay home
- Also entitled to non-compensatory support, it is not about her ability to meet her basic expenses, it is about getting her as close as possible to previous standard of living
- If Mrs Chutter is required to encroach on capital to maintain her standard of living it means she is suffering hardship which arose from the breakdown of the marriage
- Spousal support guidelines
  - \* Use only once entitlement has been determined
  - \* Useful tool in determining quantum and duration
  - \* Denote a range, not a set figure
  - \* Suggested range was \$4000-\$5000 and decided hers should be lower because
    - ★ The RRSPs would have a tax shelter increase in value and the husband now had no RRSPs
    - ★ The wife chose to keep an excessive house
  - \* Gave her \$2800 because individual factors lowered award

### *Elliott v Elliott*

- Two kinds of spousal support- monthly or lump sum
- Agreed wife would leave her job until son was in school
- Parties separated and wife returned to work part time as there were no full time positions available
- At trial a lump sum was awarded based on economists projection of her loss by not being able to work full time
- Court of appeal held a lump sum was inappropriate
  - \* Did not account for husband's means, a portion had to pay from over time
  - \* We want an equitable solution so account for means of both spouses
  - \* If the gain the payor received is less than the payee's loss, the disadvantages must be fairly distributed so the payee will receive less than full amount of loss
  - \* An interrupted career path cannot be converted to debt payable immediately
  - \* The wife should share in asset of income stream but only as it comes in
  - \* Lump sum means wife does not share risk of income depleting
  - \* Isolates only one event, decision to stay home
    - ★ But economic advantages and disadvantages come from a series of events
    - ★ We cannot see the future, the husband may change jobs or acquire other responsibilities and the wife may get a better job or marry rich
- Lump sum awards, absent a contractual agreement, should only be awarded where there is a real risk the payor won't make ongoing payments

## Variation:

### *Woolridge v Woolridge*

- Wife stopped working after first child was born
- Separated and a contractual settlement was made in 1995 where wife would receive \$1000/month to be reviewed in 1998
- In minutes of settlement, wife acknowledged her obligation to become self-sufficient
- But after the divorce two of the children developed emotional problems and wife became depressed
- Lower court looked at review date as an expiry date and terminated support because she had not achieved self-sufficiency but Court of Appeal said this was an error
- Clause did not limit the support or require her to become self-sufficient; it was merely a time period for her to attempt to become self-sufficient culminating in a review
- The clause said the wife would make efforts as soon as possible
  - \* Interpreted to mean as soon as reasonably possible given all relevant circumstances and facts that had occurred since the signing of the settlement
  - \* Account for all circumstances, including but not limited to her health
  - \* She had to take care of 2 sick children and hadn't worked out of the home for 20 years
  - \* Self sufficiency under these conditions may not be attainable for a long period of time, if ever
- Consider all the objectives of the *Divorce Act* even in the face of an agreement
- When there is a settlement with an opportunity to review quantum follow this:
  - 1) Weight of agreement depends on how it conforms to the objectives of the Act
  - 2) Look at scope and nature of change that has occurred since the signing of the settlement, taking into account all the circumstances of the parties- the more the agreement appears to be equitable, the more likely that the courts will follow it
- Effects of the marriage breakdown had a very significant impact on the wife's economic situation, more so than the marriage itself
- Looked at drastic disparity of income between the parties and wanted to rectify
- Awarded wife \$2500 a month and said once child support obligations ended she could file for another review

### A Word on Agreements:

- When you enter an agreement, terms must be specifically defined
- In the above case, lawyers could not agree on duration and did not define what would constitute a continuation of support so left the parties to fight in court

### *Miglin v Miglin*

- Parties waived spousal support in the initial settlement
- A fairly negotiated agreement that represents the intention and expectations of the parties, and substantially complies with the objectives of the divorce act, should receive considerable weight
- Process:

- 1) Look at circumstances of the agreement to decide if applicant has established the agreement should be opened up
  - 2) Consider the following factors:
    - \* Did one party take advantage of the other, vulnerable, party?
    - \* Does the substance of the agreement comply substantially with the objectives of the *Divorce Act*? Equitable sharing, certainty, finality, autonomy
  - 3) Ask when the agreement is reviewed, does it no longer reflect the intent of the parties or the objectives of the *Divorce Act*?
- Wife and husband owned a business together but once children were school age the wife commuted back and forth and was primary caregiver
  - Wife was given primary residence of children and 60K a year in child support
  - Husband got \$400k lodge and wife got \$400k house
  - Contract between wife and husband that wife would receive \$15K a year with option to renew with consent of both parties but she must do some work in the lodge
  - She only worked for 2 years but was paid for all five
  - Later she wanted to move away and brought application for full custody and spousal support
  - Court of Appeal: *Pellic* no longer applies, no need to show change in materially circumstances in order to vary, just need to show some change in circumstances
  - SCC: court is only permitted to override final agreement where there has been a significant change in circumstances since the making of the agreement- court is to ask: do all the circumstances render continued reliance on the agreement unacceptable?
    - \* Since *Pellic*, courts have recognized a shift in the normative standards informing spousal support orders and also new *Divorce Act* in 1985
    - \* *Pellic* focussed on the importance of a clean break, autonomy, respect for contract and self-sufficiency
    - \* But now we know that some marriages create interdependence and a clean break is not possible
    - \* *Pellic* dealt with a variation application, but this is an initial application because no spousal support was dealt with in first settlement
    - \* No change in situation required, except to the extent that the court is required to consider the pre-existing agreement
    - \* Balance the objectives with the parties' freedom to arrange their affairs as they see fit
    - \* Must consider extent to which the agreement represents a final settlement of issues, whether it was negotiated under impeachable conditions, and the degree to which the parties agreed and intended to rely on the contract
    - \* Then the judge can consider whether the agreement should nonetheless be set aside because it does not accord with the *Divorce Act* or the parties' intentions
    - \* Focus on totality of circumstances, in which change in circumstances of one party will be relevant
    - \* Say change does not have to be radical or connected to the marriage, but nonetheless there must be some change since the agreement was signed that disturbs the very nature of the agreement
    - \* Test:

- 1) Look to circumstances of the agreement and determine if there is any way to discount it such as oppression, pressure, vulnerability, professional assistance etc and where these are not present the court should be loath to interfere
  - 2) Look at the agreement and the extent to which it incorporates the objectives of the *Divorce Act* and only a significant departure will merit interference (must be significant lack of sharing of consequences)
  - 3) Where agreement is not impugned as in substantial compliance with the Act, ask whether the circumstances of the parties have changed in a way not contemplated in the agreement such that the agreement no longer reflects the original intent of the parties and there must be a significant departure from the range of reasonably foreseeable outcomes for the court to intervene
    - \*In this case, significant weight should be given to the agreement because there are no vulnerabilities or significant departures from the act
    - \*The fact that the husband did not renew the contract was not sufficient to render reliance on it inappropriate
    - \*No reason to overturn it because she knew the agreement was going to end and continued to be paid even though she stopped working
    - \*Change in child support is foreseeable as kids grow up
    - \*Contract upheld because there was no change in circumstances that could not be foreseen
- When we are looking at a first instance of spousal support, where there has been a waiver within a contract *Miglin* applies in a two part test
    - 1) Do we have a valid contract (e.g. no duress) that conforms substantially with the objectives and factors in the divorce act?
    - 2) If so, are there factors that were not thought about which have materially changed?

## Custody

- Only thing that matters is the best interests of the child
- Before you can bring an application for relief concerning kids, you have to take a parenting after separation course which is mandatory under practice note 1
  - \* If divorce, both parties must take the course before the divorce
  - \* If not parties, must have registered for the course by the time you file
  - \* Do not need to take if kids are 16 or older
  - \* There are some situations where you can get relief from the courts without having taken the course
    - ★ If you are asking the court for custody as part of a restraining order you can get an order with respect to where the kids live there but ultimately you have to take the course
    - ★ If there has been a kidnapping can get into court on emergency basis
    - ★ Where there is a status quo and someone refuses to bring the child back

## *Divorce Act*

- Talks about custody and access
  - \*Not only about where the child lives, about ability to make decisions concerning the child
  - \*Sole custody: child lives with one parent and that parent makes all the decision while the other parent has access to the child and access to information but no input
  - \*Joint custody: major decisions concerning health, education and welfare of the child are shared and day to day decisions lie with primary residential parent
    - ★Joint custody and one parent has primary residence while the other has specified access (joint legal custody)
    - ★Joint custody and shared residency- equal time with each parent (joint physical custody)
    - ★Parallel parenting
- Defines custody as including care, upbringing and any other incidence of custody
- Section 4 - jurisdiction
  - \* The superior court of Queen's Bench court of each province can determine the corollary relief provisions of a divorce if either of the spouses is ordinarily resident in the province at the time of proceedings or both accept the jurisdiction of that court
  - \*If 2 different actions are started, use the action that was filed first
  - \*Where parents live in different judicial centers within a province, use court in judicial center where kids ordinarily reside
- Section 16 and 17 deal with custody
  - \* Section 16 talks about making initial orders
    - ★16(1) allows parents to make an application to the court for custody or access
    - ★16(2) gives the court the ability to make interim orders
    - ★16(3) says third parties can only get involved in custody and access disputes with leave of the court
      - ◆Rarely done under *Divorce Act*
      - ◆Will usually make application under *Family Law Act* which provides for contact orders and the court will bring the two applications together
    - ★16(4) the court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons
    - ★16(5) when parent has access to child also have access to information about the child, can make the inquiries and be given information
    - ★16(6) allows the court to impose terms in any order they want
      - ◆May be time limited or indefinite
    - ★16(7) says that a court may require a person who has custody of a child and who intends to change the place of the residence of that child to provide at least 30 days notice to the other parent
      - ◆In reality need at least 60 days notice to bring court order

- ★16(8) the court shall take into consideration only the best interests of the child as determined by reference to the condition, means, needs and other circumstances of the child
  - ◆No longer about parental right to access, only child's best interests
  - ◆Access is the right of the child, not the parent
- ★16(9) says court shall not take into consideration the past conduct of a person unless that past conduct is relevant to that person's ability to take care of the child
- ★16(10) says that when the court is making a custody/access order, the court shall give effect to the principle that a child of a marriage should have as much contact with either spouse as is consistent with the best interests of the child and will take into account the willingness of the person who seeks custody to facilitate that access
  - ◆Principle of maximum contact with each spouse but caveat is that it has to be in the best interests of the child
    - ▶ This rules the day for some judges who hold there is a presumption of joint custody and even joint residency
    - ▶ But the Court of Appeal has said that there are no presumptions in custody litigation
    - ▶ Must always ask, is it in the best interests of the child to give effect to that principle in these circumstances?
- \* Section 17 talks about making variation orders
  - ★17(5) says that there will be no variation of an existing order without a change in the condition, means, needs and other circumstances since the last order was granted
    - ◆Need a material change of circumstances since the last order
    - ◆Only consider the best interests of the child
  - ★17(9) replicates 16(10) with respect to maximum contact and willingness to facilitate contact

### *Family Law Act*

- Talks about guardianship and parenting time
  - \*In the past custody was only where the child lived and was one part of guardianship
  - \*But today they are both a bundle of rights concerning the child
  - \*Different types
    - ★One parent may have primary residence and the other has specified parenting time
    - ★Can have shared residency with equal time
    - ★Can have a contact order which only gives you the ability to see the child, not make any decisions
- Applies to common law spouses or married spouses if a divorce order has not been started
- Under *Divorce Act*, all applications must be in QB, but under this act most applications can also be in provincial court
- Guardianship is umbrella term encompassing rights and responsibilities of a parent

- Part 2 of the Act deals with guardianship, parenting orders, contact orders and provisions to deal with enforcement of time
- Division 1 Guardianship
  - \*Section 21(6) sets out the terms of guardianship
    - ★Powers, responsibilities and entitlements [Make day to day decisions concerning care and control of child, make decisions on residence of child, make decisions concerning the education or extra curricular activities, make decisions concerning the cultural, linguistic, religious or spiritual heritage of the child, make decisions as to who the child lives or associates with, decide if child can work, consent to medical, dental or health treatment, grant or refuse consent required by law, receive notice with respect to the child, commence or defend legal proceedings, appoint emergency guardian, receive information that affects the child, any other powers necessary to carry out the responsibility of caring for the child]
  - \*Section 20 determines if you are a guardian
    - ★20(2): a parent is a guardian of the child if they have acknowledged they are the parent and demonstrated intent to assume responsibility of a guardian in respect to the child
    - ★20(3) has big list indicating how you can demonstrate intention to assume the responsibility
      - ◆ If you are married, you are automatically the child's guardian
      - ★Prior to this, the only guardian of a child born outside of wedlock was the mother, men had to get a declaration
  - \*Section 23 tells you what to do if you do not meet the criteria listed in 20(3) and want to be a guardian
    - ★If already have two agreeing guardians court will most likely not add a third
    - ★23(1): you can apply if you are an adult who has had care and control of the child for 6 months (court may waive the 6 months if child immediately needs a guardian and does not have one) or you can apply if you are a parent but not a guardian
    - ★23(3) onwards: consider if they will be suitable as a guardian (willing and capable of exercising the powers and responsibilities, live in Alberta etc)
  - \*Section 30 allows court to review decision of guardian if it poses a serious risk to the health or safety of the child or is likely to have longterm consequences on the child
  - \*18(1): the only thing the court looks at is the best interests of the child
    - ★18(2) gives a list to consider in determining best interests of the child
      - ◆Ensure greatest protection of physical, psychological and emotional safety
      - ◆ All the child's needs including need for emotional stability taking into account age and maturity of the child
      - ◆History of care of the child
      - ◆Cultural, religious and spiritual upbringing and heritage
      - ◆Child's views and preferences to the extent it is appropriate to ascertain them (will not carry a lot of weight unless the child is older)
      - ◆Parent's proposals for a child's care and upbringing
      - ◆Any household violence
      - ◆Ability to meet the needs of the child

- ◆Appropriateness of making an order requiring the parties to cooperate
- ◆Nature, strength and stability of relationship between the child and each person residing in the household and between the child and any other guardian
- ◆Ability and willingness of each person to care for and meet the needs of the child and to care for or cooperate on issues affecting the child
- ◆There are other things the court will look at, current guardianship, ability to maintain contact, civil provisions, ability or willingness to each party to exercise powers of guardianship
- Division 2 talks about parenting orders
  - \* Section 32 sets out what courts can put in an order when parents cannot agree on who will exercise each power
    - ★Determines who makes the decisions
    - ★Allocates powers, responsibilities, and entitlements
    - ★Allocates time
    - ★Can mandate mediation and put in any provision they think is necessary
  - \*33(2) says if you are going to be changing the residency of the child, the court can put a provision in requiring a minimum of 60 days notice
  - \*34 gives the court the ability to vary a parenting order they have already granted
- Division 3 talks about contact orders
  - \*Family, who are not guardians, bringing application for time with child
  - \*Section 35 allows court to give an order allowing that person to have some contact with the child
  - \*35(2) says if you are not a parent or in loco parentis you must get leave of the court to make an application for a contact order
  - \*35(3) says you do not have to get leave as a grandparent if the guardians are separate or one of the guardians is dead and the contact with the child has been interrupted by the separation or death
  - \*35(4) when a court looks at leave, consider the significance of relationship between child and person who is applying and the necessity of an order in facilitating that
  - \*35(5) before making a contact order, court must satisfy itself that contact is in best interests of child, physical or psychological health of child is in jeopardy and guardian's denial of contact is unreasonable
- Division 4 talks about enforcement of time with the child
  - \*Either where the one parent is making it difficult for the other to see the child during their specified access times, or when the parent is not seeing the child when his or her access times come around
  - \*Section 40 allows the court to order makeup time, that one party puts money in the court as security, reimbursement of expenses incurred traveling to see the child, impose a penalty of \$100 a day up to \$5000, 90 days jail time or police enforcement
  - \*41 says if fail to exercise time with children without notice court may order that you reimburse the primary residential parent for any expenses

Case Law:

*L(V) v L(D)*

- Mom granted sole custody of children as Dad was away a lot
- Dad applied for joint custody arguing that she was making all the decisions without him
- 16(5) of *Divorce Act* says an access parent has the right to make inquiries and get info but that does not mean they can participate in decisions
- Site *Krueger* which explains sole custody as: to award one parent the exclusive custody of a child is to give that parent full parental control over and ultimate parental responsibility for the care, upbringing and education of the child to the exclusion of the other parent
- Joint custody is akin to joint guardianship
- Sole custody is very difficult to get now because it gives one party the power to make all the decisions and the other party no power

*KK v GL/BJL*

- Unmarried mother consented to adoption, and then withdrew the consent after the child had been living with her adoptive family for a while
- Custody given to adoptive parents due to child's bonding with the adoptive parents
- Under common law, preference was given to biological parents unless unfit and this is the first time the preference is departed from
- Welfare and child's best interests were the only considerations

### **Types of Custody Orders**

- Interim orders: Disputes might take a while to go to trial and sometimes need an order about what will happen with the children between now and the trial
- Final orders: Come out of trial but can be varied after
- Variation orders: Allow the court to make a change to previous order

*R v R*

- Mom appealing decision where Dad was given custody of 4 1/2 year old child
- Mom was arguing that status quo should be upheld because she had had interim custody for 2 years
- Mom worked outside the home and needed to put the child in daycare
- Dad was a farmer who had more time to spend with the child and had family members to help
- Court rejected the tenders year doctrine: the idea that younger children, usually under 6, need maternal care and mom is best suited to provide that kind of care
- Conduct is only relevant if it effects your ability to care for child
- Major determinants for interim custody orders:
  - \* Best interests of the child must prevail
  - \* When interim custody is at issue, the court should not lightly disturb the status quo
  - \* Interim custody is by nature makeshift
  - \* Interim custody orders should be designed to cause the least amount of harm

- \*All other things being equal, general rule is that it is not in the best interests of a child to substitute an uncertain situation for a certain one
- Court rejects Mom's argument, preserving the status quo is a determination for interim custody orders, not final custody orders
- Quality of parental time is more important than quantity, but where each parents can provide quality care, quantity can be a factor and here it won the day
  - \*As a general rule, for younger children, access periods will be shorter and more frequent so if one parent has to put the child in daycare for a chunk of this time that could be a mark against them
- Have to know the attitudes of the family members who were going to help care for the child, would not have been in the child's best interests if they had poisonous attitudes towards her mother

#### *Richter v Richter*

- Shared parenting should not be ordered before a trial where there is substantial conflict and significant dispute on the evidence
- Not in the best interests of a child to impose a regime that invites continued court applications
  - \*Interim custody used to avoid repeated applications and conflicts and to engender some consistency and stability
- *De facto* arrangements should not be disturbed lightly pending a trial, need stability and certainty in the child's life
- For *de factor* arrangements the status quo is important but for final orders it is just one factor

#### **Court's Custody Options:**

##### Sole Custody:

#### *Young v Young*

- At issue where Dad's JW beliefs
- Mom got sole custody and Dad got access with restrictions that he could not share his religious beliefs with the children
- Court of Appeal said you cannot restrict exposure to religion unless it is harmful to the children or the children do not want to be exposed, but upheld the restriction
- To the extent that contact with one parent conflicts with a child's best interests, contact can be restricted
- 16(10) of Divorce Act, maximum contact provision, interpret best interests of child in light of presumptive benefit of seeing as much as possible
- Sole custody: ability to make all of the decisions concerning the child's health, education and welfare to the exclusion of the other party
- The other party is entitled to information, but not to decision making power
- Very rare today

### Joint Custody:

- One parent gets primary residence, the other gets specified access
- Major decisions are shared between parties and day to day decisions lie with primary residential parent
- Practically day to day decisions made by parent child is with

### *Collwell v Collwell*

- No presumption of joint custody in the *Divorce Act*
- Should order joint custody even if the parents do not want it if there has been a demonstrated level of cooperation
- Should not order where there is no effective history of joint decision making
- Should not order joint custody to make the other parent feel good about themselves
- Should not order joint custody to ensure the other parent pays child support
- Should not order joint custody to ensure access parent will actually have contact with the child
- Joint custody should only be ordered where parents have displayed an ability to cooperate and communicate about child rearing decisions notwithstanding ongoing difficulties and where they have maintained an ongoing and meaningful relationship with the children during the separation

### *K v K*:

- Example of sole custody being awarded to the mother because of intense acrimony between the parties

### *McMurry v Hawkins*:

- Mdm Justice Viet keeps making decisions that are overturned on appeal because she presumes joint custody
- Says parents having legal status of joint custody should have real status of joint parenting except where such an arrangement is not in the best interests of the children
- If have joint custody should be shared parenting as well unless there is a contraindication

### Parallel Parenting:

#### *B(JE) V B(C)*

- Trying to find a situation that works with the extreme antipathy between the parties
- Dad is overly aggressive and completely unwilling to make joint decisions
- Joint custody was ordered with parallel parenting
- Seven indicia of parallel parenting:
  - \*A parent assumes responsibility for child during their time
  - \*No say or influence over actions of other parent
  - \*No expectation of flexibility or negotiation
  - \*Cannot plan activities for child during other parent's time
  - \*Minimized contact between parties
  - \*Children not asked to deliver verbal messages

\*Information about health, school and vacation is to be shared in writing usually in the form of an access book

- Ordered in high conflict situations, but seems ripe for continued conflict

Bird Nesting:

- Shared parenting where kids stay in one house and the parents alternate

### **Presumption of Joint Custody**

- Movement of the courts towards some sort of presumption of joint custody and even shared residency
- 3 Court of Appeal decisions that come out and deal with joint custody and these presumptions

*Richter v Richter*

- 12 applications brought in front of 10 different judges
- For interim orders you are trying to stop interim applications
- Should not order joint custody or shared parenting where there is substantial conflict with each other and certainly not before trial where there is substantial disagreement
- Not in best interests of child to have continued applications

*Kaplanis v Kaplanis*

- Trial court ordered joint custody and shared parenting
- Ontario Court of Appeal said that joint custody should not be ordered where there is no evidence of cooperation
- Joint custody should not be awarded in the hopes that it will improve parenting skills

*Cavanaugh v Balkaron*

- At trial Justice Veit ordered shared residency even though 13 year old did not want it taking the position that there is a presumption of shared residency
- Court of Appeal said there are no longer any presumptions regulating custody and access
- Sole determinant is the best interests of the child

*R(AL) v R(DR)*

- Long and ugly custody battle which began with week on week off shared residency
- A custody assessment was done and parties came to an agreement for interim joint custody with primary residence to Mom and specified access to Dad
- 4 years later there is a dispute about schooling and another assessment done
- Eventually, after experiencing the harmful effects of the fight over her, the child asks the court for relief
- Although child showed a slight preference for Dad, he had a history of attempting to alienate her from her mother
- Court ordered sole custody with mom, no contact and access to dad in response to his behaviour and his attempt to alienate the child from her mother

## **Assessments**

- If there are strong issues and disagreement and each is saying the kid wants to be with them, the court can order a bilateral custody and or access agreement
- Often done if allegations of unfitness/mental illness/addiction/alienation/unsafe house/ disagreement about child's wishes
- Parties usually come to an agreement on psychologist and or social worker to conduct the assessment and if not court will direct someone
- Assessor issues a report and go through testing results and make recommendations
- Court not supposed to just replace decision making ability with third party, but unless there is a glaring error, these things carry a lot of weight
- If parties cannot agree, court has to determine who does it and who pays for it
- Now a process in place under Practice Note 7 that talks about assessments in high conflict situations
  - \*Either the parties come to agreement or court appoints psychologist to get involved in this situation, but not necessarily to do an assessment
  - \*Deal with both parties and the children in an attempt to make things less contentious to help the parties and the kids through
  - \*Assessor can report directly to court
  - \*Issues letters, not reports
  - \*If your order is granted, then you are appointed a QB justice to be case manager

## *Tucker v Tucker*

- A court should not just randomly or without good reason order an assessment
- If it is a variation application, you do not need to show a material change in circumstances to get the court to order an assessment

## **Factors that Govern an Award of Custody**

1. Primary Caregiver- best interests of the child to stay with the primary caregiver regardless of the interim order

## *K v K*

- Child stayed with mom for majority of time before trial, but trial judge awarded dad custody
- If Court of Appeal disagrees has 2 options:
  - 1) Overturn custody order and order new trial
  - 2) Overturn custody order and substitute it with their own order
    - \* Can they fairly evaluate the testimony or does fairness require a new hearing?
    - \* If feasible, substitute own decision to prevent uncertainty and anxiety for child
- After the first child was born, mom did to go back to work until last child was 4
- For the first part of the separation mother and children stayed in matrimonial home but then they moved out and the father moved in
- Mother begins civil suit alleging sexual assault of the daughter, but charges are dropped and the father gets access

- Initial assessment that although mother was in poor psychological state children should remain with mother and at trial revised to say mother was now in a better state
- Trial judge thought the father would be a better role model, but the mother is also a role model and the father could role model through access
- Trial judge thought that mother's mental health would affect her parenting, but the psychologist recommended her for primary residence and her health was improving
- Trial judge thought the father could provide a better lifestyle for the kids, but this can be accomplished through child support
- Great emphasis on the fact mother was primary caregiver and she got primary residence
  - \*Child support will look after material needs
  - \*Mother has proven caregiver skills whereas the father's are untested
  - \*Not the tender years doctrine, about primary caregiver
  - \*Best interests of the child mean we look to who can best meet the day to day needs of the child
    - ★Who did what with the kids?
    - ★Was it out of necessity (work hours) or agreement?
    - ★History of parenting roles
    - ★Investigation into who was the primary care giver
    - ★Status quo is only one part

## 2. Violence Within the Family

- Directed towards the children or towards the spouse?
  - \*In the past, court did not put much weight on spousal abuse as it was thought not to effect parenting ability
- Under the *Family Law Act*, violence within the family is something the court must consider
  - \*Section 18(2): The court in looking at best interests of the child, shall consider any family violence including its impact on the kids or anyone in the household
    - ★ Will also consider under *Divorce Act*
  - \*Section 18(3): In this section, "family violence" includes behaviour by a family or household member causing or attempting to cause physical harm to the child or another family or household member, including forced confinement or sexual abuse, or causing the child or another family or household member to reasonably fear for his or her safety or that of another person, but does not include
    - a) the use of force against a child as a means of correction by a guardian or person who has the care and control of the child if the force does not exceed what is reasonable under the circumstances, or
    - b) acts of self-protection or protection of another person.

## 3. Conduct/Lifestyle Factors

- Only applies if it affects ability to take care of children
- Lifestyle includes sexual activity
- Drug/alcohol abuse
  - \*Must show that consumption impacts child caring abilities

\*Will consider if this is a new issue or something the parties fought about before

\*Can put use restrictions on access

- Smoking can be a big factor, can put restrictions during access
- Obesity and how you feed the children is a contentious factor
- Common for court to order that a person cannot have overnight unsupervised access until they undergo anger management
- May put restrictions on place as to who can be in the home when the child is there
- Seek balance between parties living their lives as they want and the court looking at the best interests of the child
- Was it an issue before? Is one party trying to prevent the other party from seeing the child?

#### 4. Health Issues of the Child and/or Parent

- If the parent is ill in some way, does this impact his or her ability to care for the child?
- Did it come up prior to separation?
- Issue of child's health applies in instances of significant health problems or disability
  - \*Less likely to get joint custody, do not want to move child back and forth
  - \*Court look to party who has demonstrated most willingness to meet those needs
- *Divorce Act* s 17(5.1): party becoming ill or disabled constitutes a change in circumstances

#### 5. Parental Alienation Syndrome

- Anything someone does knowingly or otherwise to interfere with the child's relationship with his or her parent
- Practice Note 7 allows intervention so third party professional can come in and put a stop to this
- Once child is estranged, court's hands are tied
  - \*Problem is what do you do when the kids are so far alienated, that the kids wont go with the other parent? Sometimes the court will say no CS for the alienated parent

#### 6. Religious or Cultural Issues

- Was this contentious before? Is this a new religious conviction?
- Difficult to argue especially where two parents are hardcore believers of different faiths
- *Young v Young*: TJ restricted father being able to share his religious beliefs with the children and Court of Appeal said to do this you need to show the religious beliefs are harmful to the children or they do not want to be exposed to them

#### *Lehman v Bachor-Lehman*

- Father applying for joint custody and wanted to be able to hold a dedication ceremony for the child at his church
- Not enough of a change in circumstances to vary custody, but enough to change access
- Mother is sole custodian, responsible for pivotal religious decisions so father cannot have the ceremony without her permission but this does not mean he cannot share his beliefs

- Provided that sharing of beliefs is in the child's best interests and does not undermine the religious beliefs of the custodial parent, the access parent should be able to share his religious beliefs with the child

#### *Van de Perre v Edwards*

- Mother was 24 and white and father was 34 and black
- They had a 1 1/2 year relationship with a child while the father remained married to someone else
- The BC Court of Appeal invites father's current wife to join as a party and grant joint custody with residency with the father and his current wife with generous access to the mother
- Argument was that a child of mixed race should live with his father so he would learn about his heritage and be better equipped to deal with racism
- SCC overturned
  - \*Not analogous to a dispute between adoptive parents and biological parents of differing races, because here both parents can share their cultures through access
  - \*Look to which parent will facilitate contact with the other parent such that the child can build healthy identity with both races
  - \*Intervenor's argued that race is a crucial factor which should not be ignored, but court said this is only one factor and not determinative

#### 7. Wishes of the Child

- Comes through an assessment
- Assessor will look at reasons, not just about who the child says they want to live with
- 95(3) of *Family Law Act* allows for appointment of counsel for children and allows court to apportion costs of counsel for children

#### 8. Allegations of Sexual Abuse Against the Children

- Special process: Practice Note 5 for Edmonton and Area 6 for Child and Family Services
  - \*Notification form at time you file document
  - \*Affidavit setting out specifics
  - \*Filed under seal at the courthouse
  - \*Served on the Family and local Child and Family Services Office
  - \*CFS appoints investigator to see if there are any grounds to the allegations
  - \*If find no grounds, fill out a form, send to court and that is the end
  - \*If there is sufficient evidence to warrant investigation there are broad powers
    - ★Can use police
    - ★Can access criminal records
    - ★Can talk to any specialists involved
    - ★Make a report and send to case management
    - ★Filed at court under seal
  - \*Assigned a case manager to hear all applications and receive all reports and case manager hears all motions except the trial, can order an early trial

### *JVS v AVT*

- Ongoing allegations of sexual abuse concerning a four-year-old
- Parties were granted joint custody, but there was a continued denial of access by mom
- Mom continually thwarted court orders and would not allow the child call dad daddy
- Mom wanted residency, dad wanted sole custody
- Shortly after, she alleges physical abuse in QB, brings an application for an emergency protection order in provincial court and files 5 separate allegations of sexual abuse
- Mother refused to participate in access assessment
- Dad was ultimately granted access and an allegation of molestation was brought
- Matter goes to a practice note 7 high conflict intervention
- Mom makes another allegation, CFS investigate and find no grounds
- Could the court change custody? Yes, there was no final order and even if it was final, mom's attempts to thwart access and these allegations constitute a change of circumstances sufficient for a variation
- What are the best interests of the child?
  - \*Continued exposure of a child to a parent's hostility towards the other parent can have long term impact on child
  - \* Primary care of child with parent who has demonstrated that he has taken steps to put the interests of the child ahead of his own by furthering the child's relationship with both parents and both parent's families
  - \*Mom's efforts to thwart access and hostility are contrary to child's best interests
  - \*Serious unfounded allegations and continued interviews of child not in best interests
  - \*Most important factor is whether the residential parent will encourage contact with other parent, grandparents and siblings so grant dad residence and custody

### 9. Mobility

- One parent wants to move the child to a different city, province or country
- Why there are provisions in the *Divorce* and *Family Law* Acts allowing courts orders mandating notice of move (4-5 weeks to bring application in special chambers)
- Either one party wants an injunction preventing the child from moving, or one party brings an application for primary residence and custody
- Cannot stop the parent from moving, have mobility rights under the *Charter*

### *Gordon v Goertz*

- Mom wants to move to Australia to study orthodontics, so dad brings an application for custody of the child and to restrain the child from moving
- SCC approach:
  - \*Parent applying for change of custody or access must meet threshold requirement of material change in circumstances (wanting to move not necessarily enough on its own)
  - \*Once threshold is met, fresh inquiry of child's best interests having regard to all circumstances relating to the child's needs, relevant circumstances and parent's ability to satisfy them
  - \*Finding based on evidence of judge who made previous order and evidence of a change in circumstances
  - \*No presumption in favour of the custodial parent although the custodial parent's views are entitled to great respect
  - \*Each case turns on its unique circumstances; best interests of the child is the only consideration
  - \*About best interests of the child, not the rights of the parents
  - \*What a court should consider:
    1. What is the existing arrangement and relationship between the child and custodial parent?
    2. What is the existing arrangement and relationship between the child and access parent?
    3. Consider the desirability of maximizing contact between the children and both parents
    4. Judge should look at views of child (depending on age, assessment)
    5. Custodial parent's reason for moving is something that should be considered but only in the exceptional cases where it is relevant to that parent's ability to meet the needs of the child
    6. Look at the disruption to the child of a change in custody
    7. Look at consequences on child from removing them from family, schools and communities they have come to know if you allow them to move with the custodial parent
- Ultimately the child is allowed to go to Australia, but child can come to Canada for access

### *Bjornson v Creighton*

- Mother is from AB and dad is from Ont and back and forth on business a lot
- Late into her pregnancy she moves to Ont with him and later finds part time work
- Three years later marriage breaks down and in initial custody trial she is asking to move back to Alberta with the child
- Mom has family and friends and job seniority in AB, dad works weird hours and is not advancing career wise
- Court of Appeal awards sole custody to mom and allows her to move but as a result of the move reduces child support to almost nothing
  - \*Child's best interests are better served by a well-functioning and happy custodial parent

- \*Child's best interests are not only monetary, also relate to social, professional, psychological and emotional wellbeing of the mother

### *Spencer*

- Appeal from Chambers judgement not allowing mom to move to Victoria
- Mom has been sole custodian for 4.5 years and dad did not exercise access until he heard about the move
- At Chambers mom says that if she is not allowed to move with the children she won't move and she won't leave without the kids
- Court of Appeal says it is a mistake to say that moving is in and of itself a material change in circumstances
  - \*Must be a change of circumstances that materially affects the kids that was not contemplated or reasonably foreseeable at time of initial order
  - \*If child lacks positive relationship with access parent, a move might not effect the child significantly enough to constitute a change in circumstances
- Mistake for court to consider whether or not parent will move without the children because this puts the parent in a double bind of looking selfish if will go without the children and not interested in the move if won't go without the children

### *MacPhail v Karasek*

- Mom wanted to move from Medicine Hat to Okotoks and had 2 kids with different fathers
- Father number 2 brings an order seeking codification of the week on week off access arrangement he is currently exercising and to prevent the move
- Both parties are excellent parents, but mom has superior abilities due to more time with kids
- Ultimately assessment done which says joint custody, shared residency and both in Medicine Hat are in the best interests of the child
- Matter goes to trial a year later and for the first time on stand the assessor gives the opinion that if mom does not move back home, primary residence should go to dad
- Court of Appeal grant joint custody, give mom primary residence and allow her to move
  - \*Trial judge did not balance the benefit of staying with primary caregiver with effect of not seeing dad as much
  - \*Court did not look for a material change in circumstances and pass threshold
  - \*Child was only 2 at time of application, no strong ties to Medicine Hat
  - \*Not relevant to consider if mom would go without children
  - \*Trial judge placed too much emphasis on mom's reasons for moving
    - ★Move need not be calculated to be in best interests of child because Canadian's are mobile and courts are not arbitrators of every decision a custodian makes

### **Enforcing Orders**

- *Extra Provincial Enforcement of Custody Orders Act*
  - \*To enforce orders other than those made under the *Divorce Act* where child has been removed from the jurisdiction that gave the order

- \*Section 2: court shall enforce and make any orders necessary to give effect to a custody order as if that order was made here if the court is satisfied that at the time the order was made, the child had a real and substantial connection with the province, state or country in which the custody order was made
- \*Section 3: court can vary order of other court if child does not have real and substantial connection to jurisdiction that granted the last order and if the child does have a real and substantial connection to AB
- \*Section 4: if the child is going to suffer serious harm if they remain with or restore to the custodial parent the court can make any order they deem necessary
- *International Child Abduction Act*
  - \*Adopts the Hague Convention for the Rights of Children
  - \*If a child is abducted to a country which signed the convention, there is a good chance of getting the child returned and if not it is a very difficult battle because courts there might not recognize the jurisdiction of Canadian courts
  - \*Article 3 defines the removal or retention of a child is wrongful if it is a breach of the rights of custody attributed to a person or institution under the law of the state in which the child was habitually resident immediately before the removal and at the time of the removal those rights were actually being exercised
- Sometimes you will have a parent within Alberta simply ignoring an Alberta court order

#### *Van de Veen*

- Mom is on a vicious campaign against dad, refusing to comply with access orders and is alienating the kids
- Unwarranted vilification of the father by the kids
- The kids were too alienated to change their residency
- Court could jail the mom but this would just harm the kids and make them hate dad more
- Could fine her, but this would deprive the kids of limited resources
- Because they are not yet divorced, matrimonial property is not yet dealt with so they punish her by saying she cannot have her share and told mom she could bring no further applications without first purging contempt

#### *Roberts v Salvador*

- Mom is alleging abuse so bilateral custody assessment and psych assessment are done
- Parties agree that they are going to have joint custody and primary residence but despite this the justice decides to weigh in on the issue and ignore the agreement
- Looks at LL case and says that stands for almost rebuttable presumption of joint custody
- Looks at Richter and disagrees with proposition where joint custody should not be awarded where substantial conflict
- Says to award sole custody in these circumstances would reward bad behaviour on the part of the mom
- Agrees with joint custody and primary residence but gives structured access

## **Jurisdiction**

- Jurisdictional dispute within province resolved by asking where the kids live
- *Family Law Act* allows you to bring any issue before the Provincial Court of the QB so have jurisdictional issues for example where one party commences a divorce action in QB and the other commences a custody action in Provincial Court
  - \*It is not automatic that QB will take jurisdiction unless it is divorce
  - \*If an action is brought in both courts, one must cede jurisdiction

## **Variation**

- Can vary custody, access or child support where there has been a material change in circumstances - first hurdle, you are done if you cannot argue this
- *Gordon v Goertz*: would the court have ordered the same thing at the time of trial if the facts that exist now existed then?
  - \*Was the change reasonably foreseeable? Within reasonable contemplation?
- Examples of changes in circumstances:
  - \* Parent changed jobs and now has more time to be at home with kids
  - \* Parent has a new partner
  - \* Passage of time, child is now older
  - \* Illness of a child or parent (*Divorce Act* s 17(5.1))
  - \* Child expressing they no longer wish to live there (be careful)

## **Appealing Orders**

- Extremely rare, very difficult to get an appeal granted
- Appeals can take up to a year, but this is too long to wait when speaking of custody of children
- New Rules of Court have an expedited process for custody
- If you are going to appeal, ask for a stay as soon as a trial order is granted and if you do not get one you can file to the motions court for a stay once you have filed your notice of appeal
  - \*The test for a stay is the best interests of the child
- If it is an interim order which will eventually go to trial, it is more efficient to move it towards trial rather than appeal it
- Court of appeal may overturn the appeal and reinstate the order, substitute their own decision or order a new trial on certain portions of a lower court decision
- If a change has occurred between trial and appeal and you wish to enter new evidence you must show that
  1. The evidence wasn't known at the time of the trial, and
  2. The evidence is relevant to the issue at hand

## *Van De Perre*

- Role of trial judge is to balance the factors set out in the *Divorce Act* with the facts of the case and because this is a fact-based determination, appeal courts must give trial judges deference
- Deferential standard promotes finality and protects trial judge's fact finding
- Trial judge has opportunity to judge veracity and demeanour of witness

- Interests of the child prevail over societal interest in finality so where significant errors occur/ trial judges draw incorrect conclusions from the evidence, appellate interference is justified
- Trial judge is given much deference unless he has disregarded material evidence, misconceived the facts or relied on an improper legal principle

### **Costs**

- If you bring a successful application or successfully defend against an application generally you will get costs
- Lists of costs in Rules of Court outline what you are granted for each step
- If you ask for costs without specifying you will have to do a bill of costs so you are better off to calculate costs based on the Rules
- In the past, costs were rarely awarded in family cases, but this has changed to deter frivolous suits
- Difficult to get in mobility matters
- May be used punitively
- Difficult to collect
- Sometimes the court will award costs and then prohibit further applications until they are paid

### **Child Support**

#### *Child Support Guidelines:*

- If someone has primary residence, it is not appropriate for them to bear all the costs of the kids
- Child support is to ensure fairness to the children, maintain standard of living
- Non-residential parent required to pay over a standard amount of money each month to get the child's standard of living as close as possible to what it was
- In Provincial Court under the *Family Law Act* we see judges deviating from the guidelines
- Section 3 is base support: food, shelter, clothing, education and a bit of recreation
  - \*Chart sets a set number based on province, income and number of kids
  - \*Based on income of non-residential parent
- Section 7 is extraordinary expenses: includes expenses over and above the base support
  - \*Enumerated expenses: med-dent, childcare, tutoring etc
  - \*Non-enumerated expenses that it may apply to: post-secondary, sports, nannies
  - \*To be payable, need consent from payor or a court order
  - \*Look at reasonableness of expenses in context of income (is the expense exceptional based on both parties' incomes or is it subsumed in the everyday amount being paid), number of activities, historical importance (if the child was participating in this activity before the family separated it is more likely support will be awarded), and number of children
  - \*First family comes first
  - \*Payable proportionate to income- add both parties incomes together, determine what amount each party contributes and they pay that percentage of the extraordinary expense
  - \**T(CS) v T(GA)*

- ★Not an everyday expense, an expense that is beyond the payee's means, an expense that is exceptional/out of the ordinary, an expense that is extraordinary in relation to the average child
- ★Factors to determine whether an expense is truly a section 7 expense: combined income, fact that two households have to be maintained, percentage of combined income represented by claimed expense, any debt of the parties, any prospect for the decline or increase of the parties' means in the future, whether the parent who had paid the expense in the past would be able to continue to do so without contribution of other parent, whether the parent from whom the contribution was sought was consulted about the expense before it was incurred
- Section 1 sets out the objectives
  - \*A fair standard of support
  - \*Reduce conflict and tension
  - \*Improve efficiency in the legal process
  - \*Ensure consistent treatment of children and spouses in similar circumstances
- Section 2: a child of a marriage is any child born into that marriage up to the age of 18 years and sometimes longer (any child who cannot care for themselves-ill or disabled, post-secondary)
  - \*Step parents can sometimes be required to pay child support even though the child was not born into that marriage if they are in loco parentis
- Section 3: Amount of child support is an amount ordered under section 3 (binding- cannot contract out of) plus any amount ordered under section 7 (discretionary)
- Section 3(2): If a child is over 18, the amount payable for the child is the amount prescribed under section 3 or if the court deems that amount inappropriate, an amount which the court considers appropriate given the condition, means, needs and other circumstances of the child and the financial circumstances of each parent to contribute
  - \*Reverse onus: person who does not want to pay must establish amount in table is inappropriate
  - \*Problem is in determining whether a child over 18 is still a child of the marriage
    - ★*Alberta Child Support Guidelines* impose a cutoff of 21, but there is no cutoff under the *Divorce Act*
- Section 4: Guidelines for income over \$150K
  - \*Amount paid is either that set out in the table or if the court deems that inappropriate, the amount set out for \$150K and then the balance of income amount the court considers appropriate having regard to the condition, means, needs and circumstances of each child and ability to contribute
  - \*Up to \$1 million courts generally do not deviate
  - \*Over \$1 million generally deviate and award a lower amount
  - \*For deviation: look at past history of spending, the needs of the children, whether there are no section 7 expenses
  - \**Francis v Baker*
    - ★Presumption in favour of table amounts even where income is over 150K and payor must rebut and show that the amount is "inappropriate"

★Inappropriate means unsuitable

★Looking at the lifestyle the kids had before the marriage broke down, cannot say that 10K a month for 2 kids is not unsuitable

\**Simon v Simon*

★At date of separation, husband was making 180K and paying \$2.2K/month in child support and at date of application he was making 1.4 million

★Wife applied to have tables applied so husband would pay \$9K/month

★Child's needs and payor's ability to pay are the only things that govern s4

★The fact that the payor is young, does not have any assets and whether it is uncertain that his career was going to take off or end does not impact presumption that tables apply

- Section 5: in loco parentis- where a spouse stands in the place of a parent, the amount of child support payable is what the court considers appropriate having regard to the guidelines and any other legal duty to support the child

*Chartier v Chartier*

- Determination of whether someone standing in the place of a parent could unilaterally terminate that status after marriage breakdown
- Jessica was a child of the previous relationship, but while the parties were together, the step dad played an active role in her parenting
- Focus on best interest of child, not biological parenthood or legal status
- Indicia: whether the stepchild participated in the family in the same way as a biological child, whether the step parent contributed financially to the child, whether the step parent disciplined the child, whether that person represented to the child, that person's family and outside world that he is the parent of that child, and the child's relationship with her biological father
- Even though the marriage was short, his manifest intention to parent Jessica cannot be qualified by the duration
- His obligation to the child continues, he committed to caring for her and her standard of living should not suffer because they broke up
- Once a person stands in place of a parent, their obligations to that child are the same as a biological child and they also get rights of custody and parenting time
- Obligations are joint and severable, could have both the stepdad and bio dad paying support
- Step dad could sue biological dad for his contribution

*Collection:*

- Can register with Maintenance Enforcement Program who will collect for you
- Each month the payor does not pay comes with a \$25 late fine and interest and after 3 months a collection process is started, can suspend licenses, take away passport, garnish wages, take a lien against house and send you to jail (broad powers)
- But if you are able to cooperate, can just make own arrangements

**Children Over 18:**

### *Farden v Farden*

- Son who is enrolled in college refuses to have anything to do with his father
- To determine eligibility for ongoing base support:
  - \* Is the child enrolled full time or part time?
    - ★ FT=less opportunity to work/withdraw from care
    - ★ FT means 3 courses
    - ★ Today have questions about upgrading, is this post-secondary? is it full time?  
Courts will say it is to encourage education
  - \* Has the child applied for subsidies or student loans?
  - \* Is the child's career plan appropriate given their aptitude or are they just doing it because they don't know what else to do?
  - \* Does the child have the ability to work part time and contribute?
    - ★ How should the money be divided between tuition and cost of daily living?
  - \* How old is the child?
    - ★ The older the child is, the less likely they are a child of the marriage
    - ★ Can take a break from school and still be a child of the marriage, but not if simply being a chidult
  - \* Has the child demonstrated success in past academic performance?
  - \* What plans did the parents make for the child's education?
    - ★ If while in tact the parents made contributions/decisions about post-secondary it is more likely that support will be awarded
  - \* Has the child unilaterally cut off the relationship with payor parent?
  - \* Look at overall circumstances (amount of travelling, period of work, whether the child lived away from home for a period of time)
- Although he unilaterally cut off relationship, he was still entitled to some money, but with certain reporting criteria (transcript, education plan, what he is doing)
- Question about what each party should contribute, whether the child should contribute 1/3 or more will depend on student work, RESPs, attendance etc
- Deciding whether or not the base amount of child support is appropriate now that the child is an adult puts a reverse onus on the payor to prove the guideline amount is too much
- Another issues is when child is done school
  - \* FLA cuts it off at 21
  - \* *Divorce Act* does not stipulate age, not necessarily restricted to one degree
- Another factor, not at issue here, is the combined income of the parents

### *Wahl v Wahl*

- Directed that child contribute and make applications for scholarships and loans
- The child had not had contact with his father for 7 years
- If you are determined to be in loco parentis, you cannot terminate your obligations to the child, but can the same be said if the child terminates the relationship?
- Under the previous *Maintenance of Families Act* children could bring an application by a child against their parent for support, but this act no longer exists

- Now children in an intact marriage have no recourse, and children of divorce must rely on their parent to bring the application
- Child is not obliged to pick the school that costs the least in the area, but support will be based on that number

### **Split and Shared Parenting**

- Section 8 of Child Support Guidelines applies to split parenting where each parent has at least one child
  - \*“Where each spouse has custody of 1 or more children, amount of order is the difference between the amount each parent would pay if a child support order was sought against them”
  - \*Just look at tables, there is no discretion
- Section 9 applies to shared parenting and is the only provision which allows discretion
  - \*Both parents have child 40-60% of the time, but what time counts?
    - ★146 days or 3504 hours
    - ★Some cases say it is waking time spent with child, but the better method is to use time responsible for the child
  - \*Now generally understood that if you are supporting the child 40-60% of time directly, the amount of child support you have to pay should be less
  - \*Takes into account 3 considerations:
    - ★9(a) Amount payable to each parent if just a straight set-off
    - ★9(b) Increased expenses due to shared custody arrangement
    - ★9(c) To move away from straight set-off, must provide budgetary evidence of increased cost of shared parenting and about the conditions, means and needs of you and the child
  - \*Straight set off assumes that each parent will share equally in basic expenses usually covered in child support, but this is not always the case, if one parent is still covering most of the expenses but has to pay straight set off support they will have less money for the child
  - \*Take into account how much income is going towards child when in their care
  - \*Shared parenting can lead to a duplication of services and leave less money for support

### *Contino v Leonelly-Contino*

- Dad earned 80K and mom earned 50K
- Mom paid for all clothes, school fees and activities and dad paid \$120 in variable expenses
- Under section 9 there is no presumption that Guidelines apply, court must address all 3 factors
- No one factor is more important than the others
- Under s. 9(a) take into account financial situation of both parents
- Then under s. 9(b) examine budgets and total expenditures
  - \*Intended to look at total cost of raising children in shared parenting situation
    - ★Need receipts and budgets as evidence
  - \*Increased costs are apportioned between parents proportionate to income

★Need to figure out what % of net income is going specifically towards that child, and balance out that net % in each household so that dad isn't paying too much to mom, or mom receiving too little and bearing too much

- 9(c) examines the resources and needs of both parents and child
- Look at financial impact on both parties
- SCC rejected idea of using numerical multiplier to multiply the set-off amount
  - \*Cannot have strict formula, must be case by case

### **Undue Hardship**

- Section 10: On either spouses application, a court may award an amount of child support different from the amount determined under sections 3 (base), 5(in loco parentis), 8 (split) or 9 (shared), if the court finds the spouse making the application or the child on whose behalf the application was made would suffer undue hardship
- First have to provide some evidence that the amount you are being asked to pay is hard on you for a legitimate reason
  - \*Non-exhaustive list in *Federal Child Support Guidelines*:
    1. The applicant is responsible for a high level of debt, reasonably incurred to support the former spouse and children prior to separation or to earn a living
    2. Unusually high expenses in exercising access to a child (travel)
    3. A legal duty under a judgement, order or agreement to support any person
    4. A legal duty to support any child other than a child of a marriage
    5. A legal duty to support another who is unable to obtain the necessities of life due to illness or disability
- Second look to the relative standard of living in each household and establish that there is a lower standard of living in your household than in the respondent's
  - \*Take household income and divide it by number of people in the house and compare
- If these 2 ground are proven, court has discretion to award a lower amount
  - \* Can be lowered for a period of time (ex. if obliged to pay off debt)

### *Hanmore v Hanmore*

- Father had 2 children by first spouse and then remarried and had 2 more and father applied to have the child support payable to first children reduced
- Mother had 2 teenage children, living in basement apartment, cooking with microwave and hot plate and earning \$23,839
- Husband's second wife and two children lived in a house with a modest mortgage and husband earned \$32,609
- Hardship must be more than awkward or inconvenient, it must be exceptional, excessive or disproportionate in the circumstances
- Not sufficient that payor had a new family or a lower standard of living than recipient because payor must specifically identify the hardship that is undue
- Looked at the living conditions between the parties and said that even though there was less money per head in the applicant's household, the lived reality of the applicant's situation was far better than the respondent's

- Father's new spouse had privilege of not working, no evidence led as to why she was not
- Pointed to Federal Child Support Guidelines and said there is an income under the Federal Child Support Guidelines at which you do not have to pay child support because we recognize there are poverty levels but in this case the father was far above the poverty level
- First family comes first
- You pay on the basis of how many children each individual mother has, not how many children you have in total and courts have found that does not constitute undue hardship

### **Imputing Income/Calculation of Income**

- 15-20 of Child Support Guidelines talk about how to calculate income
- S 15 says line 150, gross income claimed, on tax return is starting point
  - \*Stop here if you are an employee with no control over earnings, paid at arm's length
  - \*Farmers, self-employed people, shareholders of corporations etc are different because have level of control over what appears in their line 150
- S 17 says if current line 150 is not a fair depiction of income, can look at past 3 years
- S 18 says that if a spouse is a shareholder or an officer of a corporation and line 150 does not accurately reflect money available for child support purposes, the court may consider or include part or all of the pre-tax income of the corporation or if you can provide evidence the fair market value of that person's position in the corporation
  - \*Look to deductions allowed by government and expenses claimed by corporation and sometimes include (pierce corporate veil)
    - ★General rule is to add 20% of expenses back in
- S 19 says that a court may impute income where it considers appropriate
  - \*If the spouse intentionally under or unemployed for the purpose of avoiding child support (one of great debate)
  - \*Where spouse is exempt from Federal Income Tax (ex. working in Saudi Arabia)- impute income as grossing up what they earned as if they were paying tax in Canada
  - \*Where a spouse lives in a jurisdiction with lower tax rates than Canada- gross up the income as though you were paying the same tax as in Canada
  - \*Where it can be proved that income has been diverted to effect the level of child support payable
  - \*Where spouses property is not reasonably being used to generate income
  - \*Where spouse fails to provide income information
    - ★At beginning of every action, a notice to disclose is issued which asks for full income tax return, past 3 years of notice of assessment, last 3 pay stubs, if you are a 1% or more shareholder in a corporation want the last 3 years financial year ends and corporate tax returns and full wage summary for every employee, look for receipts for section 7 expenses, 6 months bank statements, 6 month credit card statements, most recent pension and investment payments, sworn statement of assets and liabilities
    - ★If you fail to provide this info an income will be imputed
  - \* Where spouse has unreasonably deducted expenses (farmer, sole proprietor, sole shareholder of a corporation)

- \*Where spouse gets a significant source of income from dividends, capital gains or other sources of income taxed at a lower rate
- \*Where spouse is beneficiary of a trust

#### *Hunt v Smolis-Hunt*

- Dad was lawyer, but did not show that he made much money each year
- Separated prior to the divorce and mom wanted retroactive child support
- While s 15 does not specifically provide for retroactive orders, it does not specifically preclude them either
- Clear under *Divorce Act* that parents have a joint responsibility to support their children because child support is the right of the child which extends from the date of separation and therefore judges have discretion to award child support prior to issuance of pleadings
- Circumstances that warrant retroactive child support are where it is clear that prior to the statement of claim being issued, the payee was seeking support and the payor failed to recognize or avoided the obvious support obligation
- Did not impute income; income should be imputed only where payor has pursued a deliberate course of action for the purpose of evading child support
- Guidelines are intended to ensure a level of support, but not maximum support
  - \*No obligation on parent to maximize income earning potential
  - \*Just have to be employed to a standard where you can provide reasonable support

#### *Goett v Goett*

- Husband owned a company at time first child support order was awarded
- In 2007 he earned 200K but in 2010 that dropped to 80K because he transferred his shareholdings to his second spouse
- His income declined but his wife's increased correspondingly
- Section 18 allows corporate veil to be lifted where payor is shareholder and section 19 allows imputation of income where income claimed is not equivalent to available income
- Husband transferred company to evade child support and did so to a non-arms length individual
- He was a *de facto* shareholder, still the operating mind, so section 18 is applicable allowing net pre-tax corporate income to be used

#### *Ramsay v MackIntosh*

- Before trial, the husband become a 1/3 shareholder in a company and the wife wanted to add 1/3 of the retained earnings of the company to the husband's income
- Husband says that money was not available to him, it was needed to expand the corporation
- Wife's expert accountant said the corporation should have increased their debt in order to allow him to pay more child support
- Under section 18 can impute corporate income to a shareholder even where there are other shareholders and onus is on the shareholder to show that income is not available to him
  - \*Reluctant to impute income where shareholder is not the operating mind
  - \*Financing growth out of earnings rather than debt is a reasonable business practice

- \*Cannot interfere with business management unless pre-tax earnings are available to the shareholder without impairing the business
- \*Must look at historical practices of business, restrictions on corporation and shareholders, amount and costs of the capital equipment and maintenance, industry the corporation is in, potential for growth or loss, level of corporate debt, and bank/ financial restrictions on debt
- Ask 5 questions in imputing corporate income to a shareholder
  - 1) Because the corporation is a separate legal entity, should there be a general reluctance to pierce the corporate veil?
  - 2) Is there a good business reason for retaining the earnings?
  - 3) Is there one principle shareholder or more arms-length shareholders involved?
    - \*Against shareholder rights/agreement to give more than the fair share
  - 4) What is the historical practice of the corporation for retaining earnings?
  - 5) What degree of control is exercised by the spouse over the corporation?
    - \*Husband has no control over corporate finances, so judge refused to impute the income to him

#### *Miller v Joint*

- Husband was sole shareholder in corporation, wife wanted corporate income imputed to him
- Court has to have evidence as to what the company is going to use the net pre-tax income of the corporation for
- In a larger business, take effort to balance legitimate business expenses with child-support obligations - money may be held in the corporation for a legitimate reason
- Consider: role payor plays, whether he is a shareholder, degree of control, evidence as to availability of retained earnings and whether those earnings are required to maintain the business and secure an ongoing financial venture
- Judge has discretion to decide how much pre-tax income will be imputed to an individual
  - \*Up to shareholder to provide evidence of how much the corporation needs to operate, how much pre-tax income is reasonable to hold in a business, whether or not the corporation is cash intensive, whether business is seasonal, whether there is a rolling loan that has to be paid etc...
  - \*Ask: in these circumstances, is it a reasonable business practice to withhold all or part of the net pre-tax income or is it just a way to hoard money to escape CS?

#### Agreements:

- Some parties may enter into comprehensive minutes of settlement under which you can decide anything you want, but since you cannot contract out of Child Support Guidelines an amount agreed upon for child support is not binding
- Can come back years later and ask for recalculation of child support payable
- Judge must apply guidelines, no discretion on base support payable

#### **Retroactive Child Support**

- Orders that go back in time (to minutes of settlement, date of separation, or last order regarding child support)
- We use the income of each actual year to determine what child support should have been
- When making ongoing child support agreements, use last years income (always a year behind)

#### *Lavern v Lavern*

- When dealing with retroactive applications, court must deal with the known income of each year, not the income from the prior year, because FCGS talk about actual income
- The practice is to use the income of the prior year for orders going forward because there is no better way of doing it, but for retroactive orders we have this information and should use it

#### *DBS*

- Three situations where court can award retroactive child support
  - 1) Where an order existed but the amount was inadequate
    - \*Presumptively valid order but increase in income is material change in circumstances which allows a retroactive variation
  - 2) Where previous agreements have existed
    - \*If notice is filed (ex. statement of claim) court can go back to date of agreement, consent order or previous order
  - 3) Where no agreement or order exists
    - \*Order can be made for the date proceeding the statement of claim, but still have to prove notice
- CS is the right of the child; it is the responsibility of both parents to make sure child support is paid
  - \*If payee suspects payor is earning more, must give notice that want more child support
  - \*Also have to give notice if no child support is being paid and you want it
  - \*Date of effective notice is any indication made by payee that child support should be paid
  - \*If you are the payor and know your income has increased, you must say something
- Where there is no order or agreement have to look to date of effective notice and amount child support should have been
- Where there are minutes of settlement or previous orders, have to look to date of effective notice and when child support should have increased
- Court has discretion, does not have to be completely consistent with FCGS
  - \*Not a windfall, must be shown money will actually be used for child
  - \*Prevent undue hardship, maybe not payable in lump sum
- Court will go back 3 years from date effective notice is given, if no notice is given, court can only go back 3 years prior to date of application
- If effective notice was given, but then a long delay occurred before application was brought, delay may militate against retroactive award, but blameworthy conduct may be sufficient to outweigh delay
- Cannot ask for retroactive child support if child is older than 18

## Variation Applications When Arrears Have Accrued

### *Haisman v Haisman*

- Obligation on the payor to establish that they cannot now nor will they ever be able to pay the arrears
- Up to payor to bring application quickly so that they do not fall into a huge amount of arrears
- Rare for arrears to be reduced because it is pretty much impossible to prove that you cannot now or will you ever be able to pay the arrears

## **Division of Matrimonial Property**

### *Matrimonial Property Act*

- Part 1: matrimonial property
- Part 2: matrimonial home possession
- Part 3: general, ability for parties to enter into any agreement they want and contract out of part 1
- Section 1: definitions
  - \*Household goods: anything owned by either of the parties for the use and enjoyment of the children or the parties or education, recreation, social or aesthetic purposes
  - \*Matrimonial home: house or self contained unit which has been occupied as the family home; can be owned or leased by one or both of the parties
  - \*Spouse: includes spouses and former spouses and now includes same sex couples
- Section 3: jurisdiction of the court
  - \*Spouse may apply for matrimonial property order only if habitual residence of both spouses is in Alberta or if the last habitual residence of the spouses was in Alberta and there is no joint habitual residence which was established after the marriage if each of the parties were habitually resident in Alberta at the time of the marriage
- Section 4: how to bring an action
  - \*Statement of claim
  - \*Rare on its own, usually tied in with divorce claim
- Section 5: conditions precedent to an application; when an order can be made
  - \*If a judgement for divorce/declaration of nullity/judicial separation/classification of irreconcilability (under *Family Law Act*) has been granted or the court is satisfied the parties have been living separate and apart for a year or the court is satisfied the parties are living separate and apart and the defendant has transferred or intends to transfer to a bona fide purchaser for value or to give a gift to a third party with the intent of defeating the other party's claim on the property or has been dissipating the property
  - \*Can still make interim applications if none of these conditions are met
- Section 6: time for an application
  - \*If you haven't commenced pleadings by the time parties are divorced, you have 2 years
- Section 7: kinds of property
  - \*7(2) property: exempt property
    - ★Not available for division

- ◆ Gift to one spouse by third party
- ◆ Inheritance in party's name alone
- ◆ Premarital property
- ◆ Award or settlement for tort damages unless it is compensation for loss to both spouses
- ◆ Proceeds of an insurance policy (except in respect to property) unless it is compensation for loss to both spouses
- ★ Person claiming exemption has onus to prove it/trace to an existing asset
- ★ Value of exemption is value at marriage or time you received property
- \*7(3) property: increase in value or subsequent use of exempt property
- ★ Court must divide in a just and equitable manner (as per s.8 factors)
- ★ If the asset still exists, what is its value now vs the value at time of marriage/time of acquisition? The difference is 7(3) property
- ★ If you exchange exempt property (ex. a car) for something else, the value of that car is exempt and if the new asset is worth more that is 7(3) property
- ★ If have exempt property and sell it, look at the value of the asset those proceeds bought, if you can trace it, the value of the initial property is exempt and if the new asset is worth more, that increase in value is 7(3) property
- ★ Includes property acquired by spouse after divorce judgement but before property is settled
  - ◆ After divorce, what normally would have been 7(4) becomes 7(3) property
- ★ Includes property acquired by the spouse during marriage using income from exempt property
- ★ Includes property acquired by a spouse by gift from another spouse
  - ◆ Usually court will say it is just and equitable for parties to keep their gifts
- ★ If have \$100,000 before marriage and it goes into a joint asset get a \$50,000 exemption in 7(2) and the other \$50,000 is 7(3) [*Harrower and Jackson Division*]
- \*7(4) property: everything else
  - ★ Presume you divide this property equitably unless it would be unjust to do so (s. 8)
  - ★ Anything bought during marriage, does not have to be in joint names
- Section 8: factors courts look at in determining division of matrimonial property
  - \* Conduct by the parties, except for economic misconduct, does not matter
  - \* (a) Contribution made by each party to the marriage or welfare of the family including contributions made as a homemaker or parent
  - \* (b) Contribution made by spouse to the operation of a business, farm, enterprise or undertaking operated by the other spouse (business started during marriage)
  - \* (c) Contribution made by or on behalf of the spouse to acquisition, conservation or improvement of the property
  - \* (d) The income, earning capacity, liabilities, obligations, property and other financial resources that each spouse had at the time of marriage or time of trial
    - ★ Unfair where one spouse came in with substantial assets and the other with debt
  - \* (e) Duration of marriage
  - \* (f) Whether the property was acquired while the spouses were living separate and apart

- ★ Sometimes parties are separated for years prior to trial, but value of assets and liabilities is assessed at time of trial, so may argue that property acquired during that period has nothing to do with the other spouse (also if have paid off a huge amount of matrimonial debt during that period)
- \* (g) Terms of an oral or written agreement, previous distribution of the property
- \* (h) Fact that one spouse has made a substantial gift or transferred property to a third party other than a bona fide purchaser for value (will impute back to spouse)
- \* (i) Previous distribution between spouses by gift, agreement or matrimonial property order
- \* (j) Prior order by court
- \* (k) Tax liability that may be incurred by the spouse as a result of sale or transfer of the property
  - ★ Section 73 of *Income Tax Act* says equalization payment for matrimonial property is not subject to income tax
  - ★ If dealing with assets that would be subject to tax if sold or transferred, have to take tax into account and use after tax value
- \* (l) Spouse has dissipated the property at the expense of the other
- \* (m) Any fact or circumstance that is relevant to the court
- Section 9: powers of the court
  - \* May only distribute property which is in Alberta, but may take into account value of other property when determining how to divide the property in Alberta
  - \* Can order that someone pay or transfer an interest; can order sale and direct what happens with the proceeds; can declare spouse has interest even if not on title
  - \* To give effect to an order can order: someone pay instalments over time with interest, one spouse pay security for part of an owing equalization payment, property be charged with all or part of a payment to be made under the order and provide enforcement for that charge, one party to surrender all claims, a release of dower rights, a trust in favour of one spouse, a severance of joint tenancy, a variation of any terms of an existing order, any order necessary to give effect to distribution of property (very broad powers)
- Section 10: where one of the spouses has made a substantial gift or transferred to a person who is not a bona fide purchaser for value and did so with intention to defeat interest of other spouse and the transferee accepted and knew or ought to have known transfer was done with intent of defeating claim of other spouse and transfer made within last year of action started
  - \* Order transferee or donee to pay or transfer the property back
  - \* Can give judgement in favour of wronged spouse against third party for amount spouse should have received on distribution
  - \* Can treat the property as still in the possession of the spouse who transferred it f
  - \* 10(3): value is fair market value at time of trial
  - \* 10(4): have to serve the transferee or donee and include them as a defendant for that property

### *Nay v Nay*

- Husband transferred his interest in some land to his dad 2 months after action for divorce was started

- Husband's dad was not served with notice until 2 weeks before trial
- Trial court said property still belonged to son so divide as if he still owned it
- Court of Appeal said look at due process, the third party did not attend and had no opportunity to defend his claim because he only had 2 weeks notice
- If you want to make a section 10 argument, be sure third party is served in a timely manner

### *Cox v Cox*

- Where missing property does not fall within section 10 (ex. did not occur within a year of the action, third party did not know the transfer was with the intent of defeating the interest of the other spouse, wasted, unexplained spending etc)
- 8(1): court may take into account where one spouse has dissipated property at the expense of the other
- In this case, husband sold shares and put the money into gambling which left the court with two options
  - \*If there is anything left, forgo equal division and give all of what is left to wife
  - \*Say those shares should have been there, so impute value back to husband
- Nine principles of dissipation:
  - \*7(4) creates a presumption of equal division unless not just
  - \*8(1) provides 1 factor, dissipation, which can lead to unequal distribution
  - \*Dissipation requires a degree of intent, but intent not need extent to intention to deprive spouse of her share, sufficient if one spouse intends to dissipate the asset
  - \*Must be an actual detriment to other spouse
  - \*No dissipation if reduction based on reasonable expenditures made on behalf of the family or to maintain existing assets; will look to see if payment could have been made out of party's income instead
  - \*If asset is sold will not be dissipation if proceeds can be traced to another asset
  - \*If assets are sold for less than fair market value, the courts may determine whether sale was done improvidently, hastily or fraudulently, if done in way determined in pre settlement negotiations might not be dissipation
  - \*Total amount that is dissipated to detriment to spouse is half of the amount by which the asset was reduced
  - \*Ultimately in discretion of trial judge based on consideration of all the facts to determine whether or not dissipation exists

### Prevention of a Gift or Sale:

- S. 34 MPA: If court is satisfied that one spouse intends to transfer property to someone who is not a BPFV or may make a substantial gift of property which will defeat the claim of the other spouse, the court may by order restrain the transfer or gift
  - \*Application may be made while parties are still living together
  - \*Application may be commenced *ex parte*
- Rules 6.25-6.27 ARC: Interim preservation orders
- Injunction or freezing orders:
  - \*Factors for an injunction:

- ◆ Full disclosure with regards to the matters of the claim
- ◆ State particulars of the claim
- ◆ Belief that the other party has assets within the jurisdiction of the court
- ◆ Factual grounds for belief that person is likely to remove or dispose of assets
- ◆ That you will be liable for any damages resulting from restraining transfer
- For bank account, get a freezing order to prevent spending
  - \* Applicant's account will be frozen as well
  - \* Must serve order on the financial institution or person managing the accounts in the institution
- S. 35: Filing a certificate of lis pendens- filed against real property and means that real property is subject to litigation
  - \* Not an application to the court, once you commence your action you file a lis pendens with land titles to prevent other party from selling real property in their name

#### Appeals to Matrimonial Property:

- Grounds for appeal are that trial judge didn't go through all the factors in s. 8

#### *Dwelle*

- An omission to reference each factor in the reasons does not necessarily mean error
- Different if can show trial judge was led to make the error because they misinterpreted the law
- Statute in Alberta is flexible, s. 8 lists matters to take into consideration, but interplay between them is left to the discretion of the court
- Only s 7(4) (presumption of equality) is a strict rule

#### Interim Orders for Matrimonial Property:

- Can't get final division of property from Chambers but can get interim order
- Freezing orders, injunctions etc
- Exclusive possession of the house
  - \* Don't lose equity or entitlement to the home
  - \* S. 19 MPA (interim order)
    - ★ (1) Court may: (a) give spouse exclusive possession of the matrimonial home; (b) evict spouse from the matrimonial home; or (c) restrain a spouse from entering or attending at or near the matrimonial home
    - ★ (2) give the spouse possession of as much of the property surrounding the matrimonial home as is necessary for the use and enjoyment of the matrimonial property
    - ★ (3) conditions and times of the orders
  - \* S. 20 (test for exclusive possession orders)
    - ★ First convince court that cohabitation is intolerable, then look at:
      - ◆ Availability of other accommodation within the means of both spouses
      - ◆ Needs of any children residing in the matrimonial home
      - ◆ Financial position of each spouse

◆ Any court order regarding property or support and maintenance of either spouse

- \*If you want other side to pay for mortgage, must put that in application
- \*S 22: can register order at land titles
- \*S 23: can register at personal property security registry if mobile home
- \*S 24: if lease/rent person with the order gets lease as tenant
- \*S 25: getting exclusive possession of household items
- \*S 26: may register personal goods with PPSR
- \*S 30: may make application under MPA or FLA s. 67-68, but order must be heard at QB; can make an *ex parti* application

### *Portugal*

- Trial judge gave wife a right to the home for 9 years (until youngest child is 18) which is unusually long
- She is responsible for property tax and mortgage payments, but when the house gets sold she gets reimbursed
- Husband appeals and wants to sell house to pay off debt
- Court of Appeal upholds exclusive possession order, but does away with idea that wife gets credit for mortgage and property tax payments because that gives wife free accommodation for 9 years
- Person who has exclusive possession usually required to pay for maintenance and mortgage because they get exclusive enjoyment and the other party needs to find another place to live

### *Tawiah*

- Appeal of interim exclusive possession order granted to wife
- No physical abuse, but said husband had violent and quick temper and she was afraid
- Wife runs her catering company from house and needs it for money
- Husband says he is not violent, the wife does not run the business out of the house and it should be sold and both parties should find new accommodations
- Husband earned more income and was the only one on title
- TJ and CoA upheld order because it would affect her business, tension between parties, and husband's income was enough to sustain him
  
- Court may make interim distribution of matrimonial property orders or orders for interim costs to pay off debts or to support litigation costs

### *Gartner v Ewasiuk*

- Parties were divorced but had not dealt with property; separated for 7 years
- Wife applied for preservation order, freezing order, order for interim distribution and interim costs
- Corporate assets in business solely held by husband
- Husband got rid of her shareholdings and reduced his and moved money from their joint account to his own without her knowledge

- Made a gift of real property to his adult children who were added as dependents under s. 10
- Trial judge awarded freezing order for some assets, 200K under interim distribution and 10K in interim costs
  - \*Majority of the assets were acquired during the marriage
  - \*Net assets far exceed assets of interim distribution
  - \*Husband had control over all assets prior to separation
  - \*Liquid assets such as shareholder's loan were available and if necessary corporation had ability to borrow funds
  - \*Distribution could be made without serious tax consequences
  - \*Interim distribution can be made without serious prejudicial effects on matrimonial assets
  - \*Wife was in need of funds to meet capital demands
  - \*Fundamental imbalance between the parties in their ability to protect their respective interests
- S 9(3)(j): court can make any order it deems necessary

*Tarapaski*

- Wife applied under rule 221 for distribution of corporation
- Allowed interim distribution under rule 9
- Court had authority under s 9(3) to make interim orders
- Wife asked for 50% of the shares to be transferred to her and application was allowed
- Circumstances are such that court should exercise its discretion to have interim distribution
  - \*Presumption of equality with regards to shares
  - \*Effecting distribution now would not prejudice the husband with regards to other matrimonial property because other property available to husband to make up for this
  - \*As to Mr. A.K.T.'s potential prejudice arising from a personal judgment in the Tycholis matter, Ms. S.L.T. acknowledges that she should be required to save her husband harmless from that potential result.
  - \*Argument regarding inability of parties to cooperate can be dealt with through a court appointed monitor and then long-term by shot-gun buy-sell agreement
  - \*Parties and the public would benefit from having this company removed from contested property- practical reason: parties spared a week of costs and courts have additional week of trial time to make available to public
- Imbalance, sufficient property to make up prejudice, no tax prejudice
- Not a distribution automatically just because no prejudice, must show a benefit
- Idea behind interim costs is to level playing field
  - \*Courts lean towards interim distribution of property rather than interim costs
  - \*Argue costs though because under distribution of property, this is a share of the property that is later owed, so rest of case is arguing about distribution of property
  - \*Interim costs is not an advance and does not come into distribution of property

When One of the Parties Dies (s 11-16):

- S 11: What happens when one party dies before distribution of matrimonial property is dealt with
  - \* (1) Subject to this section, an application for a matrimonial property order may be made or continued by the surviving spouse after the death of the other spouse
  - \* (2) A matrimonial property order may be made on the application of a surviving spouse only if an application for a matrimonial property order could have been commenced immediately before the death of the other spouse
  - \* (3) When a matrimonial property order is made in favour of a surviving spouse shall take into consideration any benefit received by the surviving spouse as a result of the death of the deceased spouse
  - \* (4) Application to divide the matrimonial property may not be commenced more than 6 months after the date of probate or administration of the estate of the deceased spouse
- S 12: suspend whole or in part the administration of the estate until the division of matrimonial property is determined

Date of Valuation and Division:

*Kazmierczak*

- Separated for 13 years before trial and property has changed over this time
- Trial judge uses date of trial for valuation
  - \* Wording of act suggests to use the date of the trial
    - ★ 7(3): market value at time of trial of the original property or property acquired
    - ★ 7(4): doesn't matter when property is acquired; if it is acquired during marriage then presumption applies
    - ★ 8(f): whether the property was acquired while the spouses were living separate and apart
  - \* Usually after the separation the financial lives of spouses are not really separate
  - \* Difficulty in determining the value of the assets years after the separation

*Hodgson v Hodgson*

- TJ: Date of trial is only presumptive rule, but there are exceptional facts here so we should use date of separation
- COA clearly states property is valued at date of trial and if there is a negotiation then at the date of the negotiation
  - \* Presumption strong because of wording in statute
  - \* If want to argue for unequal division, look to section 8 factors

Exemptions:

- First determine what property exists
- Then ask: was there a common law period before marriage? If so, constructive trust
- Was there a prenup? This trumps
- 7(2) look for exempt property and ask does it still exist or can it be traced to an existing asset?

- How much is exempt? What was value at time of acquisition or time of marriage? What is its value now? Increase in value is 7(3) property to be divided as is just and equitable (if not in joint names)
- If exempt asset was put into property in joint names, Harrower and Jackson division (1/2 exempt, 1/2 s 3)
- Any evidence to argue against 7(3) portion being a gift? (Quigg)
- Increase in value after property has been moved into joint names is 7(4) property to be divided equally
- If the exemption has decreased in value, can only claim current value

### *Quigg*

- At time of marriage husband had 14K of equity in the home which he sold and used proceeds to buy home in joint names
- TJ said since it was put into a house in joint names it should be divided equally
- CoA says something in joint names is still subject to division under MPA
  - \*36(1): do not apply presumption of advancement between spouses
  - \*36(2): notwithstanding (1) fact that property is taken in name of both spouses is proof in absence of evidence to contrary that joint ownership of beneficial interest in the property is intended (prima facie proof it was a gift)
  - \*But no evidence he intended to give half of 14K to his wife by putting it into a home in joint names
  - \*So he gets the full 14K exemption
  - \*When you are dividing the property, 14K of the equity in the house belongs to him before you apply any equal division to the rest of the equity

### *Jackson v Jackson*

- Husband's mom gives him \$61.5K as a gift, which is exempt because it is a gift from 3P
- Uses to pay down mortgage on jointly owned home and purchase duplex in joint names
- CoA says when you take exempt funds and you put it into a jointly owned asset, 1/2 of it remains exempt and the other half is considered **a gift to the marriage** and that is properly section 7(3) property

- Not 7(4) property, no presumption of equality, to be divided in a manner that is just and equitable
- Can still use *Quigg* to ask if any evidence to rebut the presumption that the 37.75K was a gift to the two of them, but it is very hard to do

#### *Harrower v Harrower*

- Husband gets 72K gift from friend and uses it to pay off joint debt and some jointly owned property
- Must be able to trace exemption into existing property to actually claim it
- Sometimes tracing can be very difficult to do, but tracing can be inferred, implied or presumed- if there was no other pot from where this money would have come
- Value of exemption is value of traceable asset after last trade in
- Losses in exempt property are not distributable even though increases are distributable as s 7(3) property
- If you take exempt funds, and you use it to pay down debt, and you cannot tie that debt to an existing asset you lose your exemption
- Virtually impossible to argue that other half was not a gift, all you can really do is argue that under 7(3) it should be divided unequally

#### *Brokopp*

- When parties were first together had house purchased with money from wife's father but that money was a gift to the two of them
- 7(2) only applies where gift to one spouse only
- House moved onto land owned by husband's father who signed agreement acknowledging house and improvements were separate property of husband
- Farmed land with understanding it would be inherited by husband
- Wife inherits 27K and argues invested 5K in her name alone and used rest to acquire matrimonial property and pay matrimonial debts
- Any exempt money spent on debts that cannot be traced into existing asset is lost
- Unless you can show it is to pay down debt on specific asset you do not get exemption
- She could trace about 14K of that inheritance that went into specific assets and because those assets were jointly owned, her exemption was 7K
- Beneficial interest in dad's land was exempt gift to husband, no talk about increase in value
- Basic divisional structure: Total of assets- total of debts - total of exemptions and what you have left is 7(4) which you divide 50:50

#### *Sparrow*

- Parents transferred cabin to husband and his brother
- After they transferred it, the parents continued to pay property taxes and paid for all upkeep
- From time of marriage to time of trial cabin increased by from 160 k to 1 million in value
- Husband had a half interest, so at time of marriage exemption was 80K but increased to over 440K

- CoA: increase is 7(3) property which should be divided as just and equitable and look to s 8 factors to determine
- Trial judge looked only at contributions the parties made while at cabin, CoA said this is an error because should have a more complete analysis of s 8 factors
- Unnecessary to conduct factor by factor analysis but at least consider the factors the parties have clearly raised in evidence and argument
- Failed to consider the fact that in 8(c) the husband parent's contribution to taxes and maintenance was made on behalf of husband
- Factors which favour wife must be balanced against factors which favour husband
- Ultimately gives 70% increase to husband and 30% increase to wife
- But for husband's parents and the contributions made by them on his behalf the parties did nothing to increase the value of the property
- Capital gains when cabin is transferred are almost 900K and 50% would be taxed
  - \* Husband arguing you should take that into account when valuing the property (this is what you do the vast majority of the time for real property)
  - \* Weird that court said no in this case, said they may never sell it and tax laws may change
- At time of trial husband owed Revenue Canada 91K in unpaid taxes
  - \* These parties often owed taxes which his parents paid off
  - \* His parents paid this off but he is claiming matrimonial debt and both parties should be responsible to pay it off
  - \* CoA says it is a matrimonial debt and wife is responsible for half
  - \* His parents may have paid this but they did so because the parties used their money to maintain their lifestyle and they both benefited who she should take some responsibilities
  - \* Debts accumulated during marriage are generally going to be matrimonial debts

### *Felker*

- Final division of property made in Chambers, unusual
- Husband ran a cattle ranch
- Common law relationship for 3 years, separated for 6 months, get back together, married for 12 weeks before they separate
- At time of marriage husband's net assets were 200K and at time commenced marriage his assets were 364K
- Husband is saying there is no increase in value here, there is a loss in exempt assets, therefore what is left is all exempt, there is nothing to divide
- Wife said he cannot trace exempt assets, money went into cattle and he made 2 dispositions of entire herd
- Wife saying sale of 2 quarters of land used to pay off debts so exemption lost, reduction in mortgage from sale of exempt cattle so he should only get half of the exemption
- He was arguing if repayment of debt from proceeds of exempt property does not create non-exempt equity, does not mean there is pool for her to share if no assets to share in the first place
- Judge says sometimes tracing can be inferred and looks at nature of this farming operation

- \*Husband provided records to show he sold his herd largely to pay down operations loan which is used to acquire more assets and generate more income
- \*Able to infer paying down debt would improve financial position to purchase a new herd
- \*Wife's position ignores the nature of the operation which would inevitably involve the sale of cattle to pay down operations loan to get more assets and generate more income
- \*Inference that source of existing asset is an exempt asset is not limited to situations where source is clear and established, sometimes it can be inferred
- \*In businesses like this, cannot stop at one transaction, look at nature of operation
- \*All traceable because paid down debt of farm operation, no evidence at all in 12 weeks of marriage that there was any gifts made to wife or commingling of property, property did not come into matrimonial regime, short term marriage

### *Mazeranko*

- Together 30 years, 3 year separation, got back together and then split permanently
- Had a farming operation together on husband's family farm
- 3 quarters of land at issue, all transferred from husband's parents into his name alone
  - \* First quarter for 5K in 1954
  - \* Second quarter for 6K in 1964
  - \* Third quarter for 16 K
    - ★ Sold for 30K before trial
- In 1973, husband had purchased house in town and put it in names of his grown daughters
- CoA said trial judge was wrong to divide everything equally and looked at each quarter of land
  - \* First quarter was a gift to both parties; wife had just come back from separation and had been promised land to farm for her own -7(4) divide equally
  - \* Other quarter sections at time of transfer were 7(2) property and increase in value is 7(3) to be divided as is just and equitable using s 8 factors
- Wife made argument that house in town was not a bona fide purchase, but no evidence
  - \* Wife trying to argue entire house was matrimonial property even though it was in the name of her husband and daughters
  - \* No evidence this was done to defeat her interest
  - \* Only 1/3 was matrimonial property
- In determining how 7(4) should be divided you presume equality, but court discretion to look at factors in s 8 to deviate from this presumption
  - \* Must be some real imbalance in the contributions in regards to what was expected of each party because ordinarily equality is the rule
- In dividing increase in value ask if exempt property was brought in for the use and benefit of both parties and determine what is just and equitable using s 8 factors
  - \* Land in 1964 was brought into regime, farmed, improved, maintained and dealt with as part of the matrimonial farm, so proceeds should be shared on the same basis as the other matrimonial property (exemption for 6K at time of transfer, increase is split)

- \* Land in 1974 was transferred to husband after separation but prior to divorce and never came into matrimonial regime, exemption is the original 16K value, but just and equitable division of the increase is 100% to husband so he keeps all

*Dwelle v Dwelle*

- Husband is 53 year old widower farmer and wife is 30 year old hair dresser with kids
- Wife threatens to leave, so husband purchases her a duplex and puts it in her name
- Trying to value his farm land at time of marriage which can be very difficult
- Court of appeal give the husband 80% of the increase in value and 20% to her and he gets exemption
- With duplex she gets 80% of increase in value and he gets 20%
- Overturned trial judge's decision because he was very concerned with wife's non-economic behaviour during marriage which is never a factor
- Only economic misconduct can come into the analysis

*Jenson v Jenson*

- At time of marriage, wife is a dietician and at her husband's behest she quits to care for the kids and household, do bookkeeping for his farming operation and work on the ranch=
- Parties incorporate company as equal shareholders and most of the farm's assets are transferred to the company
- Prior to marriage husband had some land in his name alone and some land jointly held with his brother
- During marriage parties acquired more land, some acquired in name of company and some went into their joint names
- One parcel of land that was transferred to the parties in joint names from his parents 3 years into the marriage
- Parties provided a promissory note and granted his parents a mortgage but later entered into an interest reduction agreement which basically forgave the debt and grant the parents a life estate, a right to receive all payments under surface lease on those disputed lands
- Husband commences divorce action, and wife commences action under ABCA and parents are not added to either action
- Before trial, parties enter into an interim distribution agreement and agree that some land would be transferred to the wife into her name alone and she would receive 97K from the company to be characterized as a dividend upon which she will be taxed
- For 7(4) property, begin with presumption of equality and look at s. 8 factors, cannot overemphasize the contributions of each party at expense of other factors; unequal distribution is an exception

- \* No formula for applying s 8 factors, presumption of equality is the closest thing that the legislature came to when proposing a rule for matrimonial property distribution
- \* Designed to protect against inequities arising from dissolution, recognize social and economic partnership
- \* Parties allocate responsibilities in manner which is adequate for them; do not need contributions to be equal for equal division (Leblanc)
- \* Question to be asked is whether there is some real imbalance in contributions regarding what was expected of each
- In regards to valuing exemptions, it must be the actual value
  - \* Cannot ignore any debts on the property, must look at net equity
  - \* If land is valued at 200K with 50K mortgage, equity is 150K and that is exempt
  - \* Also account for taxes, do a notional tax deduction
- In regards to the proceeds of a sale of cattle which were owned by the company, it is 7(4)
  - \* Parties were equal shareholders in company and cattle were corporate property
  - \* Sale of assets to be divided 50:50
- In regards to disputed lands trial judge awarded a resulting trust over the disputed land in favour of the parents, but CoA said this was wrong as resulting trust was never pleaded and parents were not made parties to the action
  - \* Besides, look at intention of parties at time of transfer, not later when they regret it
  - \* At the time of transfer, the land was a clear gift to the two of them
  - \* Parties had legal advice and consideration was given in the form of a mortgage and promissory note and interest reduction agreement was gift to the son which was shared with the wife
- CoA said husband bound by amount of land transferred to wife in distribution agreement because agreement was made under s. 37 of MPA so they are bound to what is written there
- But said the 97K was not an income or dividend it was an advance on her share of the property
- She will not have to pay taxes, but when final distribution is ordered her share will be reduced by 97K

## **Common Law**

### *Murdoch v Murdoch*

- Mrs Murdoch wants a share in farming operation and claims that early on she worked so he could save money to put a down payment on the house down
- SCC said this is not enough because to claim resulting trust must have evidence to show she contributed to acquisition of the property
- Laskin J brought up the foundation for constructive trust in his dissent and said she should be entitled to a share based on the work she put into the property
- Constructive trust: enrichment to one party, deprivation to the other, and absence of juristic reason (ex. she was not his employee)
- If the parties do not agree to a roll over, have to put on matrimonial property statement and make notional deduction for tax purposes

### *Rathwell*

- Case where Laskin J's description of constructive trust became part of the law for married people (while *Matrimonial Property Act* in the works)

### *Pectus v Becker*

- Constructive trust applies to both married and unmarried people
- Marital status should not matter for a claim in equity
- She paid rent and bills while he saved to buy property in Ontario
- Set up a beekeeping operation which she looked after while he was away trucking
- Dixon said she qualified for resulting trust because while she was paying rent he could save money and would not have been able to do this otherwise so she made financial contribution
- But even if that is not true, she is entitled to constructive trust because she worked throughout the relationship and he was enriched and she was deprived as he left her nothing

### *Syrokin*

- He already owned the property when they got together so she could not show contribution from the beginning
- SCC, Dixon J, said does not matter when looking at constructive trust, you are looking at contributions whether that be to the acquisition of the property or not
- She worked on the land for 43 years, he was unjustly enriched and she was deprived with no legal reason
- She was given a share but it was not half

### *Peter v Beblow*

- Over 12 year relationship she had contributed to domestic services but not financially
- SCC said domestic services are sufficient to ground a claim in unjust enrichment and she gets a share
- Once constructive trust is found, generally grant monetary remedy, only where monetary remedy is inadequate do you get a piece of property if you can show a nexus from the work done to that property
- 2 ways of determining monetary award
  - \*Value received- How can you quantify the work done?
    - ★Quantum meruit- what it would have cost him to pay for those services
    - ★Done for limited, short-term relationships
  - \*Value survived- How much value is left in the assets and can we calculate what that person's contribution was?
    - ★If land is worth 100K and she made a 30% contribution she gets 30K

### *Walsh v Bona*

- Nova Scotian woman challenged exclusion of common law couple from *MPA*
- SCC said the exclusion of common law folks from matrimonial property legislation across the country was not a violation of section 15, it did not discriminate, because of choice

- People choose to get married and take on obligations of matrimonial property legislation

*Eric v Lola*

- 5 judges in SCC now say it is discriminatory under s. 15, but one said it was a reasonable limit under s. 1 so still not included

*Kerr v Baranow* and *Vanasse v Seguin*

- Three approaches to valuation
  - \*Quantum meruit: Shorter relationship; value received- what would he have paid for these services? Amount reduced by benefits received
  - \*Constructive trust: where person can prove contribution to a specific piece of property (acquisition, maintenance, improvement or preservation) court looks to value of property and calculates what that person should receive based on the proportion of their contribution (contribution less any benefits what would a fair percentage be?) - tied to specific piece of property, only get proprietary interest where money is inadequate
  - \*Joint venture: enrichment has occurred because one person has received a disproportionate share of the wealth at the end of the relationship even though the wealth was produced by joint efforts (where can't show it went to a specific piece of property)- if find joint family venture, can give person a share of the whole value of the property (including RRSPs, investments etc)
    - ★Mutual Effort
      - ◆Kids- show joint commitment, make more likely
      - ◆Length- more likely for 10+ years, will not find for >5
      - ◆Joint Contributions- pay mortgage together, joint account etc
      - ◆Childcare/housework- was it equal?
    - ★Economic Integration
      - ◆Joint bank accounts/paid for things together
    - ★Intention of the Parties
      - ◆Did they consider it equal to marriage? Was it a deliberate decision not to enter marriage with all of its proprietary consequences?
    - ★Priority of the Family
      - ◆Did one party give up career to raise children?
- If can find a joint venture, get a share of the assets, but how much?
  - \**Lemoine v Griffith*- 35% despite hard work on farm, unlikely to get more
  - \**Vanasse v Seguin*- she got 1 million and he got 7 million
  - \**Sworan v Sworan*- 25%, 12 year relationship, farm
  - \**Kerr v Baranow*- Sent back to trial because he had unjust enrichment claim against her for helping her out when she had a stroke where her share was reduced from 1/3 of the house to 1/4 of the house

## Valuing Property:

Types of Property to be Considered:

- Property is more than real property and land
- Land, cabins, home, farms, timeshares, collections, motor vehicles, boats, RVs
- Corporate interests
- Professional Corporation
- Stocks, bonds, stock options
- RRSPs, non-registered investments, tax free savings account, mutual funds, Canada savings bonds
- Life insurance policies
- Trust accounts, bank accounts
- Bonuses, severance packages, pensions

Matrimonial home:

- Do not rely on city's tax adjustment, get a real estate agent or pay for a certified appraisal
- Look at encumbrances (mortgage, line of credit, property taxes) and subtract from value

Other real property:

- Anything but matrimonial home will attract capital gains taxes
- Need current value and time acquired because 50% of increase is subject to tax
- Do notional deduction

Time shares:

- Virtually impossible to sell because many restrictions on contract
- Difficult to determine fair market value so will need agreement between parties
- Sometimes agreement where parties share it year to year
- Make sure put into agreement who pays maintenance fees

Household stuff:

- Very little value unless special collection
- Best thing is to hire arbitrator to help parties each select half of it
- Common to argue about jewellery and need an appraisal (but gifts are 7(3) property)

Vehicles:

- Decrease in value as soon as you acquire them
- Go online, get the specs of that particular vehicle and get an idea of what it is worth
- But if fancy car, go to dealer

#### Bank accounts:

- Look at 6 months of bank statements you get in disclosure
- Check to see how much is traditionally there and to see if it changed around the separation
- Put on matrimonial property statement if it is significant

#### RESPs:

- Vast majority of the time agree those assets belong to the children and do not go onto matrimonial property statement
- Have to deal with who is going to administer it and deal with tax implications if it is never used for educational purposes

#### RRSPs:

- Usually dealt with separately from matrimonial property statement via roll over (one party has 80K and the other has 100K total here is 180K, equal division is 90K each so the party with 100K rolls over 10K into the RRSP account of the other one)

#### Corporate interests:

- Sometimes there will be shares in a larger company, but most of the time the shares are in a small company incorporated to run one party's income through
- Compellable disclosure for financial statements of last 3 years for privately owned company for which you own more than 1%
- If have significant assets, 3P shareholders or think something is wonky, need a business valuator

#### *DBC v RMW*

- Husband owned 39% of common shares in corporation and wife owned 1%
- Minority shareholders owned the rest
- Parties agreed shares must be held onto to realize value potential, but it is impossible to value the shares at this time
- Issue was should the husband keep those the shares and hold half in trust for her, was her interest beneficial or was it legal? should half the shares be transferred to the wife?
- USA said no transfer of shares without approval of board of directors (husband and his friend)
- Court in no position to override USA and order transfer of shares so say husband must hold his wife's half of his shares in trust
- He does not need to consult with wife when he is voting associated with her shares, but had to vote in a manner that a reasonable person would consider to be in her best interests
- Husband got stock options as part of an incentive for a job he started after separation
- Wife was arguing she was instrumental in this investment opportunity because of love and support she provided during marriage but court rejects this because it was property acquired after marriage and it would be unjust to give the wife a share

#### Stocks and bonds:

- If parties cannot afford to keep them, if not enough money to divide up, have to sell them and after tax value is split
- If want to keep them, need to do notional deduction for taxes
- Ask if they are vested, exercisable now or in the future?

### *Gardner*

- Husband got stock options from his employer every year and when he exercised it would get tax benefits
- He argues that the stock option is not property it is income
- Court rejects it and said all of stock options, whether exercisable immediately or in the future are matrimonial property
- Options which have been allocated but are not exercisable are present right to acquire something in future
- If exercisable now you can determine the value and buy the other person out or exercise and split
- If they are exercisable in the future, will be held in trust until exercisable
- If they are a stock option acquired during marriage chances are will find it to be property

### *McDonald*

- Application for variation of spousal support went to chambers
- Husband arguing that the bonus and severance package and stock options are property and wife arguing that they were income
- Husband saying we have already divided our property, if you now when we are doing a variation in support, if we are now calling this income, she is getting a share of the same thing as income
- Court of Appeal said it was all income because no matrimonial property action before the court, the property has already been divided so have to call it income (prof thinks they were wrong)
- Bonuses are always going to be income, paid as remuneration
- Followed Read analysis as far as severance is concerned
  - \* 2 components to severance, one is a recognition for past services and 2nd is recognition for loss of future income
  - \* If first part was acquired during marriage it is distributable as matrimonial property
  - \* Second part not distributable because no tangible connection to marriage

### Pensions:

- Used to be that you could not divide your pension until it was cashed
- Now all pension plans have the ability to transfer a lump sum after pension into a locked in retirement account for the other person
- Once you have determined what the non-pension spouse is entitled to, it can be transferred over just like a roll over, pension administrator will take that amount and roll it over into a locked in retirement account

- Some pension plans will actually create a separate pension for spouse and divide it out
- If both spouses have pensions, there will be some equalization involved
- When people want to keep their pension have to deal with what is the actual value so will need to hire an actuary

#### *McAlester*

- How do we determine what portion of a pension is matrimonial?
  - \* Number of years of marriage divided by number of years of service and multiply by value of pension and that equals the matrimonial value of the pension

#### WCB claims:

- Damages you get in tort are exempt (7(2)(d)), but these are not

#### *Hughes v Hughes*

- WCB claim is not exempt because it is achieved under WCB legislation and not a tort claim

#### Debts:

- Occurs often where parents gave money to their child during the marriage
- People will say a lot that my parents gave us this money but it was really supposed to be a debt, but can't just recharacterize something now that they are getting divorced
  - \* Was anything written down?
  - \* Any talk about interest?
  - \* Did you pay anything back?
  - \* Did the cheque come with a Christmas card?
- Also comes up where one party pays down matrimonial debt or accrues more debt before trial but after separation
  - \* You still look at assets and liabilities as they are now and argue for an unequal division of property under s. 8 because the debt came after separation and this is one of the factors

#### *Abbott*

- Husband's mom advanced him some money and he does not pay her back so she commences a legal action and he does not defend and she gets a judgement for 750K
- He is claiming this is a matrimonial debt
- Wife arguing not all the debt was accrued during the marriage and it was not actually a true debt, he had no plans to pay his mom until the divorce, just wanted to reduce her share
- What ultimately ends up happening here is debt which was accrued before marriage was not matrimonial
- Looked at portion accrued during marriage and asked if she benefited from it and found only 1/4 was matrimonial debt

### *Bousineous*

- Look at the reason for the debt, can you tie it to the marriage? If not, you will be arguing for an unequal division of debt
- Quite often people will pay off debt just to get rid of it, other lawyer will try to argue that it does not exist now so we won't deal with it
- If it was paid off, argue it as if it still exists, and whatever the equalization payment is it should be reduced by half the amount of that debt

### Occupational Rent:

- One spouse is living in the matrimonial home and the other is living elsewhere and paying rent
- Sometimes person paying rent will request occupational rent (usually where no mortgage left on home)

### *Kazmierczak*

- Parties separated for 13 years, 1 still living in matrimonial home
- Principles of occupational rent:
  - \*If you do not put it in your pleadings, you cannot argue it
  - \*Generally cannot claim occupational rent if kid is still living in the home
  - \*Claim and cross applications for spousal support and child support should all be considered at the same time- since it is an expense for the person living in the house and income for the person receiving it
  - \*In most cases it is easier to eliminate occupational rent from the equation and deal with child support and spousal support together
  - \*Person living in house will not receive credit for any property taxes or mortgage payments paid by him/her unless there is a decrease in the principle
  - \*May be some cases where the family cannot afford to keep the house; If one spouse insists on staying in the house, then fairness may require that occupation rent may be included in those situations
  - \*Must plead it from the beginning
- Valuation: what would you get if you rented the home on the open market? Occupational rent will be 1/2 of that or 1/2 of the rent that the non-occupying spouse is paying somewhere else
- To avoid issue, bring application to sell matrimonial home under s. 9 or *Law of Property Act*
  - \**Law of Property Act* has limits regarding matrimonial home
  - \*In negotiations, want to set out price which is acceptable
  - \*Usually do this where house is only significant asset
- When selling matrimonial home and parties are married, need a dower release
  - \*Can bring application under *Dower Act* to dispense with consent requirement
  - \*If someone who is separated but not divorced wants to buy the house with a new partner it is technically matrimonial property and will need dower release from spouse
- Bankruptcy can be a big problem

- \*Must let other party know if you are considering declaring bankruptcy
- Lottery winnings
  - \*If lottery is won during marriage, no issue
  - \*But issue where parties are separated but not yet divorced
  - \*Lotto winnings are s. 7(3) property, the longer parties are separated and the less financially deprived the parties are, the less they will get
- Points from various memberships
  - \*Hard to separate, but must address in minutes of settlement
  - \*Virtually impossible to value, parties can agree on value
  - \*Some plans allow you to split, set up new card and transfer points
  - \*Need not only entitlement but permission to deal with company directly
  - \*Usually through negotiations; s. 37 and 38 of Act allow parties to enter agreements

### **Matrimonial Property Agreements:**

- Section 37 talks about agreements
  - \* (1) Part 1 does not apply to property that is owned by either or both spouses or that may be acquired by either or both of them, if, in respect of that property, the spouses have entered into a subsisting written agreement with each other that is enforceable under section 38 and that provides for the status, ownership and division of that property.
  - \* (2) may include prenups but the agreement doesn't take effect until marriage (if not getting married call it a cohabitation agreement)
- Section 38 talks about requirements for an agreement to be binding
  - \* Need acknowledgment that
    - ★ Spouse or person is aware of the nature and the effect of the agreements
    - ★ Spouse or person is aware of the possible future claims to property the spouse or person may have under this Act and that the spouse or person intends to give up these claims to the extent necessary to give effect to the agreement, and
    - ★ Spouse or person is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or person
  - \* Need certificate of independent legal advice
    - ★ Cannot have agreement if other side won't hire a lawyer so if agreement is important to you, may want to pay for their lawyer
  - \* Without those 2 documents, agreement is open to challenge
  - \* If these requirements are met then *prima facie* the agreement is binding
- Setting Aside Property Agreements:
  - \* Does the agreement meet the formalities of s. 38? If so, move on
  - \* Challenge whether they had independent legal advice
    - ★ Advice explaining what they are entitled to and what they are giving up
    - ★ Rick v Brandsema: advice about what the lawyer actually thinks of the agreement
  - \* If can't challenge under s. 38, could still challenge it under regular contract principles

### *Segal v Qu*

- Parties had a prenup, separated, got back together and signed a new property agreement
- Husband is relying on first prenup but wife is attacking prenup on a number of grounds
  - \* Lack of complete financial disclosure (Ontario, not AB requirement)
    - ◆ But would the parties have signed the agreement anyways with full disclosure?
    - ◆ Disclosure is huge, make your client disclose, courts will open up agreements if something is not disclosed
  - \* Mistake- she should not have signed the agreement
    - ◆ Mistake is a person signing a doc which they thought had one effect when it actually had another
    - ◆ No mistake, she knew effect of agreement
  - \* Duress
    - ◆ Threat of death or serious injury made with intent to make them sign agreement
    - ◆ Not found here, very hard to prove with 2 parties
  - \* Undue influence- abuses of power which are more subtle than duress
    - ◆ Some relationships raise a presumption of undue influence, be careful not to pressure the other party
    - ◆ Ability of one person to dominate the other through manipulation, coercion, abuse of power
    - ◆ Look for pattern of dominance, but it is tough to prove
  - \* Unconscionability
    - ◆ Have to find an inequality between parties, preying of one party on the other, combined with improvidence
      - ★ Is the agreement grossly unfair? (objective)
      - ★ Did the stronger party take advantage of the there party's weakness? (subjective)
        - ♣ Necessity of relying more on objective rather than subjective part of the test simply because it is difficult for any trial judge to know what the environment was in terms of negotiations because negotiations are often fraught with emotion
- Where s. 37 requirements have been met and full disclosure has been given, then very difficult to have a property agreement overturned

### *Rick v Brandsema*

- Attempting to overturn matrimonial property agreement based on unconscionability and lack of disclosure so looked to *Miglin* case
  - \* Because of emotions involved, these agreements should not be treated the same as regular contracts
  - \* Must take into account the negotiation environment
  - \* Onus not to take advantage of the other party or put them under duress because one party may be particularly vulnerable
- Test:

- \*Was one party vulnerable and did the other take advantage of that party?
- \*Does the agreement correspond to the requirements of the act?
- Disclosure is important for
  - \*Knowing all the assets and debts
  - \*Understanding exemptions
  - \*Exchange of financial documents, not just hearsay
- Duty to make full and honest disclosure is required to protect the integrity of the negotiation in the unique family law circumstances, without full disclosure agreements will be opened by the court
  - \*Requires that all relevant financial info be disclosed because cannot freely waive an entitlement if you do not know what you are entitled to
  - \*Full disclosure is required, it allows for certainty

### **Preuptial and Cohabitation Agreements:**

- Prenuptial agreements set out how property will be dealt with upon divorce or separation but do not take effect until marriage
  - \*Find out which each party has in terms of assets and liabilities
  - \*Deal with what happens if they increase in value or need to be replaced (will that be available for division?)
  - \*Decide how gifts between them and from 3Ps will be treated/inheritances and increases
  - \*Decide how property acquired during marriage will be handled
- If you are creating a prenuptial agreement, but there is no marriage date yet, it should be called a prenuptial/cohabitation agreement
- If getting married, make it a prenuptial agreement in consideration of marriage
- Must meet requirements set out in s. 38 for an agreement to be binding (acknowledgement of MPA and independent legal advice)
- Cohabitation agreements: if not married, do not need acknowledgement of MPA, but still need certificate of independent advice and some acknowledgement that they know what rights they are waiving
- Must be detailed, consider all potential property that will come into the marriage
- Even if agreement says spousal support is not to be given or that the party was not in loco parentis, court has ultimate discretion and can overturn