

LAW 524

FAMILY

COCHARD/GORDON

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Family Law: Cochard & Gordon

Development of marriage: 5 periods

1. until end of 5c. Tribal ways of solemnizing marriage (purchase, polygamy)
2. 5-11c. Private affair, little state involvement, Christianity exercising more control, polygamy outlawed. Marriage became a contract between two parties.
3. 11c. marriage began to fall under jurisdiction of the church. Church makes rules about solemnization of marriage (before a priest and witnesses)
4. In protestant countries, church lost jurisdiction and secular bodies took over. Divorce emerges
5. Modern period, reform divorce and MP laws. Responsibility placed on courts.

Legal Regulation of the Family

- Summary – Federal Divorce Act, Individual provincial governments enacting all legislation regarding property and the division of property
- Huge benefits and rights of marriage

Essential Validity of Marriage

Hyde v. Hyde (HOL)

FACTS – Polygamy case

Ratio – sets forth common law definition of marriage as union of one man and one woman for life with exclusion of all others

Comment – same sex couples in Canada challenged this because it violated equality rights

Halpern v. Toronto (2003 Ont)

FACTS – apply for marriage licence and denied

ISSUE – does the common law definition of marriage infringe s. 15 of the charter and can it be saved under s. 1?

HELD – common law definition does offend charter, determined through a functional analysis of family, new definition: **voluntary** union of two individuals

EGALE Canada Inc. v. Canada (2003)

- Common law definition contravenes s. 15 and is not saved by s.1
- Procreation is not the point; gay marriage doesn't challenge heterosexual marriage or the maintenance of the species.

Bill C-38 – Same sex marriage

Consanguinity and affinity – you cannot marry people you are closely related to

Federal act says – you cannot marry brother and sister *Marriage Act* s. 2(2)

Common Law Requirements For Marriage

- 1) consent (need sound mind, no duress, intention of parties to contract for marriage is important)
- 2) Capacity to consummate
 - a. Annulments in catholic church
- 3) Consanguinity
- 4) No subsisting marriage (you cannot already be married)

The Formal Validity of Marriage by Statute

Alberta Marriage Act – R.S.A 2000

Rules about solemnizing marriage; authorized commissioner, two witnesses and a licence:

Essential elements

s. 17 - Provincial government only has capacity to deal with age, cannot marry under 16 unless you have a certificate from doctor showing mother to be pregnant or mother of living child, need parental consent between 16 and 18

If your spouse is absent for seven years you can presume them dead.

Marriages Valid at Common Law

Keddie v. Currie et. al. (1991)

FACTS – 2 people live together 4 years; is there a common law relationship for dividing woman's assets on death

RATIO – Common law spouse defined as married at common law or cohabiting for two years dependently. Marriage at common law only recognized where impossible to comply with local law. Where it is impossible to comply with formalities of local law. In this case it was not common law marriage because in BC there was a statute specifically providing for the formal requirement of a marriage, and there was no evidence of an actual mutual agreement to enter into a matrimonial relation.

re Noah Estate – marriage was found to be valid at common law, because the priest could not be present as one party was Hindu

Presumption of marriage

Three elements for presumption of a marriage in the face of formal defects:

- 1) ceremony
- 2) living together as husband and wife
- 3) holding themselves as husband and wife

Mahadervan v. Mahadervan

FACTS – parties got married in foreign country, got married in a home, husband goes to England and tries to get re-married

HELD – presumption of marriage, technicalities won't invalidate marriage, if there is a **Ceremony** followed by **Cohabitation** and you hold yourself as married; you are.

Common Law Relationships

Miron v. Trudel (1995 SCC)

FACTS – husband was injured in a motor vehicle accident, because his wife was CL and not married she was denied benefits

HELD – the exclusion of unmarried family units from benefits = discrimination; there is historical deprivations of disadvantage (stigma)

Definition of spouse contravenes s. 15 and not saved by s.1

CL marriage protected by charter

When is a CL spouse entitled to benefits?

- Provide proof of economic interdependence, support of children, long term commitment, sharing of residence, sharing of responsibilities for home, sexual relationship, demonstrate to community they are a couple, raising children

Walsh v. Bona (2002 SCC)

FACTS - Common law for 10 years, applied for property under MPA, denied b/c not a spouse

HELD - Appealed on grounds of discrimination

SCC found no discrimination b/c of **CHOICE**; distinguished from *Miron* based on “3rd parties”—no sense

L’Heureux-Dube dissents: idea of choice is crap! Furthermore, CL are denied most expedient method of distributing property.

Same Sex Marriage

Same sex marriage reference

ISSUE – Gov. puts same sex marriage to SCC

HELD – SCC answers in affirmative and bill c. 38 is passed

Definition changed to **Union of two people to the exclusion of all others**

M. v. H. (1999)

FACTS – Same sex couple had business, but the end of it one had more assets of business, if man and woman, one could have gotten spousal support.

HELD – Look at the function of a family rather than its form; use of charter in family law to prevent discrimination Found Family Law Act to contravene s. 15 and not saved by s.

1. Recognized that the support was not founded on need to “protect women and children” but rather

based on responsibility flowing from relationship

Dispute Resolution

Mediation – Use a neutral facilitator – assists in reaching resolution

Often good kid arrangements, not good for financial arrangements or if there is a power imbalance

Collaborative Law

Lawyers are engaged as settlement counsel—will not go to trial if process doesn’t work.

- This allows greater focus on settling!

Lawyers work as a team, but there is still privilege.

All negotiations are face to face meetings—usually b/n 3-8

Also use CHEAP BFVs—move away from positional reasoning to interest discussion

Rich and candid discussion about resolution of issues

More privacy for clients—can do more on own. Not necessarily cheaper, but definitely less intrusive.

Negotiation

More positional, pre-trial strategy. Get a result can fight for position

Uses threat of court as back up

CONS – takes times, costly, corrosive process

Major issues can be dealt with

Trial

Most intrusive, most expensive, least certain (precedent for almost anything)

Litigation Process (Slow process)

Beginning-----Court of appeal

- 1) Beginning
 - a. Interview client
 - b. Give advise
- 2) Commence pleadings
 - a. Statement of claim
 - b. Frames action
- 3) Pleadings served on opposing parties
 - a. Sometimes opposing party files counter claim
- 4) Interlocutory Applications
 - a. In term application (Occurs in Queens Bench)
 - i. Deal with in term support/restraining order/preservation order for asset/parenting orders
 - ii. Orders which divorce act says you can get before trial
 - b. Take form of application in chambers on affidavit evidence only
 - i. Notice of motion (gets you into chambers)
 - ii. Chambers is a judge in a suit and lawyer in a suit, client watching
 - iii. Chambers 15minutes in morning
 - iv. Special chambers in afternoon; take longer
 1. tell judge short history and what you want
- 5) Examinations for discovery
 - a. Where both council have opportunity to have opposing party examined by them under oath
 - b. Occur in form boardroom
 - c. Court reporter present
 - d. Witness is sworn in
 - i. Purpose; to obtain a concession or information from other party, size them up as witness, real process for a litigator
 - ii. What are strength and weaknesses of case
- 6) Pre trial conference
 - a. Mandatory step prior to trial
 - b. You and opposing lawyer in judge's office prior to trial

- c. Both lawyers confirm that they are ready to go and can secure a trial date
- 7) Mini trial or JDR (judicial dispute resolution; a formalized process of the court to resolve as many issues as possible, voluntary but can have voluntary results)
 - a. PRO – can provide reality check for each side, useful if your client cannot afford trial; you can pick judge
- 8) Trial

Settlement/Negotiation of Agreements

Broseau v. Brosseau (1990)

FACTS – Wife’s lawyer was not independent council (lawyer was associated with husband)

ISSUE – what constitutes real independent council?

HELD – Independent advisor must have info needed to support advice given.

Dealing with Violence

Violence

- Increasing since 1996
- ♀ are generally the victims
- Violence against partner can influence incidence of violence against children
- EPO—allows CL possession of home (otherwise no dice)
- There have been legal developments
 - stalking laws
 - special Domestic Violence Court
 - easier to get restraining orders
 - more education for judges, lawyers, police etc.
 - *Protection Against Family Violence Act (2000)*
 - Related issues – **Feminization of Poverty**

Damages for Violence

Mead v. Mead (1995)

FACTS – common law relationship with long term physical violence

HELD – you can claim damages within divorce action or, through civil court

She got \$35000

White v. White

Award for assault damages

Wandich v. Vio

FACTS – Woman meets older man, married for 3 years, she asks for spousal support, property division and damages for assault
HELD – judge gives award for damages (10K)

Jurisdiction

- **Constitutional Division** of powers in Family law are overlapping between provincial and federal governments
- **Constitution Act 1867**
- s. 91(26) confers power on fed. Gov to legislation in area of marriage and divorce: Feds also have corollary powers of custody and support – necessarily incidental to divorce
- s. 92(12) confers on provincial legislature power to enact laws regarding the solemnization of marriages
- s. 92(14) provinces can enact laws pertaining to property and civil rights: Created legislation to cover those not covered by divorce act (common Law)
- *Domestic Relations Act; Maintenance Orders Act; Parentage & Maintenance Act*

Divorce History

- Historical divorce law: prior to 1968 we did not have a Canada Divorce Act and you had to find fault to get divorced.
- **1968 Divorce Act** – Had to prove marriage breakdown, by separation for 3-5 years, provision for non-consummation, s. 3 grounds = physical and mental cruelty, adultery
- **1976 Law reform commission** – suggest fault be taken away
- **Bill of 1985** – Make divorce less adversarial; provincial responsibility to provide good process
- **1985 - Divorce Act** – breakdown of marriage s. 2(a) divorce judgement granted if they are separated for at least one year and must be living separate at time of proceedings, courts do not deal with other grounds unless you need a quickie divorce. Separate and apart or cruelty or adultery.

Courts

- If superior court makes an order, lower court is bound (ie can't continue with process)
- If a superior court is silent (ie support) then lower court can make an order
- If a motion is started in two separate provinces, then first come first serve.
- Must be “ordinarily resident”—generally have lived in a province for 1 year before can proceed with a divorce action (note, interim requests can be made before that.)

Jurisdiction Case Law

Hinte v. Hinte (1996)

FACTS – She lives in Florida, he lives in Europe, for last three years.

ISSUE – could she start divorce action in Ontario if neither live there?

HELD – If there is matrimonial property you can apply there.

***Zacks v. Zacks* (1973)**

HELD – Federal government has corollary powers (eg. Custody and support) under the Divorce act that are necessarily incidental to the divorce power. Judges under the Divorce Act can make a reference to province to fix the amount – this is an appropriate delegation of powers.

***Spiers v. Spiers* (1996)**

Held – one an order for custody has been made by a superior court, then the provincial court loses jurisdiction over issue of access.

Ordinary Residence

s. 3(1) ordinary resident and jurisdiction

***MacPherson v. MacPherson* (1977)**

HELD – ordinary resident is different than special resident
Court will look to evidence if person intended to stay there

***Nowlen v. Nowlen* (1971)**

HELD – one party has to be an ordinary resident for at least a year

***Byrn v. Mackin* (1973)** – It is not enough to consent to a jurisdiction, there have to be factors that support jurisdiction beyond the consent of the parties. Two parties cannot consent to a jurisdiction; if two actions start on different days, the first one will take precedence, if started on same day, federal court will get precedent if it is a tie.

***Molson v. Molson* (1998 ABQB)**

S. 3(2) first come first serve basis

S. 3(3) federal court gets jurisdiction if followed same day

S. 4 – if you become ordinary resident of another province you can apply for colory relief

***Leitz* –**

Facts – Parties were divorced in Germany, wife moves to Canada and could not access corollary relief because the court could not deal with the divorce itself. Section was changed after: this seems unfair...

S. 5 variation proceedings divorce act (you change apply to change order if either spouse is an ordinary resident or if both former spouses accept the jurisdiction the court is in)

S. 6 – Determine jurisdiction is correct for child – is child substantially connected to jurisdiction

Shield v. Shield

FACTS –

HELD – Significant on 6.1 proceedings; substantial connection issue

S. 9

Lawyer's duties

- discuss possibility of reconciliation; marriage counselling ect
- Discuss potential mediation facilities
- Sign a statement that you've done this

S. 10 – Can't grant a divorce if there is a possibility of reconciliation

Miller –

FACTS – one party wants to reconcile but the other doesn't

HELD – duty of the court is to satisfy there is no possibility of reconciliation

Admissions Made to Marriage Counsellors/Mediators

- S. 10(4)
- *Cronkwright v. Cronkwright*
- *Robson v. Robson*
- *Shakotko v. Shakotko*
- *Keizars v. Keizars*

Barriers to religious remarriage

- Divorce act encourages individuals not to use refusal to give religious divorce as a hammer over someone S. 21.1 (divorce act) if the spouse doesn't remove barriers to religious remarriage. Spouse cannot access any remedies of court if they have not removed religious barriers to remarriage.

The Divorce Judgement

- Divorce Act 1985 12(a)

Abridging the Time

- Awaiting time of 31 days established for people who may have second thoughts
- Can be waived if agreement by other side s. 12(2)
- S. 13 –divorce judgement has legal effect throughout Canada
- *Teskey v. Teskey*
- *Feigal v. Feigal*

Appeals

- Appeals for divorce different than other matters in terms of time limits; only have 30 days to appeal. Court can extend it, usually a long process.

Cairns v. Cairns (1931)

Hickey v. Hickey (1999) – generally appeals are not going to fly – extreme discretion to trial judge because of uniqueness of family. Appeals courts should not overturn support orders unless the reason disclose an error in principle, a significant misapprehension of the evidence, or the award is clearly wrong.

Grounds to Divorce

- Divorce Act 1985 s. 8

Living Separate and Apart

- **What does separation mean?**
- The year before divorce judgement granted they are living apart, living apart when statement of claim filed.
- Divorce Act s. 8
 - S. 8(3) – only one party has to live separate and apart
 - 3(b) – during separation, if parties got together for a short period of time, less than 90 days, then it is ok and their year still counts, if more than 90 days, you start from last day they separated.

Rushton v. Rushton (1968)

FACTS – Petitioner married and lives with respondent until 1965

HELD – even though they are in the same house, they live separate lives, different parts of home, no domestic services provided, no sex, there was withdraw from marital obligations with intention to destroy matrimonial union.

Calvert v. Calvert (1997)

FACTS – prior to Alzheimers, she was able to make it clear that she wanted to separate by seeing lawyer and doctor and indicating thing.

HELD – Court says you have to have very little capacity to get married, and even less to separate. Great evidential weight placed on people who saw her at time of separation.

NOTE – in AB we divide property up as current (time divorce followed)

Coates v. Coates (2000)

Taylor v. Taylor (1999)

ISSUES – when was separation?

Ratio – must look at specific facts every situation is good. Date of separation determined by evidence, not just parties representations to the court. Some acts are clear and unequivocal (eg. Filing for divorce, financial planning as if a separate person)

Oswell v. Oswell

ISSUE – what is a separation?

HELD – absence of sex, little communication, no domestic services provided, eat meals separately, no social activity together

Velisek v. Velisk

FACTS – Even though relationship was friendly (trips and sex) they never got back to same intimacy level. Parties lived apart and had separate bank accounts.

HELD – Can do things together as not as not same level of commitment or if less than 90 days it is ok to get back together; and even one time, total cannot be more than 1 time.

Adultery

***Orford* (1921)**

FACTS – wife said she didn't commit adultery and was artificially inseminated

HELD – the essence of adultery is the voluntary surrender of the reproductive powers to another person beyond the husband/wife.

***Burbage v. Burbage* (1985)**

FACTS –

HELD – once opportunity and interest are status on balance of probabilities (sworn affidavit) adulterer must call evidence, onus of proof shifts to respondent to disprove adultery.

Cruelty

Objective and subjective; must render further cohabitation intolerable

***B(Y) v. B(J)* (1989)**—Subjective and objective—must actually be intolerable and render further cohabitation impossible—Must be willing cruelty—case where ♂ was homosexual does not count

***Barron v. Bull* (1987)**

FACTS – Husband say wife threatened to leave him and she was jealous of material items that others have and she doesn't.

HELD – incompatibility does not = cruelty, cruelty has an objective test (must objectively be nasty) and a subjective element (how does it effect spouse claiming it?)

Here, no evidence that wife's conduct cause husband to suffer. Cruelty = excessive suffering, severity of pain, mercilessness.

Lacey v. Lacey

HELD –

9 factors considered in cruelty

Bars to Relief

Collusion: Lying to get a divorce

Divorce Act s. 11(1)(a) and s. 11(4)

***Ahmad v. Ahmad* (1981)**

FACTS – Parties to conspire to get married for immigration status, wanted to punish wife and she was not allowed divorce

HELD – Says that there was collusion in marriage, but not in divorce

Amhad v. Amhad (1983)

Court granted divorce when man disappeared. Found a way around initial case, wife could not collude with someone who she could not find.

Meikle v. Gill (1981)

Decision to reject cohabitation did not arise until the ceremony was over. Marriage was not tainted by collusion.

Marriage of convenience for no money, wife thought marriage was valid and wanted to break it off, court finds marriage can be broken off

Court distinguishes between a collusive marriage and collusive divorce. Guy takes off.

Connivance: Actively promoting your spouse to commit adultery.

Divorce Act s. 11(1)(c)

Maddock v. Maddock

FACTS – Sets out principles regarding what is and is not connivance.

Fleet v. Fleet (1972)

FACTS – wife initially denied a divorce because she walked in on husband and didn't do anything Walked in on husband

ISSUE – was failure to end intercourse connivance?

HELD – this is not conveyance; no corrupt intention.

Condonation: If there is an affair and spouse takes cheating partner back, forgives spouse and reinstates him, you cannot file for divorce

Leaderhouse v. Leaderhouse (1971)

FACTS – extreme case of cruelty, husband tries to say she condoned this because they are having sex

HELD – sex is not enough, must show knowledge, forgiveness and reinstatement

Duty of court to protect children

Divorce Act s. 11(1)(b) **Reasonable arrangements have to be made**

Judge can decide not to proceed with divorce if reasonable arrangements have not been made for children

Harper v. Harper (1991)

If there is not a sufficient agreement in place to take care of children, a court can deny a divorce until acceptable arrangements have been made. S. 11(b) is an overriding provision that applies to every petition, court must not 'rubber stamp' applications for a desk order divorce just as the court does not rubber stamp any other matters involving children. Must have arrangements ensuring sufficient funds for proper support of children.

Practical note: how to start a divorce

- 1) First interview, gather info, tell client about yourself and how you operate, establish methods of communication (ie. by mail). Client should lay out their concerns, get basic divorce data, any potential violence? Why the separation? Have they gone to counselling? To proceed further will need marriage certificate, photography of spouse, last three years income returns and tax assessments, financial statements for any corporations, bank statements, credit card statements for last three months, RRSP statement, pension statement.
 - a. Money – set out a retainer letter and get a signed copy back with a certain amount of money (\$2000-25000)
 - b. Mandatory parenting and separation course (2 evenings)
 - c. Ask client to think about the divorce and entire process

Matrimonial Property

History

1978 – AB gets matrimonial property legislation; substantially unchanged today.

Queens Bench = jurisdiction for divorces and MPA.

Civil law tradition – share property during marriage, English law got around title by applying trusts

Division of Property in Common Law Relationships

Truman v. Truman

HELD – contribution can be more than money, can be labour for resulting trusts

Resulting Trust – Show financial contribution to acquisition and intent to share. BCCA expanded the definition of contribution to include work that was the nature of a ‘hired man’.

Murdoch v. Murdoch (1974)

FACTS - Married for 25 years. Upon divorce gets nothing.

Appeals but SCC find she did not contribute “significantly”—did no more than the average farm wife

Dissent: introduces idea of *constructive* trust; concept coming from USA three elements

- 1) contribution 2) unjust enrichment 3) no juristic reason

Rathwell v. Rathwell (1978)

FACTS – woman did gardening, meals and transport for farm

HELD – wife got half of property on constructive trust

Constructive trust does not automatically give you half

Best way to deal with property decision is to deal with constructive trust. Assume intention as parties contributed. Requirements for constructive trust = enrichment to one party, corresponding deprivation to other party, Absence of any juristic reason for

enrichment ie. there was no legal obligation for the person to do the work they were doing.

SIGNIFICANT – first case in Canada with constructive trust (only to married)

History –

More legislation enacted, only to married couples though

Eventually case law found that constructive trust also apply to

- 1) common law
- 2) same sex
- 3) mistress

Pectus v. Becker (1980)

ISSUE – Evaluation date of MP.

RATIO – equitable principle on which constructive trusts rests upon is broad

Need to show a causal connection between the contribution and the corresponding deprivation. If contributions are unequal, shares will be unequal.

Still looking at acquisition not simply contribution

Sorochan v. Sorochan (1986 SCC)

FACTS – Mrs S worked on farm for 42 years, no salary, raised six kids, did all housework.

ISSUE – Mr. S had farm prior to relationship beginning; increase in value in land, no acquisition.

HELD – SCC finds enrichment because he directly got the benefit of her 42 years of working and six kids. Court says had she not been there operation would have deteriorated. Find corresponding deprivation; 42 years of work without pay. No juristic reason, she was under no obligation to perform the work; where one party prejudices herself with the reasonable expectation of receiving something in return and the other person freely accepts benefits where he should have reasonably known of expectations. Important = clarification of juristic reason and also flexibility.

You must show that the person had something to do with the preservation and maintenance of the property.

RATIO – **Must show connection between the work done and the property.**

Constructive trust does not just apply to acquisitions, it also extends to the improvement of property.

Peter v. Beblow (SCC 1993)

FACTS – lived together 12 years, wife did household work and raised children, they were his kids. It was his children, not hers. She took on position of being nanny. Two years before they started living together he bought house. She moves into house that he owned prior to relationship. No rental associated. She did gardening and maintenance. He paid mortgage and acquired assets. They bought another piece of property.

ISSUES – whether or not requirement of absence of juristic reason for unjust enrichment; nature of application for remedy.

SCC – A constructive trust arises where monetary damages are inadequate. SCC says a constructive trust means that person A is holding a share of property for person B.
Constructive trust = proprietary interest.

HELD –

3 questions to see if there was lack of juristic reason

- 1) did the P confer the benefit as equitable statutory obligation (was it a gift)?
- 2) did the P submit to or compromise D's honest claim?
- 3) does public policy support enrichment?

No logical reason to distinguish domestic service from other services.

Value survived = if you cannot put monetary value on persons services. Look at what is left when court considering it the matter; in this case, house.

Value Received (quantum Meriot) = (value of goods, services rendered) monetary remedy; can you put a price on the work done?

Nowell v. Town Estate (1994)

FACTS – man has relationship with woman but he is married at same time (dual life).

He dies, there is claim by girlfriend in terms of unjust enrichment: he is unjustly enriched as a result of all the things she did during relationship.

ISSUE – does mistress have constructive trust on estate.

HELD – found unjust enrichment even though she was not living with him all the time.

Case pushes envelope even further about what constitutes common law.

Pickland v. Gillmore

RATIO – you can apply for constructive trust in same sex relationship

Split

Diebert v. Calder (2001 ABQB)

FACTS – together for nine years, no kids, worked but was paid

HELD – court finds deprivations, court looks to 'reasonable expectations' roof over head, vehicle, awards lump sum payment

Walsh v. Bona (2002)

HELD - S. 15 challenge to MPA unsuccessful – common law couples only allowed constructive trust.

S. 15 challenge to MPA – unsuccessful. Common law couples only allow constructive trust remedy and not legislation.

Kinch v. Kinch (2003)

FACTS – both have land and get married; man's land sits and gets nothing, wife does nothing on his land, they live on her land and he builds fences.

ISSUE – is there any entitlement to constructive trust?

HELD – court looks at each piece of property and looks at what each spouse did.

She does nothing for his property thus no claim. Look at her property – he is entitled to monetary sum. Consider the value at trial time. He gets 50% of increase in value, but this will always be the case.

Dudla v. Lemay (2003)

FACTS – courts look at every piece of property to see if there is a claim or not, she receives part of property but not corporation.

HELD – judge does not like *Walsh v. Bona*

COMMENT – you must prove that you are entitled to money in common law relationships, MPA does not apply and you are not guaranteed 50-50. She was awarded lump sum spousal support.

Practice Note

Wall v. Wall

ISSUE – Is Mrs. Wall entitled to share of business assets which were acquired prior to the marriage but during the CL relationship?

QUESTIONS – How long were they common law? If more than 6 months ask them what they owned at relevant dates (marriage, separation, current).

IN common law cases –

Constructive trust actions are fact driven

Panara v. DiAscenzo

FACTS – Met in 1982, he opens restaurant in 1984 she works as cook. 1988 they become romantic and live together 1988-1992. Get married 1992; separate 1998.

HELD – She was more than just an employee and they built restaurant together.

She is given 50% of value acquired during common law relationship.

Matrimonial Property Redistribution Laws

General

Every province has one MPA; Albert is 1978

Presumption of Equality – 7(4) limited by discretion

Remember exemptions

Remember pensions

Matrimonial home possession option

2 year limitation/1year for gifting

Choosing a jurisdiction/conflicts

Tezcan v. Tezcan (1987)

FACTS – Property located in BC couple divorced in Turkey

ISSUE – which place can you start action?

HELD – start action in jurisdiction where property located

Jurisdiction of Alberta MPA

Void Marriage

Reaney v. Reaney (1990)

There are going to be occasional cases where people have been out of the province, for a period of time, they cannot start a divorce action –

If you meet certain requirements

- habitual residence of both spouses is in Alberta, whether or not they are living together

- last joint habitual residence was in Alberta

- then the wife comes back, can she start a matrimonial property action?

- she wants to deal with the property?

Prior to marriage at time they both got married they were living in Alberta; at time of marriage they were both habitually resident in Alberta

Habitual Residence

Adderson v. Adderson (1987)

FACTS – Wife USA citizen, then becomes Canadian

Ratio – what does habitual means?

HELD – in between domicile and residency

Parties/Adding Parties

Gabriel v. Gabriel and Keith of London Boutique Ltd.

FACTS – Mr. G owns hair salon, lawyer acting for wife tries to bring in corporation by naming corporation as defendant.

HELD – only husband and wife can be party to action not corporations

Rights of surviving Spouse

S. 11 Dead person rule

If you were in position to start a divorce and one spouse dies you can continue; or get the matrimonial property vs. the estate.

Perry v. Perry Estate (2001)

S. 16

Estate can continue action

Dissipation/Section 10 Application

S. 10 Dissipation – Sneaky transfer rule

Must prove that transferee knew that transfer was made to defeat claim

Always ask people what happened a year before or you could be sued

Nay v. Nay (1982)

FACTS – man transfers home to father to defeat woman’s claim. Woman gets home from father but can’t put a s. 10 claim in at the last minute. Need to give 15 days notice to add a party.

Pederson v. Pederson

Man has kids from previous marriage, enters into agreement to sell land to kids.
Man and wife separate, father forgave debt to children, women tries to make s. 10 application for dissipation because no bona fide value given for the debt, she loses because you have to have intention to dissipate.

Burger v. Burger

FACTS – Shares in privately owned company, purchased company from parents of company, parents take back on company, wife adds parents to s. 10 actions.
HELD – court agrees with wife; company assets put in his column. Wife gets ½ of the interest in his shares and he gets ½ interest in his shares.

Kremp v. Kremp

Hunt v. Smolis-Hunt

Bzdzich v. Bzdzich

Powers of the Court

S. 9 outlines the powers of the court in terms of making MPA order

Appeals

Dwelle v. Dwelle – (1983)

RATIO – At trial judge accepts husband’s evidence regarding valuation of assets, issue was discretion of trial judge.

Discretion to be exercised is that of the trial judge.

Possession of matrimonial home

Interim possession

Portugal v. Portugal (1987)

FACTS – Possession of matrimonial home.

Legislation – s. 19 – directs spouse can be given exclusive possession of mat. Home
s. 20 – outlines factors of consideration – (avail of other accommodation, needs of children, financial position of spouses, order made by court regarding property or maintenance)

In this case, trial judge was concerned that the children of marriage be disrupted as little as possible. There was nothing in the financial circumstances of the parties which militates against the mat. Home possession order made by trial judge.

HELD – Mrs. P should not be given credit for the total amount of the mortgage payments made by her or for one half of the taxes. The effect of this direction would be that Mrs. P could live in matrimonial home until the youngest child reached age of 19, with minimal expenses for accommodation, in spite of the fact that Mr. P had an interest in that home.

***Timms v. Timms* (1997)**

Wife given exclusive position of home until kid turns 18. House could keep house or sell it.

- Look at avail. Of other accommodations, financial position other parties and kids.
- Can make final order or interim until trial.

***Tawiah v. Tawiah* (2002)**

***Grunenwald v. Grunenwald* (2006)**

Exemptions

Types of Property to be Exempt

7(2) property – inheritance, gift, tort settlement

Money or Property received prior to marriage is exempt from a division of property, if money/property receive is put into joint names, only half is subject to exemption (unless you can prove inention of gifting) Rebutting presumption of gifting is based on facts. To retain exemption must be able to trace money/property to current money/property – if you get money and go on a holiday its gifting and there's no exemption, intention in joint tenancy is key – need to prove this.

Method of Distribution of Exempt Property and Increase in Value of Exempt Property s. 7(2) and s. 7(3)

***Quigg v. Quigg* (1983)**

HELD – If money received is put into joint names of half is subject to exemption unless you can prove no intention of gifting

CA – finds no intention to gift and gives full exemption

***Jackson v. Jackson* (1989)**

FACTS – husband received a gift and used it to pay off mortgage of home in joint names
Wife has legal ½ interest and equitable interest – presumption to gift the money not rebutted, so husband loses ½ of exemption. If you put it into joint names you presume to gift it to other half.

***Harrower v. Harrower* (1989)**

FACTS – received a gift of money and used it to pay debts

HELD – at trial, unable to account for money/trace it so it was NOT exempt

***Borys v. Borys* (1994)**

FACTS – Very fact based decision, both lived on farm land in husband's name, she convinces him to sell it and put it into house in joint name. Farm was still in his name but she convinces him to sell it. Court said he only did this because he was harassed.

HELD – wife did not take any responsibility on property. Finds no intention to gift because of short time between home in joint names and divorce. He gets full exemption – do not assume you will get 50%.

Rosin v. Rosin (1994)

FACTS – Wife receives gift and pays off mortgage. House is remortgaged to pay debts.

HELD – Court finds no intention to give the mortgage payment, thus full exemption is found. CA said she can get full exemption because court viewed husband as manipulative.

RATIO – intention is key as to whether you will get full exemption.

Brokopp v. Brokopp (1996)

FACTS – wife inherits money.

HELD – exemption must be traceable to assets owned at time of separation.

Dissipation by one spouse after separation does not defeat exemption.

Dissipation by one spouse after separation does not defeat exemption (he sold stuff she had bought with exempt money – it still counted as traceable)

- You can infer if the records are not traceable

Nuttall v. Rea

Sparrow v. Sparrow (2006)

FACTS – husband’s parents gave lake property to husband and brother. Parents pay taxes and maintenance.

Property increases in value.

HELD – She gets 30% (court focuses on s. 8 factors) not 50%.

Wald v. Wald

FACTS – wife claiming increase in value of property given to man, section 8 factors could be included because no maintenance done.

S. 7(3) Discretionary divisions

No presumption of equality; if you can show that the increase in value was mainly inflationary judges will give less than 50%.

Increase in value of exempt property, interest accrued on an account prior to marriage

Property acquired after divorce, property acquired as a gift from other spouse, not a 50% presumption, Look to s. 8 to determine how it will be split.

Money gained from investment

Property acquired after divorces form first marriage

Gift

Property to be Divided

S. 7(4) Divisible property

Presumption of equality applies – very difficult to rebut

Rebut if you show dissipation before divorce

Matrimonial Home/Real Property

Land –Remember capital gains (where you sell a home and there is tax implications) – tax implications (pay tax on value increased) If sale of property not primary residence Tax implications if more than a certain amount of gain.

Stock Options/Bonus/Severance Packages

RRSP – Stocks and savings bonds; Equalize; most common way – party with more can just “roll over” difference so they’re equal – no tax implications. Split and deduct tax: leave uncashed, but consider in property divide minus the tax

Stock options – generally, if not yet vested, then arguably not yet property. If vested, then definitely property.

Gardiner v. Gardiner (1996)

Bonus - Court held that bonus was not property because it was tied to performance.

Although pension plan was not vested, and employee had not made any contributions, the plan constituted property right contingent on him remaining employed until 55, therefore it was mat. Prop. The appropriate way to value it was on an ‘if and when’ basis.

All allocated stock options, whether exercisable or not, were matrimonial property. The stock options that had already been exercised would be allocated between parties. The options that had been allocated but were not yet exercisable should be valued on an ‘if and when’ basis. Half would be held in trust by husband for wife, with the sole discretion as to when they would be exercised and to exercise them in best interest of both parties with husband.

MacDonald v. MacDonald (1997)

Trial judge erred in considering bonus, stock and severance as property rather than income. The father had received a raise, bonus and severance packages, and had disposed of stock options which gave him increase in ability to pay child support. Child support order varied to account for father's increased ability to pay. If the stock option is vested it is considered as income.

D.G.M. v. K.M.M. (2002)

Miller v. Miller

RATIO – even if the shares change character they are still exemptions (you can make this argument)

Future Income Streams/Trust Interest

Sutton v. Davidson (1999)

Income that is saved becomes property and does not remain income forever. Trial judge properly treated husband’s employment termination payment as property rather than income, making it subject to property distribution.

Corporate Interests

Business/ Corporation – generally need business valuation, In small business generally look at liquidation value (assets minus liabilities), Large business, get professional valuator (apply for interim costs)

DBC v. RMW

Generally speaking a value must be placed on company and one person will be bought out. Less likely there will be share transfer.

Brinkos v. Brinkos (1989)

Kachur v. Kachur (2000)

Sagl v. Sagl (1997)

Pensions/WCB benefits/Disability/RRSP's

Pension – This is property that can be divided 3 ways (divide at date of trial *Wilson*)

- 1) wait and divide *McCallister* equation: (# of years contributing while married)/(# of years worked) x monthly pension amount x 50%
- 2) Cash out: take to accountant and determine amount needed to create an annuity (don't have to wait)
- 3) Locked in pension: If CPP can get half in spouses name and retain lock it (this is a right, can't be waived)

McAlister v. McAlister (1983)

City of Calgary fire fighter with big pension.

Court holds that the pension was property. Then dealt with question of dividing something when you don't know value?

Formula for division recognizes that the pension-holder holds in trust the other party's share of the trust.

| |
|--|
| <p>- Pension-holder holds in trust the other parties share of the trust. How do you determine what is her share?</p> <p>- <u>Formula: number of years married/number of years worked X monthly pension amount/50</u></p> <p>- <u>Will not always be divided by 50, because court could determine the other party should only receive 40%</u></p> |
|--|

Note – statute overrides *McAlister* – now do buy act

Both provincial and federal pensions override it.

If the pension is already in receipt then it can just be split

Wilson v. Wilson (1986)

ABCA in this case says this is not the date of separation but rather uses the number of years married in the *McCallister* formula. To argue date of separation for special considerations under s. 8 there would have to be exceptional circumstances.

Best v. Best (1999)

Hughes v. Hughes

WCB payments are not exempt (even when lump sums) because they are not like tort damages; rather more like a pension.

Debt

Debts – if acquired during marriage then divide equally, look at reasons for increase since divorce – necessities vs. fun – fun debt is not considered; get bank disclosure

Abbot v. Abbot (2006)

Wife argued debt incurred after separation was not to be divided.

Principles of Division of Divisible Section 7(4)

Presumption of equality applies, try to get around it by s. 8 factors

Longer marriage more likely 50% split

Mazurenko v. Mazurenko (1981)

HELD – Value property at date of trial.

In some cases, property will be valued at date of separation (need exceptional circumstance, ie. parties have gone through most of the steps of dividing at separation or, where there is a long term separation).

This case suggests that if property is never brought into matrimonial regime it is exempt.

Stewart v. Stewart (1982)

Trenchie v. Trenchie (1987)

Judicial Discretion: the Factors in S. 8

- Contribution of both spouses (is one super lazy?), was there a dissipation of funds?
Conduct only in so far as it makes a negative contribution, (property starts from time of marriage, constructive trust for pre-marriage time)

Purich v. Purich (1998) – Dissipation of funds/property can lead to non 50-50 split, have to show bad intent (don't forget s. 10 Sneaky transfer rule)

Lobo v. Lobo (1999)- Court looked at contributions of both spouses and decided she contributed more, so a 60-40 split was ordered, she saved and he quit working to allow his artistic side freedom.

Westworth v. Westworth (1999)

Hrycak v. Hrycak (2000)

Hunt v. Smolis-Hunt (2001) – husband didn't work to potential, do not equally divide assets

Dhala v. Dhala (2006)

Example of chart for property distribution.

Date of Valuation and Division

Mazurenko v. Mazurenko (1981)

Bracewell v. Bracewell (1994)

O'Brien v. Obrien (1985)

Crane v. Crane (1996)

Kazmierczak v. Kazmierczak

FACTS – 13 year separation prior to divorce, husband wanted date of separation because number of assets were acquired. ABCA found 3 reasons for valuation at date of trial

- 1) the wording in s. 8(f)
- 2) Even after separation the parties were not independent as they made mortgage payments on the jointly owned property
- 3) Easier to find value currently than historically.

Unless exceptional circumstance, date of trial to be used.

Hodgeson – husband inherited lots of money five years after separation, court finds exceptional circumstance and divides property at date of separation

Ratio – if it is easier to determine what couple had at separation it is likely court will divide property at separation.

Importance of consistency (rule of valuation of date as of trial or settlement)

Interim Distribution of Property and Costs

Katz v. Katz (1993)

McDonald v. McDonald (1998)

Randle v. Randle (1999)

Gartner v. Ewasiuk (2002)

M. v. M. (2000)

Occupation Rent/Pre-Judgement Interest

Kazmierczak v. Kazmierczak

No occupational rent was paid because the husband occupied the matrimonial home in order to provide home for children of the marriage and made no claims for child support, take the cautious approach and claim occupational rent in the statement of claim. If you exclude one of the persons from the home you can apply for occupation rent; often not awarded.

Tax Implications/Business Valuations

Other Topics

- Severance of Joint Tenancies
- *Dower Act*
- Lottery Winnings/Airline Points and Other Goodies
- Bankruptcy

Prenuptial Agreements/Cohabitation Agreements (not on exam)

Must fulfill formalities to be binding, is open to contract law arguments, will only be held unconscionable when imbalance of power resulting in an improper agreement, if agreement is from another jurisdiction can be considered under s. 8

Setting Aside Property Agreements

Hartshorne v. Hartshorne (2004) – woman tried to get prenup agreement overturned by arguing it was unconscionable, court wouldn't do it, note poor facts for overturning (older, both lawyers)

Corbeil v. Bebris (1993)

Moldaver v. Moldaver (1984)

Brosseau v. Brosseau (1990)

Jang v. Jang (2000) – Went to court saying there was an agreement but wasn't signed (one party refused to sign it) formality is important (agreement not binding if not signed).

Segal v. Qu (2001)

Signs a marriage agreement, later on wife decides the agreement is not fair, looks at K law – can use this to overturn an agreement but quite difficult, make sure to document your files

Rosen v. Rosen (1994) – Looks to unconscionableness: generally limited to unequal bargaining power resulting in an improvident agreement
Agreement upheld here b/c woman has business knowledge and had contacted several lawyers (Facts did not support unconscionability).

Phillips-Renwick v. Renwick Estate (2003)

Hill v. Smith

Support

Provincial/Federal Jurisdiction Issues Related to Support

Zacks v. Zacks (1973) speaks about fact there is no doubt federal government has ancillary powers to address support (to divorce at)

Tuz v. Tuz (1976)

Keller v. Keller (1987)

Goldstein v. Goldstein (1976)

Kett v. Kett (1985)

White v. White (1994)

Farquar v. Farquar (1983)
Jackson v. Jackson (1972)

Child Support

1997 – federal government introduces child support guidelines

Children of unmarried parents

The Family Law Act (no long term disability)

Children of Married Parents

The divorce Act

In Loco Parentis Relationship – in the shoes of the parent, origin of obligation comes from divorce act s. 2.2

Chartier v. Chartier (1999 SCC)- Not allowed to unilaterally reject parental standing
child's rights trump the adults – if you put yourself into the place of the parent, you will remain there. Existence of parental relationship determined at time of functioning family unit, NOT at time of trial (although this can be taken into consideration)
Court considers: if the child participates in the extended family in the same way as would biological child, whether the person provides financially for the child, whether the person disciplines the child as a parent, whether the person represents to the world (explicitly or implicitly) that he or she is responsible as parent, nature of existence of a child's relationship with absent biological parent.

Age Limits

Illness and disability – no caps in divorce act if child suffers from ongoing and potentially lifelong disability: this is an objective test, issue is of inability to work.

Difference between family law act (no provision for lifelong illness)

Farden v. Farden (1993)

Baker v. Baker (1994)

FACTS – girl was 17, attempting to upgrade and living at home while pursuing employment – judge determined one parent shouldn't have to support her.

A depressed economy was considered sufficient "other cause" to continue as "child of the marriage". She is eligible for support because she couldn't find work

Wall v. Wall

Parties separate after 15 years of marriage, mother has custody and father pays support (have one child). Discontinued when turned 18, then she starts university (applies for reinstatement of support) but the application was dismissed because only spouses can apply, not children.

Federal Child Support Guidelines

Apply to married parents under s. 15 divorce act

Apply to non-married parents under s. 51 family law act

Can agree to deviation but have to convince judge

Judge can deviate from guidelines given specific circumstances outlined in s. 15.1.5 and 15.1.6

Two components to child support base value and s. 7 component

Areas of discretion; adult children, loco parentis and incomes over 150000k

Section 9 – Shared Parenting

Contino v. Leonelli Contino

FACTS – over time kid shifted to spending equal time between parents,

SCC holds

- 1) there is no presumption of table amounts under s. 9
- 2) No automatic reduction for shared custody
- 3) No formula is mandated; pro rated set of for multipliers
 - a. Court rejects presumption of simple set off

If you reach 40% threshold you have less to pay

Court sets out steps for shared parenting

- 1) starting point = straight set off;
- 2) supposed to review the child expense budget
- 3) court says you consider the ability of both parents to handle the increased costs of shared custody
- 4) look at standard of living for children in both households.
 - a. Children should not experience large disparity between households

Section 10 – Undue Hardship

- 1) **is there undue hardship**
- 2) **is the payor's standard of living lower?**

Hanmore v. Hanmore

After calculations man had a lower ration and woman and thus claimed undue hardship. CA said hardship must be excessive or exceptional or disproportionate, not merely awkward.

The situation of two were disproportionate in favour of the man who had a home, medical and dental benefits ect. Comparable with woman who had no benefits and lived in basement suite. Must look to reality of situation, not just math.

Calculation of income/imputing income

Hunt v. Smolis-Hunt (2001)- Man was lawyer, stopped working and got a lower paying job, court found him trying to avoid paying child support, court tries to balance individual's right to make independent choices with, but when they are linked to an avoidance of parental responsibility, the court will impute income

Step 1

Gross income – taxes – other deductions (EI or CPP)

Step 2

Take amount of income from step one and minus any costs to (travel to the child) and the table amount

=

Step 3 = add amounts of adjusted annual income (income of a spouse is relevant)
Household standards of living

Step 4 = low income measure amount

What is household income low income measure

Step 5

Divide household income amount by low income measure amount to get a fraction

Section 7 – Special Expenses – allows for customization because of differences between children (discretionary)

Johnston v. Johnston (2004)

Clegg v. Downing (2004)

Hiemstra v. Hiemstra

Extra curricular activities

Look at family income – looks at table amount being paid by payor and means of recipient parent

RATIO – gives guidance, states that s. 7 should serve the best interest of the child.

Where an expense is reasonable and necessary in the best interest in the child, the capacity of the parents to afford it must be put in that light

Incomes over \$150,000

Francis v. Baker (1999)

FACTS – father appeals child support award of 10,000 a month calling it inappropriate.

Dismissed

Child has a presumptive right to share their non-custodial parent's income and the presumption is in favour of the tables. Father could not demonstrate why the amount was unsuitable.

Simon v. Simon (1999)

FACTS – Hockey player, makes it NHL and income increases dramatically. Child support also increases and he appeals arguing that this income increase is only short term. Court imposes table amount despite uncertainty of future income – there will be variation at that time. Court also rejected request to put money into trust because it is only appropriate if there is evidence that the payee parent will mishandle the money.

R. v. R. (2002)

Effects of Agreement

Retroactive Orders

There are issues about timing and why child support or variation doesn't get sought, sometimes people do not address support when they separate, takes time to share disclosure and determine incomes

S. 17 of divorce act makes it clear that retroactive support can be ordered.

S. (D.B.) v. G. (S.R.) (2005)

In exercising discretion to order retroactive support, there is discretion in every case. Ask what reasons were delaying for? Conduct of payor
Hold up principle of pay what you are supposed to
He condenses reasons for retroactive child support

FACTS- four cases from ACA;

Obligation to have child support payments corresponding with income; however, this is not a freestanding right, in Canada we have an obligation based regime, obligation is not enforced or crystallized until such time there is an application.

Three factors to see if there is need for retroactive order 1) no pre-existing order, 2) order in place, 3) agreement

Henry v. Henry (2005)

LJW v. TAR (2005)

Park v. Thompson (2005)

Hunt v. Smolis Hunt (2001)

Variation of Child Support Orders

Wilick v. Wilick (1994)

A change in parents income meets threshold of material change. A child is entitled to live a lifestyle commensurate with joint income of parents.

Haismann v. Haismann (1994)

Child (and spousal) support was ordered and not paid, mother waited 7 years before going to court. Father claimed arrears should be forgiven because he didn't have money to pay (equal material change in circumstances) or there should be a bar because it took too long. Court says no; simply building up a lot of arrears is not a reason to forgive them. Test – need evidence of past inability to pay to be excused.

Spousal Support

Look to: condition, means, needs and circumstances

Four objectives: economic advantages, apportion financial consequences, relieve economic hardship, promote self-sufficiency.

Divorce Act 1985 s. 15.2

Family Law Act s. 57-61

Question – entitlement, quantum, duration

Factors to be considered and Objectives for Awarding Spousal Support

Formula for spousal support – eyeball about what might be fair

Give a range of what is fair – consider her budget and his budget,

Go through means, needs and other circumstances, pre-existing order, length of marriage (more generous in longer term), existence of other assets

If you have enough information to use guidelines, then do this, or, if you don't use principles

Modern Spousal Support

Moge v. Moge (1992)

Economic self-sufficiency is NOT paramount. It is only one of the four objectives. The idea that there is no sharp decision between traditional and modern marriages; pre-Moge, only traditional marriages got spousal support, now recognise the role of primary and secondary earners. Feminization of poverty. Forward looking aspect of support – not just compensation for loss in the past but also for inability for future work.

Bracklow v. Bracklow (1999)

FACTS – short marriage of 3 years after cohabitation for seven years. Wife was unemployed and disabled at the end of marriage. No children.

HELD – Look to same factors as entitlement to determine quantum and duration.

Marriage is not an insurance policy, but there is an obligation (contractual model). A confusing decision which messes up *Moge* – is used for both sides arguing support).

Creates a third support model (in addition to means, needs and entitlement) contractual

→ arises from parties entering into a written agreement before the court does.

Says sometimes, just getting married is enough to found a support obligation.

Leskun v. Leskun (2006)

FACTS – court dealing with long term

Types of Orders: Form and Duration

Elliot v. Elliot (1993)

REVIEW – court orders can specify for review, but they don't have to

Wooldridge v. Wooldridge (1998) Review

It was said spousal support would be reviewed in three year period, husband makes action in court to terminate support obligation.

HELD – a review is not presumptively a termination.

Review = **de novo consideration of entitlement**, quantum and duration.

In refusing to enforce an agreement which terminated support after three years, the court held that an agreement does not bind the court if it does not satisfy the objectives set out in the Divorce Act. Here it was not reasonable for her to become self-sufficient, and a strict enforcement of the agreement would ignore the economic realities of the breakdown of this long term, traditional marriage.

Interim Support

Chambers v. Chambers (1998)

Row v. Row (1992) – Courts have held that on an interim basis, a proper component of any support order is a provision for savings (RRSP contributions) → reflection of the courts going beyond a bare essentials approach to interim support.

Bailey v. Plaxton (2000)

Termination of Support On remarriage

Rosario v. Rosario

After Death

Spousal Support Advisory Guidelines

Taxation of Support Payments

Income Tax Act s. 56(b)

Enforcement of Support Orders

Variation of Spousal Support

Variation of Support Orders s. 15 – look at original order and see what has changed

Miglin v. Miglin (2003) **This is a de novo application under s. 15 talking about how much weight to give an agreement**

Two part test:

- 1) do the circumstances in which the agreement was negotiated give any reason to discount it? Negotiation process must be transparent not rushed, fair independent, legal advice for it to be valid; doesn't work if power imbalance.
- 2) Court looks at whether the contract still reflects the intentions of the parties and if there is substantial agreement with the objectives of Divorce Act. Does it fairly apportion the economic consequences? If it's too sweet a deal, then not going to work.

Courts give more weight to contracts as long as it two tests.

Tierney-Hynes v. Hynes

Adoption, Guardianship, Child Custody Access

Parens Patriae

The Judicature Act

K.K. v. G.L. (1984)

Adoption case, natural mother rejects consent three months after giving up son, court decides based on 'best interest of the child' (rejection of unfit parent doctrine) best interest of child is often very subjective – doesn't necessarily privilege bio parents.

Adoption

Child welfare Act s. 35 to 71.1

Custody Disputes

Generally

Divorce Act 1985

Child Welfare Act 1984

The Domestic Relations Act

The Provincial Court Act

Young v. Young (1993)

Father became JW – wanted to convert children, mixed court, what's role of the custodial parent? Custodial parent can only restrict non-custodial parent if there's harm or the child doesn't want it – he can 'expose' children to religion if they want.

Hewer v. Bryant (1970)

Custody in its widest meaning is the same as guardianship. It is a 'bundle of rights' or a bundle of powers, which includes physical control over the child.

Dipper v. Dipper (1981)

Custody does not disentitle the non-custodial parent to know and be consulted about future education issues and major matters.

R. v. Enkrich (1982)

Who May Apply

Provincial Legislation

Bowes v. Gauvin (ABCA) court has held that to change guardianship the test is not best interest (unlike all the other provinces). Rather if it is a fight between mother and a stranger, then have to show the mother and father are unfit under s. 53. This flies in the face of s. 49 of the child welfare at.

Divorce Act

The Form of Custody Orders

Sole Custody

Joint Custody

Garska v. McCoy

K (MM) v. K(U)

L(V) v. L(D)

Shared Custody

Parallel Parenting

Factors Governing the Award of Custody

Generally/Best Interest of Child

Physical and emotional safety

Needs and circumstances including:

- physical and emotional needs, stability, age and stage of development
- history of child care
- cultural, linguistic, religious and spiritual upbringing and heritage
- Child's view and preferences
- plans proposed for the child's care and upbringing
- any family violence, see section for impact
- nature, strength and stability of the relationship (with people)
- ability and willingness of each person
- views of the child's current guardians, benefits to the child of developing and maintaining relationship
- ability and willingness to exercise powers, responsibilities
- any civil or criminal proceedings

R. v. R

Tender years doctrine is not given much weight, look to how much time each parent has for child and decide based on that – no gender of parent. IN age of changing attitudes, each case should be considered on its own merits, father was awarded custody.

DGS v. SLS

Miller v. Miller

There was an agreement for joint custody, woman appeals to change it, court decides both parents are in the 'best position' to decide on best interests therefore will defer to their agreement (even though now wanting to change).

Garska v. McCoy

K(MM) v. K(U)

Violence

Conduct/Lifestyle

Interference with Parent-Child Relationship

Health

Factors Concerning the Child

Religious and Cultural Upbringing

Van de Peere v. Edwards

Allegations of Sexual and Physical Abuse/Denial of Access

Mobility Rights

Klachefsky v. Brown

Carter v. Brooks

MacGyver v. Richards

Goertz v. Gordon

Facts – mom decides to move to Australia for two years to get a degree and wants to take child with her. Father says no.

SCC – continues custody with mother but allows access n Canada and Australia.

Three pronged test to apply for custody variation (must prove all three)

- change of condition, means needs or circumstance of the child and/or the ability of the parent to meet the needs of the child
- Change which materially affects the child
- Change which was neither foreseen or could not have been reasonably contemplated by the judge making the order.

In assessing the best interests of the child, court considers; existing custody relationship, existing access arrangement, desirability of maximizing conduct with both parents, the views of the child, custodial parent's reason for moving only in the exceptional case where it is relevant to that parent's ability to meet the child's needs, disruption to the child as a result of a change in custody, disruption to the child from removal from family, friends and community.

Bjornson v. Creighton

Assessment

M(DM) v. L(DP)

The Hauge Convention/Extra Provincial Enforcement of Custody Orders Act

Access

Approaches to Access

Droit de la Famille

Dean v. Dean (1978)

Rutherford v. Rutherford (1986)

Interference with Access/Access Enforcement/Maximum Contact

Kett v. Kett

Tremblay v. Tremblay

Mother continually thwarted father's attempt to access children. Judge Trussler physically gave custody to dad in Courtroom!

Van de Veen v Van de Veen

Court fined mother for denying access to father in spite of a court order; don't do this!

Which Court – Transfer Proceedings

Divorce Act s. 17

Kuzio v. Kuzio

Woman had a drinking problem at the time of divorce, but man gave her custody because she had stopped. She falls off the wagon, but court finds this was not unforeseen, she still has the ability to meet the needs of the child.

Appeals

Talsky v. Talsky

Rejects tender years doctrine and resorts trial judge decision because trial judge is finder of fact and made no mistake in law thus not opened to appeal.

K. v. K In determining the best interest of the child, it is very important to look at who was the primary caregiver during the marriage. Look at – preparing and planning meals, purchasing and care of clothing, medical care, social interaction among peers, alternate care, bedtime routine, discipline, primary education, religious/culture. Social identity
(*Garska*)