

LAW 524

FAMILY

STATE RECOGNITION OF THE FAMILY UNITY

A. THE TRADITIONAL MARRIAGE

1. The Essential Validity of Marriage

Halpern v. Toronto (city), 2003

The common law definition of marriage excluded same-sex couples, thereby creating a formal distinction on the basis of sexual orientation, an analogous ground of discrimination under s. 15(1) of the Charter. The effect was discriminatory, as it violated the dignity of same-sex couples. The violation could not be saved under s. 1 of the Charter, as there was no pressing and substantial objective for excluding same-sex couples from the institution of marriage. A constitutional amendment was not required to change the definition. Accordingly, effective immediately, the existing definition was declared invalid, and was reformulated as "**the voluntary union for life of two persons to the exclusion of all others**".

Remedy: They changed the definition immediately, this is unusual. Generally, the courts will suspend the definition and leave it to the legislation to make a new definition to fix the discriminatory aspects; however, in this case the courts changed the definition on their own accord.

BILL C-38 "An Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes"

codifies an expanded definition of marriage (first time in Canadian Law), in manner that expands the traditional idea of marriage as a purely heterosexual institution. Ie. Civil marriages are extended to same-sex couples

Reference RE: Same-Sex Marriage (2004)

Facts:

- The GofC asked the court to hear a case on the federal governments proposed act on civil marriages between 'two persons'.
- The act is as follows:
 - o Section 1: Marriage, for civil purposes, is the union of two persons
 - o Section 2: nothing in this act affects the freedom of officials of religious groups to refuse to perform marriage that are not in accordance with their religious beliefs

Issues

1. Is the Act within the authority of Parliament?
2. If yes, is section 1 of the Act, consistent with the charter?
3. Does section 2(a) of the charter (freedom of religion) protect religious officials who do not believe in same sex marriage?

Analysis

1. Section 1 is exclusive to federal government under se. 91(26), have authority in respect of 'capacity to marry'. Interveners tried to say that the term was constitutionally fixed, but this is not so. Section 2 relates to who can perform marriages, the performance or solemnization of marriage is allocated to the provinces under section 92 (12).
2. Yes, The purpose is to extend the right of civil marriage to same sex couples. The preamble further suggests that it is embodying the charter. Interveners suggested that it had the effect of discriminating against certain religious groups. There is no inequality apparent in this Act, it does not withhold benefits of impose burdens on a differential basis. The mere recognition of a group of rights for one group cannot constitute the violation of the rights of another group.
3. Limited to civil marriage, and cannot be interpreted as affecting religious marriage. Up to provinces to legislate in a way that protects religious officials rights The charter only protects religious officials when there is state compulsion. Sec 2 is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.

2. The Formal Validity of Marriage by Statute

The Marriage Act R.S.A. 2000 c. M-6

3. Marriages Valid at Common Law

Keddie v. Currie

Facts: This case discusses the statutory requirements for a common law marriage. Section 85 of the *Estate Administration Act* defines a common law spouse as: 1) a person who is united to another person by a marriage that although not a legal marriage, is valid by CL or 2) a person who has lived and cohabitated with another person as a spouse and has been maintained by that person for a period of not less than 2 years immed. Preceding death.

- C and K lived in house for 6 years together (both were previously married)
- K helped bring C out of debt, and provided money for mortgage payments
- C transferred half interest in house to K as a tenant in common

Issue: Is K a CL spouse? What are the required elements of a CL spouse?

Analysis:

- Marriage valid at common law (or common law marriage) is different than a common law union or relationship.
- Dependancy is an essential ingredient

What are the circumstances where the courts would recognize marriage valid at commonlaw:

- 1) unable to comply with formal requirements of marriage
- 2) parties have not submitted to the local law (military occupation)

B. COMMON LAW OR COHABITIONAL RELATIONSHIPS

Miron v. Trudel (1995) SCC - Marital Status an Analogous Ground for Discrimination

Facts: Man and woman lived together with their children in a common law relationship. Man injured in car accident and attempted to claim the injuries under his partner's insurance policy. Ontario *Insurance Act* provided that benefits were only available to spouses who were legally married.

Issue: Does the definition of spouse in the legislation violate s. 15 of the Charter?

Decision: Court held that an insurance benefit provided only to married couples discriminated against common-law couples. Denial of equal benefit on the basis of marital status was established. (one considering factor – unmarried persons are a historically disadvantaged group).

Ratio: Marital status was an analogous ground of discrimination for purposes of s.15 and cannot be saved under s.1. Should be “read in” to the legislation.

C. SAME SEX UNIONS

M. v. H. (1999) OCA - Pre-halpern: interspousal benefits are conferred on same-sex couples

Facts: Two women that lived together for almost 10 years. At time of separation, they agreed on division of family property. M changed her application to include a claim for spousal support in accordance with provisions of the *Family Law Act* of Ontario. Argued the definition of “spouse” was invalid because it only applied to opposite-sex spouses and thus deprived her right to receive support from H.

- Challenged definition of “spouse” so that she can seek the equivalent of spousal support
- the definition of spouse included cohabiting couples but it related to heterosexual relations (a man and a woman)

Issue: Whether same sex couples have a right to seek spousal support?

Decision: Court held that the exclusion of same-sex couples from the definition of spouse under section 29 of the *Ontario Family Law Act* was in violation of equality rights under section 15(1) and not saved. As a remedy, the court struck down section 29 altogether rather than read in any necessary changes.

This was a SCC decision, so all the provinces had to implement it into their legislation. Alberta was obviously quite hesitant; the actually were able to satisfy the MLA through the creation of the Adult Independent Relationship Act (which replaced the domestic relations act). This act was a way to show that the province would give equal rights to all sorts of relations without explicitly recognizing same-sex relations outright.

Walsh v. Bona (2002) SCC - CL Relationships do not have same rights as Married couples with regards to property (surprise ruling)

Facts: Couple lived together in CL relationship for 10 years (two kids). Woman applied for division of assets and argued that definition of spouse in *Matrimonial Property Act* constituted discrimination. Rather than having the presumption of equal division of matrimonial property, the onus was on her by way of constructive trust, to prove what she might have been entitled to.

Issue: is exclusion from the MPA of unmarried cohabiting persons of the opposite sex, discriminatory?

Decision:

The MPA only extends to persons who are legally married and does not extend to persons in a common law relationship (marriage is not an enumerated ground but it is an analogous ground). The main question is whether it violates a claimant's human dignity?

No violation. Decision to marry is intensely personal and many individuals in relationships of some permanence chose to avoid marriage and legal consequences that flow from it (Distinguishable from *Miron v. Trudel*)

- should not impose the property regime created by this statute upon a person who chooses not to marry
- unmarried persons have protection under other legislation and that they are free to enter into an agreement to share property, but should be willing and able to not do so
- where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount → to do otherwise would be to nullify the individual's freedom to choose an alternative family form and have it respected by the state

No adverse effect because there is no deprivation; they have other legislation, the idea of a constructive trust and are left with the option to marry if they so choose.

→ marriage is essentially a contract, by marrying the persons are choosing to be governed by the province, and for those who are not married they are either explicitly or implicitly deciding NOT to be governed

→ matter of DIGNITY, in that we should not force this regime on people because it is an affront to their dignity (because of the element of choice)

Ratio: Issue of choice emphasized by majority of SCC: you choose to get married or you choose not to and couples who choose not to should not have legalities of formal marriage imposed upon them

Dissent: L'Heureux-Dubé: Common law couples should be afforded the same property rights under the *MPA* as formally married couples enjoy

Distinction from *Miron* – insurance rights had no bearing on the rights (benefit or detriment) of the other spouse

Reasons Why People Choose to Cohabitate

- The existence of a legal impediment to marriage

- The existence of some religious obstacle to marriage
- Marriage is a relic of patriarchy
- They want to avoid legal rights and obligations associated with marriage
- There has been a removal of stigma of unmarried cohabitation due to weakening of religious influence
- Trial marriage
- Convenience

UNJUST ENRICHMENT

- Apparently unmarried persons have constructive trusts and unjust enrichment so don't need matrimonial property act
- The chore faced with for getting 50% (establishing entitlement) was high and she got a reduced amount (starting from 50-50 the negotiation is different than going from 0-100 when negotiating settlement).
- High degree of discretion and no presumptive entitlements = different landscape, they do not have the same access to rights

THE BREAKDOWN OF FAMILY UNIONS

A. THE CONTINUUM FOR FAMILY

1. EXPLORING ALTERNATIVES FOR DISPUTE RESOLUTION

Stewart v. Stewart

Facts: H and W separate and go to mediation, no agreement is signed. The W then files for summary judgment using emails as evidence. The H contests her ability to do so?

Issue: Can documents or discussions from mediation be used in court

Decision: No

Analysis: It is clear from both the agreement to mediate and the mediation information document that all of the discussions both between parties and with a third party mediator are confidential (without prejudice) and can thus not be used in court proceedings

The Collaborative Process

- A lot of people getting divorced choose to go about it by themselves; the refusal to secure legal advice is not based on poverty or lack of complexity but more often a distrust for lawyers
- Lawyers tend to over-litigate and do not consider the emotions behind the acts

What is collaborative Law

- two clients, two attorneys working together toward the sole goal of reaching an efficient, fair, comprehensive settlement of all issues
- The lawyer is not able to represent the client if the matter instead goes to court
- The lawyer's job extends beyond recognizing issues to managing conflict and guiding the negotiation process
- If the process breaks down, the attorneys must withdraw
- The lawyers must commit to not continuing to representation client that they feel is not abiding by the good-faith communications contained in the stipulation

Confidential

Without prejudice

Parenting expert – neutral party brought in

Before you go to court, now you have to show that you have tried some alternative dispute resolutions

Entering Litigation

1. Pleadings
 - a. SOC – description of facts giving rise to the claim at law
 - b. SOD + CounterClaim
 - c. Reply to counterclaim
2. Disclosure
 - a. *Notice to disclose* – paystubs etc
3. Chambers
 - a. Interim relief – interim custody support, order to preserve assets
 - b. Interlocutory - "Notice of Motion"
 - i. Support with an affidavit, take notice, im going to be seeking X
4. JDR
 - a. 80% goes here – mini trial
 - b. can pick a judge, occurs in boardroom in court house
 - c. Judge says, most of my colleagues would decide the case this way
 - d. Can encourage settling
5. Questioning
 - a. Examination for Discovery (former name)
 - b. Question other side under oath to see what their case is
 - c. Purpose:
 - i. Assess weaknesses
 - ii. Obtain additional disclosure
 - iii. Test credibility
 - iv. Gain admissions
6. Case Conference
 - a. Formerly called pre-trial conference
7. Trial – only 3-4 % get here

B. VIOLENCE IN RELATIONSHIPS

FACTORS LIMITING THE PRESENTATION OF EVIDENCE IN PARTNER ABUSE CASES

Introduction to research

- the number of cases that report partner abuse seems to be significantly lower than stats can numbers (3.5% to 40%)
- One reason may be that judges are not taking it serious OR they are not commenting on it in their judgments
- A research study found 10-15%, still much lower than the family violence research

Articulated Statute law in Social Context

- contact with both parents is the best so long as they are not exposed to abuse. Frequent contact to both parents is damaging if the children are exposed to abuse, adverse co-parenting competition, or high levels of conflict

Articulated law on Custody in cases involving partner abuse: principle v. practice

- until the 1980 judges downplayed the importance of domestic violence in al legal contexts; more recently they have started placing more weight on spousal abuse as a factor in child-related proceedings
- The divorce act and legislation in most provinces says that when assessing a child's best interest, the court shall not take into account a persons past conduct, unless that conduct is relevant to their ability to act as a parent of a child.

Articulated law on access in cases involving partner abuse

- where there is a history of spousal abuse or violence, access may not be in the child's best interest
- if supervised access or made to take anger counselling and fails at either, then the access may be terminated
- victims of abuse seldom claimed denial of access, thus judges are able to endorse access norms because parents are not contesting

- many people including lawyers state that partner abuse and good parenting are not connected, but many family violence experts suggest otherwise
- In practice evidence of partner abuse is considered important when deciding which parent should have primary care of children, but unimportant in access or contact disputes
- Supervised access is often awarded as a compromise

Legal Process

- as the cases move further and further up the legal system, fewer and fewer retain evidence and claims pertaining to partner abuse
- Filtering process:
 - o **first**, many things are not handled through the legal process,
 - o **second** many lawyers are given certain information that is then interpreted and evaluated, that not deemed legally relevant is discarded (also many do not ask, and many abused persons will not readily disclose)
 - o **third**, the documentation and articulation of legal claims – lawyers may not include this info in legal claims because it inflames conflict AND because many see it as irrelevant to access (unless abuse is on child). Some lawyers are only concerned with the person getting everything they want and push their clients into signing agreements that give it to them, without mention of abuse
 - o **fourth**: negotiation and settlement process – it is assumed that parties will present all facts but this does not always happen in practice; often there is pressure to settle and then abuse becomes a side issue and not important (pressure both due to gender relations and court resources)
 - o **five**: presenting cases to the judges – incomplete presentation of abuse and parenting to judges (one person stated that the judge said it was part of the past and no longer relevant).
 - Additionally, expert evidence is rarely introduced in court

Factors other than legal rules and processes (such as social and procedural factors) affect the evolution of articulated law

Protection Against Family Violence Act

Defines: violence, sexual abuse, stalking

Have to consider things under **section 2(2)** – read list

Just because there are other things, such as criminal charges, is not a factor. A person is not going to be given civil protection under one act (this one) just because there is a criminal matter

NO authority to issue an order concerning parenting, access etc. SO interesting that it can conclude with kids. If EPO then that judge does not have the ability to vary the order to add terms of contact / access

Section 2(6) – must be confirmed within 9 working days after the order (by justice of QB)

By this time, the respondent has notice and can appear alone or with counsel, but in the original order the person is not there. This is usually the point where affidavits are brought forward

Section 4 – QBPO – NOTICE

Allows same things as EPO, but there is notice to the opposing party, generally this is used when there is no immediate threat

Has provision for compensation, affects communication with family, co workers and has enforcement provisions (read)

4(2)(c) – grants access to the premises for a specific time

The police will attend the residence with her so she / he can get the items she needs, and to ensure that they are safe going into the home and there is no breach of the peace. They will not assist with taking things out.

Siwiec v. Hlewka (2008) ABQB

Facts:

- P and D live in CL relationship and have one daughter together.
- Relationship disintegrates and D is forced to move into basement.
- After altercation on June 28th, 2005, P moved out with daughter and leaves D in matrimonial home (incident includes knocking over couch and chair – this incident is disputed)
- D learns that P is going to move everything out of the house. D changes lock.
- Applies for EPO, cannot attend her friends house/. Reapplies so that he cannot attend the matrimonial house claims she is homeless and has no access to the home (which were not true and not what she displayed to first judge)
- Went back a third time to get it affirmed, was enforced and he was kicked out
- D wants compensation, because she ‘stretched the truth’

Issue: Did the Justices of the Peace follow proper procedure in issuing the EPOs

Decision:

Analysis:

- EPO are granted under *Protection Against Family Violence Act*, there are two kinds of orders EPOs and QBPO
- EPO can be granted by a PCJ, without notice to the respondent if the PCJ determines that (a) family violence has occurred and (b) by reason of seriousness or urgency the order should be granted to ensure the immediate protection of the claimant
- EPO must be scheduled for review by QB within 7 days
- A QBPO only needs family violence and there is usually notice to the other side
- **When there is no immediate threat, notice should be given and the order should be applied for (if there is a threat than an EPO is appropriate)**
- QB judge was concerned that the *Protection Against Family Violence Act* was being used for strategic purpose by P to gain possession of the matrimonial home (and in other cases, maybe this, to garner full custody of the kids)
- Felt the JPs were not rigorously checking the facts like they should. Awards D \$500 in compensation

Quigley v. Gillmore (2008) NSCA

Facts:

- GW filed for divorce in Texas, the wife filed in NS
- The pair lived for some periods in NS and some in Texas
- W practiced law in NS and he worked overseas so they spent a lot of time apart
- W lived in NS from 1999-2005, moved in August 2005 with intention of living in Texas – she maintained her law practice in NS – agreed to go to Texas with kid to see if they could work things out, but intended to move back if they did not

Issue: Did KQ satisfy the residence requirements of the *Divorce Act* prior to filing for divorce?

Analysis:

- Went through multiple similar fact scenarios where ordinary residence was not granted.
- Court determined that “when engaged in determining for jurisdictional purposes in matrimonial cases where a person is ordinarily resident, the persons state of mind may properly be taken into consideration for the limited purpose as to whether he was at the material time within the jurisdiction as a mere visitor
- Things to consider:
 - o Time, object, intention and continuity
- Degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations.
- **The issue is answered by asking where in the settled routine of her life the petitioner may be said to have regularly, normally or customarily lived in the year preceding the commencement of the proceedings.** It is not the length of the visit or stay that determines the question but rather the nature of the time spent

- The ordinary residence may be limited from the beginning or it may be an indefinite period of time (it is highly fact specific and a matter of degree)

Decision: not ordinarily resident

Hickey v. Hickey (1999) SCR

Facts:

- H and W married, separated on their own terms with a separation agreement that granted spousal and child support to W. The agreement said that changing circumstances would justify re-evaluation. When one of two kids moves out, H applies to remove her from the support at the same time W applies to increase the amount of child and spousal support

History:

- Lower court determined more money should be granted as the H's assets had greatly increased and because children should be entitled to share in that increase
- Under the divorce act section 17 a court can vary an order so long as it is satisfied that there has been a change in conditions, means or needs of either spouse or the child.
- Court of Appeal altered lower court decision 750-1500-900 dollars and decided there was no justification for increasing spousal support

Issue: Did CA error in reducing child support and spousal support from QB

Analysis:

- **Court tends to not overturn support orders unless an error in principle, a significant misapprehension of evidence or unless an award is clearly wrong**
- Increased means in the payor is an appropriate factor to justify variation; as was the fact that the child was 10 years older and thus expenses were likely higher
- The CA should not have altered the lower courts decision to increase child support
- **Section 17(7)(a)** have to consider the economic advantages and disadvantages arising from marriage and the marriage breakdown.
- W suffered as they decided she was to leave the workplace (financial disadvantage), thus increase is acceptable (lower court judge did not err, CA should not have overturned)
- Restored to what the chambers judge ordered BECAUSE he had not made an error law and had considered all things under the act; it is not up to the CA to change it just because they do not agree (best addressed by judge who hears the evidence)

Standard of Review: Appeal courts should not override chamber orders unless an error in principle, a significant misapprehension of evidence or unless an award is clearly wrong

Grounds for Divorce: Indicia of Marriage Breakdown

Manifests itself in three ways

- 1) Living Separate and Apart (99%) → *Eman v. McCafferty*
- 2) Adultery (0.5%)
- 3) Cruelty (0.5%)

***Eman v. McCafferty* 2010 NBQB**

Facts

- E and M married, separate but live together for another 7 months due to finances – but they still had sex, they went to social events together, appeared the same
- M testified that she left the house they still have conjugal relations
- After E filed for divorce transferred her property (that she owned prior to marriage) to H for refinancing. Got 99,000 dollars that she thought was to be shared, he got the refinancing in his own name
- They had accumulated 757,000 in debt

Issue: Did E and M meet requirements for divorce as irreconcilable differences?

Analysis

- Section 8 *Divorce Act* –
 - o grant a divorce on the grounds that there has been a breakdown in marriage
 - o 8(2): where breakdown is established in they have lived separate and apart for at least one year preceding the divorce proceedings and were living separate and apart at the commencement of the proceedings
- *Dupere v. Dupere* lists circumstances that need to exist for spouses to qualify as living separately and apart:
 - o occupy separate bedrooms
 - o absence of sexual relations
 - o little communication between spouses
 - o the spouses performing no domestic services for each other
 - o eating meals separately
 - o no social activities together
- complete withdrawal from the performance of matrimonial duties and obligations, with intend of terminating the matrimonial relationship

Decision: NO. after filing divorce they continue to live and act as a married couple

***Burbage v. Burbage* (1985) Ont SC → CRUELTY**

Facts:

- Wife says not supportive of her likes, or of their son (son doesn't agree fully), and that he slapped her (but that was 20 years ago) and kicked the dog
- H counter sues with adultery, as the W had hung out a lot with a guy including spending the night,
- The W and guy say that no sex occurred as he was impotent

Issue:

- Do the H actions constitute cruelty?
- Do the W actions constitute adultery?

Analysis:

- Section 3(d) of *Divorce Act* → physical or mental cruelty of such kind as to render intolerable the continued cohabitation of the spouses (subjective test, but intolerable to a reasonable person)
- Adultery: There was evidence of opportunity and intimacy (two things needed) and this is countered by testimony of impotence
 - o Once opportunity and intimacy is shown, burden on alleged adulterers to call evidence in rebuttal
 - o Should have called some form of medical evidence to support impotence
- Division of Assets
 - o H has a larger total asset and a secure job (which she did not have)
 - o Section 4 Family Law Reform Act – equal division of family assets
 - o H has to pay W, after splitting home, 8750 to equalize assets
 - o Also has to pay 500 a month until her half of house and equalizing payment is made, at which point it is to be reduced to 350 while she is in school

Decision:

- **No**, incompatibility but not cruelty
- Yes, adultery was established

***B.(Y). v. B.(J).* (1989) ABQB**

Facts

- H admitted he was homosexual, to wife and daughter

Issue

- Does this constitute cruelty

Decision: No

Analysis:

- Homosexuality alone is not enough, there must be some added element submitted that constitutes grave conduct
- There has to be a mental willfulness, and being homosexual is not really a willfulness to be cruel, there has to be a disposition to inflict suffering
- The fact that the other partner does not contest the claim, does not mean the standard is more relaxed, the W still has to meet the burden established by Parliament

Be careful in defining cruelty as something that a person finds intolerable – there must also be an intention to inflict suffering

Also, because this is from 1989, not adultery, because back at this time the traditional definition still applied, so same-sex relations did not meet the definition

S. 7 Alberta Evidence Act – questions regarding adultery

→ protects an individual from having to answer a question (ie. admitting) that they have engaged in adultery

Orellana v. Merino (1998) Ont Cj**Facts:**

- H has essentially not been a part of W or the kids life for a long time, and was only paying 100 dollars a month (separated for 8 years)
- W wants to remarry but in order to do so the court asks her to get more financial info so that the support is altered based on the new guidelines
- W cannot and wants the divorce finalized anyways as her new partner is willing to support the kids

Issue: Can W get a divorce

Decision: No, Divorce is stayed

Analysis:

- the new custody and child support guidelines are in place for a reason and it is not the applicant to choose not to other to try to obtain reasonable support, regardless of new partner, the natural father has obligations

Jomha v. Jomha (2010) ABQB**Facts:**

- met, married under a kitbe-al-kitab ceremony. The certificate was registered but there was no banquet and no consummation
- They went before an Islamic leader in the community and the bond severed

Issue:**Analysis:**

- in law, for an annulment to be granted, the law requires proof that the marriage is unable to be consummated (proof of impotence, physical or psychological)
- The mere refusal of marital intercourse is not sufficient; there must be an incapacity
- Annulment may be granted where the marriage is not consummated by reason on an invincible repugnance or impossibility in the mind of at least one of the parties

There was an inability to carry out the sexual acts, its not that they just are not having sex, but rather that one cannot (impossibly psychological or physical)

SUPPORT

Family Law Act

Definitions:

Section 1 (f) Father:

- (i) biological father
- (ii) adopted child, the person whom adopts
- (iii) section 13(2) A male person is a father if at time of conception he was spouse of or AIP of some permanence with the female person and (a) his sperm is used in assisted conception OR (b) his sperm is not used but he has consented in advance to the conception of parenting

Section 1(i) mother:

- (i) the person who gives birth to the child
- (ii) adopted child, the female that adopts the child
- (iii) Surrogacy: section 12(6) a genetic donor who is declared to be the sole mother of the child under section (5-child resulted from the fertilization of the genetics donors material) is demed to be themother at and from the time of the birth of child **section 12(7)** – contract to give birth to a child for the purpose of relinquishing that child to a genetic donor, is not enforceable

Statutory presumption – when living with them

Surogacy – see section

DNA test – section 15 – court can make an order that the parties undergo a DNA test [subsection 3 – consent is required, but section 15(4) says a negative influence by court will be drawn by refusal to do DNA test]

Section 45-48

Parent: some one standing in the place of a parent

Drew of Chartier to give us factors

- spouse of other party
- relation of AIP and demonstrated a subtle intention to
- 48(2)
 - o age of child
 - o relationship with person (duration of relationship)
 - o did the child see that person as a parental figure
 - o to what extent is that person involved in care, education and discipline
 - o after separation was there continuing contact or attempts at contact
 - o did the person ever consider adoption
 - o was the child called by that persons last name
 - o direct or indirect financial support
 - o relation with other parent (ex. Biological father)

Section 49 – every parent has an obligation to support their child

Divorce Act

Child of Marriage

Section 2(1): A child of marriage means a child of two spouses or former spouses who, at the material time

- a) is under the age of 16
- b) OR is 16 yrs or older and under their charge but unable, by reason of illness, disability or OTHER CAUSE, to withdraw from their charge or obtain the necessaries of life

Section 2 (2) For the purposes of the definition “child of marriage” in subsection 1, a child of two spouses or former spouses includes

- a) any child for whom they both stand in place of parents; and
- b) any child of whom one is the parent and for whom the other stands in place of a parent

in loco parentis – standing in the place of a parent

Chartier v. Chartier

Facts

- parties were married for a short period of time (15 months marriage, 3 years CL). The child was not the biological child of the male party, however was deemed to be *loco parentis*
- while they only discussed adoption, they did change her name to his last name, change his birth registration to have him listed as the father and he acted as a father figure
- He deemed them children of the marriage and was granted access to both

Issue

- Under what circumstances, if any, can an adult who has been in *loco parentis* withdraw from that position ?

Decision

- two lines of reasoning available to court:
 - o *Carignan* (MBCA)
 - Focused on the common law intention of parties and held that someone found in *loco parentis* could unilaterally withdraw from that role
 - o *Theriault* (ABCA)
 - Focuses on relationship between parent and child and determined one could NOT withdraw from a *loco parentis* role (stands in place of parent)
 - Based on best interests of the child (to not have parental figures abandon them)
- SCC unanimously followed ABCA

Ratio:

- Once it is shown that the child is to be considered a child of the marriage, the obligations of the step-parent towards that child are the same as those relative to child born of the marriage

Commentary: Judges are still very nervous about applying this case, as a result the bar has been placed high when finding a party *loco parentis* because it is a PERMANENT finding

There was additional concern that the child might collect support from both the biological and the *loco parentis*. The court said the contribution of each is to be assessed separately ; the obligations are joint and several.

Material Time: Forget about what is happening currently, what is the reality during the currency of the relationship (ie. in the marriage or when the family functioned as a unit, the relationship with the child)

Factors in Chartier

- Does the child participate with the extended family
- Is the child treated the same as the biological child
- Was discipline offered
- Was it offered to the world implicitly or explicitly that they were responsible for the child

Cook v. Cook

- post Chartier case – are we going to have a high or low threshold in determining *In loco parentis*, now that there is this permanency
- Some courts are uncomfortable with the idea of a person have more than one mother or father
- Other courts accept the modern realities that a person can have a biological father and a person standing in place of the father
- Justice Campbell – high threshold for standing in place of parent; factors:
 - o Duration
 - o Presence of Bio Dad

- To the extent that this person is still involved and still paying child support (ie. if still around, then less likely to be *loco parentis*)
- What is dad is just sending a cheque but has no emotional connection? And how much is the dad paying (they may combine the two – under chartier – it does not offend the divorce act for two parents to pay support)?

FAMILY LAW ACT - SUPORT

Obligation to pay support does not extend under the Divorce Act to children whom have withdrawn from their parents charge.

Section 46

- a child means a person under 18
- over 18 but under age 22, but whom cannot withdraw from charge because they are a full time student

Child of Marriage – DIVORCE ACT

- There is nothing specific about being under age 22, or being a full time student
- No temporal limit
- No clean cut requirement of being a full time student

ADULT CHILDREN

- Adult children CAN continue to get support after they turn the age of majority
- **s. 2(1)(b) of the *Divorce Act, 1985***
- Practice Note: Generally, a child can get support up to their first degree/diploma

Farden v. Farden

Facts:

- H paid child support until son hit age 19. Stopped.
- Now W if officially filing for divorce and wants child support because while the son is over 16 he is a child of marriage under the divorce act, due to his attendance at a post-secondary school.
- Son was refusing contact with father
- Only attending part time with no real goal or plan; has to go PT because needs job to pay for education

Issue: Is Education considered an “other cause” under the Divorce Act?

Decision: Yes, but have to look at all the factors and the context. There is no absolute duty to pay under the Act. In this case, Farden was not a child of the marriage (burden on applicant for support, to show that the person is the child of the marriage)

Analysis: FARDEN FACTORS

1. Is the child in full time or part time studies
2. Is the student eligible / applied for student loans
3. What are the career plans of the child, are they reasonable and appropriate (or is the kid just chilling out at school)?
4. What is the ability of the child to contribute to his or her own education through employment
5. What is the age of the child (crucial)
6. Demonstrating success in their chosen course of study?
7. What financial plans were made during cohabitation by parents?
8. Has the child over 18 unilaterally terminated the relationship with one of the parents? OR is there evidence of a dysfunctional or unhappy relationship?

Federal Child Support Guidelines

There is also AB guidelines, but for the purpose of the exams only really need to focus on the Federal guidelines

Interaction with the Divorce Act

Section 15: Support

- 15.1: ability of court to grant support for any and all children of marriage
- 15.2: interim orders
- 15.3: Court SHALL make an order in accordance with guidelines (court has to follow, mandatory, the federal guidelines)
- 15.5: special arrangements to vary off the guidelines, where special agreement between parties

Child support is usually payable periodically (periodic payment) so monthly, can be paid in lump sums (don't tend to see this happening because not binding to say that this is the only child support, can still apply for more)

Also, **child support is not taxable or deductible** (tax neutral) – post 1997

(spousal support is not tax neutral, paid periodic basis pursuant to order or written agreement, are taxable and deductible)

Child Support Guidelines

Objectives – see Act; important that argument is honoring the objectives

Structure

- section 1 -27 = body (p. 184)
- schedule 1 & 2 = standard of living test
- schedule 3 = deals with necessary adjustments
- Tables

Pre- 1997 child support orders were completely discretionary on a per child bases (200 a month per child), they were based on any number of factors. They were also budget based, had to bring in an explicit budget of spending etc. NOW, its based on a specific table based on income and it's a lump amount a month, not a per child amount.

Tables → child support is driven by gross (total) of the payor. The variables are the number of children and the province you live in (each province has different tables)

What about the income of the payee?

- If non-custodial parent earns 85 000; there are 3 kids, then the payor has to pay 1599 to the payee
- The mom can earn \$0 or \$200 000 a year, it does not matter. This is the base amount

Tables go to 150 000 then there is a formula (WHERE IS THIS FORMULA)

Section 16: Custody

Federal government in creating the federal guidelines looked to US model where it was assumed that each parent would spend the same percentage of his or her income on the child (Flat Percentage). Our model has features of the flat percentage formula but uses a specific set of underlying principles to arrive at percentages that vary according to income.

Guideline goals:

- 1) children continue to benefit from the financial means of both parties
- 2) reduce tension and fighting by making support objective
- 3) encourage settlement and be more efficient in court
- 4) ensure consistent treatment of spouses and children in similar situations

Divorce act section 26: Parents have a joint obligation to maintain their children in accordance with their relative abilities to contribute to the performance of that obligation

Section 9 (of guidelines)

Where a spouse exercises right of access to, or has physical custody of, a child for not less than 40% of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;

- (b) the increased costs of shared custody arrangements;
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought

Contino v. Leonelli Contino (2005 SCC)

Facts

- One child and family that had originally had one kid living most of the time with mom and seeing dad
- Overtime shifts so dad is equally sharing time (50-50) with child
- Father earned 87 000 and mother earned 68 000
- Original chambers judge used a “set off” approach (688-560 = 128), half of which is 64 (their respective obligations) and grossed it up %)% to 100 to be paid in support;
- Divisional court said there was a failure to account for increased cost of shared custody, set back at 688
- CA took it to 400 and SCC took it to 500

Issue

- Awarding set table amount seemed inappropriate but what is the correct mathematical solution to determining an appropriate amount?

Decision

- Court rejects the presumption of simple “set off” between the two spouses income
- You can start here (and it probably is the easiest way) but don’t necessarily end here

Analysis:

- Presumption in favor of the guidelines amount, increased or reduced if rebut presumption of appropriateness
- Follow table except in 5 exceptions
 - o Children over age of majority
 - o High income earners
 - o Step-parents
 - o Undue hardship
 - o Shared custody
- CA said once show the 40% threshold is reached, there is no discretion, the court must apply section 9 (of guidelines) and the table amounts no longer apply
- No specific formula set
- Follow these steps when figuring out shared parenting case
 - o Look at the applicable amounts under the table
 - Look at financial situation of both spouses
 - Types of set off (page 143-144)
 - o Review the child expense budget and spending patterns. Court is concerned with the increases costs of shared custody arrangements
 - o Consider the ability of each parents ability to bear increase costs of custody
 - o Look at Standard of Living for the child in each household. Important for many Judges and they find it useful when they exercise discretion. Judges feel that children should not experience a huge difference from house to house

Dissent: Appropriate does not mean mathematically correct, it means within an acceptable range. The 400 dollars by the CA was acceptable. What need to be concerned with is that the standard of living is relative to that before the divorce, and that it does not change to much from house to house

UNDUE HARDSHIP

Hanmore v. Hanmore

Facts:

- two children of marriage, in custody of A since divorce
- R paid 75 per child every month, fell into arrears and was ordered to pay 300 until caught up. Then continued to voluntarily pay 300.
- A applied for an increase under guidelines to increase to 562
- R applied for a reduction based on undue hardship
- R supports new wife and two kids (none of whom work) on 31 000; A makes 23 800 and supports their two kids (15 and 17), appellant has a basement suite cooking on a hot plate and microwave and has no benefits. R gets full benefits and resides in house

Issues:

Does the R have a case for undue hardship?

Decision

- chambers judge claimed R would have to support 4 ppl on 24000 and that constituted an undue hardship
- But CA found no specific evidence was given significant to rebut presumption of section 3 and thus applied table amounts

Analysis

- Section 10 (1) Undue Hardship
 - o *On either spouses application, a court may award an amount of child support that is different from the amount determined under any of section 3-5, 8, or 9, if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship*
- Section 10(2) Circumstances that may cause undue hardship
- If undue hardship is established, the applicant must show that his or her household would enjoy a lower standard of living than the household of the other parent should child support not be reduced (a lower SOL does not automatically mean UH)
- **Undue = excessive or disproportionate**
- **Hardship = difficult, painful suffering**
- Must specifically identify the hardship which is said to be undue, a claim regarding general inability to pay or a generic reference to the overall expense of a new household will not suffice.

CALCULATION OF INCOME / IMPUTING INCOME

Sections 15-20 - Calculation of Income/Imputing Income

s. 15(2) – Spouses can agree on income amounts (if the court thinks the amount is reasonable)

s. 16 – “Total income” must be the one considered on T1 General Form

- there are 13 ways of earning income (employment, pension, investment, interest)
- not automatically what is reported to Canada revenue (not bottom line)
-

s. 17 **Pattern of Income:** fluctuating income

- does not mean that the court averages income
- but may instead say that one of the years is a fair income.
- If it has been steadily increasing, may only look at the last year, court is concerned with current income

Lavergne: The amount of child support to be paid is the amount based on the income earned in that year (support should always be determined by the year they are in)

- practically they look at the year before
- YTD income up to oct 2010; 9/12 months so if income is 70 000 so far, then

can estimate / extrapolate to what it is going to be for 12 months

s. 18(1) – Income of Shareholders, directors and officers (see: *Miller v. Joynt*);
- does the income accurately reflect the amount of money available to the person

s. 19(1) – Imputing income: The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following (impute: adds income back into the corporation) NOT limited to businesses:

a) Spouse is intentionally under-employed or unemployed (see: *Hunt v. Smolis-Hunt*)

b) Spouse is exempt from paying federal or provincial income tax (aboriginals)

c) Spouse lives in a tax haven

d) Spouse has diverted income to offshore accounts

e) Spouse's property is not reasonably utilized to generate income (example: have an apartment and it is sitting there and they are not trying to rent it)

f) Spouse has failed to provide full income information

g) Spouse has made unreasonable deductions on income (EXAM QUESTION)

- self-employed individuals or control the corporation THAN are there any unreasonable expenses being deducted
- The onus of proving all the expenses are reasonable is on the payor
- Example: insurance on a sports car (under corporate policy) OR has a large truck and uses it for work but have to have a mileage log and justify that all the mileage is for work (if not then the 50% use for personal use, may make the insurance unreasonable and then the judge may add a portion of money to the bottom line income)

h) Spouse derives significant income portion from dividends and capital gains

i) Spouse is a beneficiary under a trust is in receipt of income from the trust

Hunt v. Smolis- Hunt

Ratio:

- The court can impute income for purposes of section 19, however majority takes a different view than dissent and says we are not going to use section 19 unless you can prove to us on a reasonable basis that an individual is intentionally employed for the purpose of paying child support
- Direct evidence or inference from evidence is required to demonstrate an individual undermined their parental obligations
- **The intentional element: not just about intention to not work, or be unemployed BUT need extra step: I'm not going to work because I do not want to pay child support**

Broader discretion, you have a right to govern your own actions, have a life and we are not going to mandate for you to have to get the best paying job to provide child support (there is no onus to maximize your earnings)

Miller v. Joynt

Issue

- pre-tax income of the fathers corporation for the purpose of calculating his income?
- Child turns 18 two months after starting University, is he child of marriage?

Decision

- not a child of marriage (applied Farden factors)
- use pre-tax earnings not retained earning

Analysis

- officer and shareholder of a corporation (sole shareholder) has the ability to control the income of the corporation
- the purpose of section 18 to lift the corporate veil to ensure that the money received as income by the paying parent fairly reflects all of the money available for the paying of child support
- onus is on the payor why all of the income available to him (pre-tax) should not be included in the bottom line income

The onus is on WHO to show what the amount is that he should be paid for the services he offers
May be on the recipient to show (labor surveys) what those individuals on average are making

Add to pre-tax income:

Extraordinary Expenses (Section 7)

- 1) Necessity of the expense in relation to the child's best interest
- 2) Reasonableness of the expense within the means of spouses
- 3) The family spending pattern prior to the separation

- (a) Daycare
- (b) Benefits – health and dental
- (c) Extra health expenses above and beyond insurance reimbursements
- (d) education
- (e) post secondary expenses
- (f) extraordinary expenses for extra curricular activities

Section 7(1.1) defines extraordinary expense

These expenses are divided PROPORTIONATE to the income

Hiemstra v. Hiemstra

Facts:

- child of marriage is 18 and plans on attending NAIT
- Has to move to city to go and makes budget of all expenses, including tuition, books, power, rent, groceries, insurance etc
- Judge says kid has to get a line of credit, once does he is expected to pay a portion and the court then goes through the different types of expenses and determines whether each falls into the category of 'extraordinary' and thus the father is expected to contribute?

Issue:

- What constitutes an extraordinary expense and when should it be paid by spouse?

Decision:

- power, rent, groceries = extraordinary and payable
- cell phone (NO), insurance (borderline but decided it was), gas (yes, but less)

Analysis

- **Where an expense is reasonable and necessary in the best interests of the child, the capacity of the parents to afford it must be assessed in that light**

- the mother and father pay a proportionate share of the shortfall after the child's contribution is deducted from his budget
- section 7 *Child Support Guidelines* (subsection d, e)
- The fact that the expenses might cause a parent to have to scrimp somewhat on their personal spending to their own interests is not of itself a particularly persuasive argument against finding a particular expense to be eligible under s. 7
- The fundamental rights of children (bests interests of) take precedence over economic advantage for parent → where it is reasonable and necessary in the best interests of the child, the capacity of the parents to pay must be assessed in that light
- The evaluation may include whether the family would have or could have afforded the items
- **Extraordinary = exceptional, beyond what is regular, customary or usual**

Incomes over 150 000

Section 4 of *Income Guidelines* → first 150 000 based on guidelines, anything over that amount can increase the tabled amount on a discretionary basis

Not about “need”; not about saying look the recipient doesn't “NEED” this money, as is proven by her putting half of it in a college fund

Francis v. Baker

Facts:

Spouse is given 11, 000 in child support based on tables, court is allowed to calculate a different amount if they find the former amount to be inappropriate (section 4(b))

Issue: What is meant by “inappropriate”?

Analysis

- Onus is on person seeking more or less (really its less- so payor) to rebut presumption that table amount is inappropriate; **must have clear and compelling evidence**
- Look at circumstances of family and children (may include budgets)
- inappropriate is not inadequate, but rather **unsuitable**
- 11 000 was upheld!

Simon v. Simon

Facts

- payor is a professional hockey player, his salary fluctuated
- made 180 000 when separated, paying 2200 for kid and for spousal support
- salary jumped to 1 000 000
- ms. Simon applies to increase support to 9215 and lump child support of 150 000
- Judge increased to 5000 only because found amount to be inappropriate (he found this because support will go for next 20 years and father wont always make a million, should not have luxuries that will shortly be reduced)

Issue:

- is the table amount unsuitable given the volatile industry (uncertainty and risk), can this distinguish it from *Francis v. Baker*?

Decision:

- No, income varies for everyone, should be 9215 (table amount)

Analysis

- For income over 150 000 (section 4 guidelines)
 - o Amount in table OR
 - o For first 150 000 amount in table and in respect to the balance the amount the court considers appropriate

having regard to the condition, means, needs and other circumstances of the children

- Ms. Simon does not need to justify budget, **burden is on the payor to demonstrate that the table amount is inappropriate**
 - o Custodial parents need not justify each and every budgeted expense
- Judge got sidetracked by uncertainty of financial situation rather than considering, as the guidelines require, the ability of each spouse to contribute to the support of the child (if his income changes Mr. Simon can apply to have his support reduced)
- the payor cannot dictate to payee what to do with the child support, even if it is a large amount, this would undermine the principles in the guidelines

Pay the amount in the child income guidelines

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

Facts:

- Four cases are appealed that relate to requests or objections to **retroactive awards**

Issue: When should we apply retroactive awards?

Analysis

- Factors to consider:
 - o Unreasonable delay by the recipient parent (no persuasion may mean its unreasonable time delay, persuasion to not or to wait, may negate delay)
 - o Blameworthy conduct by the payor (such as failing to provide information about pay increases, or misleading / persuading the recipient parent)
 - *I would characterize as blameworthy conduct anything that privileges the payor parents own interests over his/her children's right to an appropriate amount of support*
 - o Would a retroactive award be a hardship to the payor
 - o Circumstances of the Child (if currently having a high standard of living, may not benefit from the retroactive award)
- May also consider whether the payor met his obligations in a different manner; the expenses incurred in accessing the children, whether there has been disclosure by payor and /or whether the payor has attempted to avoid their obligation or not.
- Parents have mutual obligations to their parents, it is BOTH of their jobs to ensure proper support, this means that recipient should inquire and/ or the payor should disclose changes in circumstances (not just up to the payor)
- Recall that child support should be based on needs, care and support, and that sum should be divided according to the respective incomes and resources of the parents
- Three circumstances for RA:
 - o In adequate order for child support in place (the parent has obligation, even if meeting order, may not be meeting obligations if the payments should have increased)
 - o The difference between a court order and an agreement exists (the courts will deviate from guidelines but only if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates)
 - o Status Quo is that there is no existing order (no statutory restriction as to how far back / limitation on RA's): the obligation to pay more always existed its just that the orders didn't reflect it
- Where ordered a RA will be granted from the date of effective notice by recipient of an intention to seek an increase (if there is blameworthy contact time frame may increase)
 - o Other options: when increase occurred, formal notice, when application made to court, date of effective notice (the latter lacks formal court documents –just requires that the topic be broached)

STEPS:

- 1) look at four factors
- 2) Determine whether an award should be due
- 3) Date for the Retroactive Award

Retroactivity works BOTH WAYS.

- for example if the payor has paid too much because say their income had fallen; will still have to look at all factors though and there will likely be a delay, it could more easily constitute hardship because the kid has already eaten the food etc

Lavergne v. Lavergne

- use payor's current income, not the income from the previous year (can estimate future income – future as in rest of year)
- No disclosing an increase in income can be considered blameworthy conduct

Schick v. Schick

- fathers actual income is significantly and materially higher; and that the failure to increase in support was blameworthy
- In this case father knew of financial difficulty, did not disclose increased income but rather mislead her about his situation
- Non-recurring amounts need not be excluded from calculations of RAs

Willick v. Willick

Facts

- W and H separate and have an agreement that he will pay 450 per child a month + 700 a month in spousal support (at an annual increase rate of 3%)
- The divorce judgment later incorporates this agreement
- The income grows from 40 000 to 154 000
- The trial judge varied the amount to 850/month per child
- CA said that the conditions under **section 17(4)** had not been met

Issue: What are the necessary conditions and were they met in this case?

Decision: Yes met

Analysis

- while the court is not bound by a separation agreement, it is strong evidence that it represents what each party thinks the children need
- when the agreement is embodied in a divorce judgment, it must be assumed that the courts duty to satisfy itself that reasonable arrangements for the support of the children, have been made
- **child support orders can be varied under section 17(4): there must be a material change of circumstances that if known at the time, would likely have resulted in different terms**
 - o "that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage"
- AN order for child maintenance may be varied when the relationship between the needs of the children having regard to the means of the parents changes in a material way
- P. 134: once condition is fulfilled the judge is entitled to re-examine those circumstances affected by the change in the means of the payor and the needs of the children, and given the nature and magnitude of the changes, could have looked anew
- If the children are already being maintained at a very high standard a change, even a substantial change in the wealth of the payor spouse, will not in itself entitle the children to increased support so as to permit them to live in luxury.

Concurrent Decision

- Under s. 15(8) of the Divorce Act, the objective of a child support order is to recognize the former spouses' joint financial obligation to the children and to apportion that obligation between them according to their relative abilities to contribute to such support
- A court may take judicial notice of the fact that it costs more to support children as they grow older. When this fact becomes compounded by the effect of inflation, it may constitute a sufficient change.
- The threshold test to justify variation has clearly been met in this case. Both the respondent's income and the

children's needs increased, although a change in either of them would have sufficed, and the change in the respondent's income was significant.

- 1) **The Nature of the Change of circumstances**
- 2) **Sufficiency of the alleged change in the parties or children's circumstances**

Haisman v. Haisman

Facts

- chamber judge refused to cancel maintenance arrears
- made application under section 17 of act
- judge found there was no change in circumstance which would justify a reduction in arrears

Issue: When can an order be reduced?

Analysis

- Delay in enforcing a child support order is irrelevant, there is no one year rule, there is no limit on when the enforcement has to occur (delay on the enforcement of child support)
- The SCC dismissed the appeal, the judge did not find that he was unable to pay, so that fact that he may have been unable to in the past was not relevant to current application (present inability to pay is not itself enough)
- Consider factors
 - o Nature of support obligations
 - o Payor's ability to pay the support order back when it was ordered (evidence burden on the applicant to bring T4 and budget for that year)
 - o Ongoing financial capacity (may hit a rough spot now but likely to be re-employed)
 - o Is there an unreasonable and unexplained delay on part of the payor to get relief from the situation
 - o Would enforcing the arrears cause unreasonable hardship on the payor
- Father tried to say that they had agreed that he did not have to pay child support, but the court held that even if they believed that agreement had occurred, it would not be sufficient to say that a variation was in order
- judge only erred in awarding interest on arrears

A judge should not vary or rescind an order for the payment of child support so as to eliminate arrears unless he or she is satisfied that the former spouse cannot pay and will not be able to pay the arrears

Will not be handled casually by the Judge, a somewhat exhaustive look at finances will occur

SPOUSAL SUPPORT

Divorce Act

15.2(1):

- spousal support can be periodic or lump sum (or both)
- secure their orders (if there is a past tendency for not paying by payor)
 - o insurance (life insurance) so still get money if payor dies
 - o Can also get secured against the estate (if die the estate is bound to pay)
- can make an order for definite or indefinite period or until a specified event occurs (ex. Until W completes her Nursing degree)

15.2(4): Factors

- Consider conditions, means (not just income, includes assets), needs (in context pre-separation standard of living) and other circumstances
- Length of cohabitation
- Roles each person played during marriage
- Agreement

15.2(6): objectives

- economic advantages or disadvantage from marriage or it's breakdown (compensatory)
- relieve any economic hardship (non-compensatory – means and needs)
- In so far as practicable, promote economic self-sufficiency

Adultery or other grounds for divorce are essentially irrelevant to spousal support; no-fault based system; not giving people money because they were wronged but because they may have an entitled.

Family Law Act

- Show to court that partners are AIP
- **Section 56**
 - o Obligation to support spouse (p.87 of statute) or AIP
 - o Doesn't mean entitled, just a relationship where an obligation may be found
- **Read section 57** – prerequisites – have to be living separate and apart (etc)
- **Section 58: Factors**
 - o Factors 1, 2,3 = similar to DA
 - o B, c, d = unique to family law act
 - o B = take into account any legal obligation to provide for another person
 - o C = take into account whether or not that payor's support has a partner that might help him with expenses in his own household
 - o D= take into account extent to which someone is living with the recipient and the extent to which they are contributing to the household (does not need to be a conjugal relationship; just concerned about economics)
 - o Misconduct

Moge v. Moge (Man) 1992

Facts:

- W had low level education, did all domestic work and was employed pt in evenings
- The trial judge found that there was no evidence that H took additional responsibilities while she was at work
- She was laid off, her income was reduced to EI, H's income increased
- At trial she successfully increased order from 150 to 200 in both forms of support, going from 150 a month to 400 total. The H then made an application and both forms were ceased, W appealed on spousal support only and was given 150 a month (CA)

Issue:

What are the circumstances in which spousal support ought to be varied or terminated?
Is the wife entitled to ongoing spousal support forever or is there a termination point?

Decision: the support should not have been terminated

Analysis:

- P. 245-8: what is traditional and what is modern (marriage) – stereotypes, some marriages do not fit into either; ditch motion and look at each marriage on its own
- Self-sufficiency is only ONE factor to consider (in so far as practicable) **section 17(7)**
- Another factor is if the spouse has or continues to incur financial disadvantage as a result of caring for a child of the marriage
- Equitable distribution of resources: not perfect, not necessarily spousal support, may be achieved through distribution of property, child support etc
- Courts are starting to recognize the equality in relationships, namely, that the cooking, caring and cleaning of children is equal to paying for the food and clothing
- **Must look at ALL 4 objectives** in the act in order to achieve equitable sharing of the economic consequences of marriage or marriage breakdown (no one is paramount)
- Equitable sharing does not guarantee to either party the standard of living during marriage, but it is not irrelevant to support entitlement. Marriage is a joint endeavor, the longer the marriage the closer the economic unit, the greater the claim to equitable standards of living

- Application:
 - o She has sustained substantial economic disadvantage
 - o 17(7)(b) long term child rearing affected her ability to earn an income
 - o W continues to suffer hardship due to breakdown In marriage
 - o W has failed to become economically self sufficient despite efforts

The same factors go to quantum and duration. If a person has a weak entitlement to spousal support they may get less money for less period of time. If meet the entitlement threshold do NOT have to fully meet the needs, can partially fill the need

Chutter v. Chutter

Facts:

- married 28 years
- W = dental hygienist, convinced to quit her job and move to a campground/ waterslide park to run it
- H and W are very successful and start selling waterslides, grossing lots of money
- Have a kid; she mostly stays home with the kid, care of house, works once a week – has restrictions on work times must be home for when kid gets out of school (at husbands request)
- Divorce, split assets, each totaling some 4 million

Issue:

- is the wife entitled to spousal support

Decision:

- yes
- Trial Judge: No, the division of assets was more than enough to have a comfortable living

Analysis:

- section 15(2) of the Divorce Act (look at 4 objectives)
- 15.2(4) – factors pertaining to if spousal support is granted
- **Compensatory Support**
 - o Marriage is a joint endeavor, the longer the relationship endures the closer the economic unit
 - o If the wife has to cut back on her labor to care for children, it jeopardizes her own ability to earn income and ensure security
- **Non-Compensatory Support**
 - o Social obligation model – goes beyond basic necessities of life and carries according to the circumstances of the parties (needs do not end when the recipient achieves a level of income above subsistence)
 - o The fact that a spouse is employed outside of the marriage, or is engaged in the same career at the end of the marriage as in the beginning, does not necessarily preclude entitlement to spousal support
- Application
 - o H gained advantage to travel world and gain business experience because she stayed at home and cared for kid; her career was limited by this and by his desire that she be home for the kid after school (by 3)
 - o Thus she is entitled
- **How much and for how long**
 - o Two formulas: (1) without child support (2) with child support
 - o P. 277 factors under guidelines
 - o Without child support amount is between 1.5-2% of the difference in incomes for each year they were married (up to 50%). The duration is 0.5-1 year for each year of marriage (at 20 years say indefinite)
 - o In this case gave amount lower than guidelines due to many factors

Step 1: Gross Income Difference

- (Respondant's income) – (appellants income) = gross income difference

Step 2: Percentage Range

- married for 25 years means 37.5 -50% range

Step 3: Application of percentage

- 37.5% x Gross income difference = yearly spousal support

50% x Gross income difference = upper range of yearly spousal support

Always settle the property first

- If get property that creates a stream of income (might affect support)
- An impute income, but won't do it for matrimonial home b/c then where do they go

This is BC, its more progressive than AB

Entitlement → form → Quantum → Duration

Periodic payments are taxable for the recipient and tax deductible for the payor. Lump sums are not subject to tax consideration.

Duration – indefinite, definite, conditional , review (support subject to a review)

Elliot v. Elliot

Facts

- H and W decide W will leave employment to care for children until in school fulltime
- W left in 1981 went back to work in 1989 parttime
- Trial judge relied on an economist who calculated the present value of the wife's income loss as 350 000; judge played with a but an awarded her a lump sum of support

Issue

- did the judge correctly calculate the deserved spousal support?

Decision

- No

Analysis

- reluctant to give lump sum awards.
- Periodic or monthly payments are better because they can be varied with changes in income/ family structure / situations
- Lump sum is based on one event or decision in the marriage (decision to leave workforce) need to look at whole context (like the fact that the H gave up job opportunities because he couldn't move his wife and kids). He only looked at her value loss and no other factors (or mitigation factors)
- Also failed to take into account the husbands ability to pay (specifically that he had child support arrears from paying to little and was paying them off with 1000 a month – clearly making a lump sum inappropriate)

Not a lump sum – W should share in the asset in the form it actually exists – an income stream

Woolridge v. Woolridge (1999 ABCA)

Facts

- Spousal support was awarded and granted review in 3 years
- She was busy taking care of the kids who after the divorce became sick, one was anorexic and one had depression
- After three years the H went to court trying to end the support payments because the W had not managed to obtain self-sufficiency in the time period stipulated by the divorce judgment

Issue

- what is the meaning of “review”

Decision

- Review does not mean reduce or stop; it can mean that the support order goes UP

Analysis:

- The judge cannot presuppose anything on review – obvious in this case that he treated it as an upset date (that is, if she did not become self-sufficient, ends support)

- Applied pre-*Moge* in error (should have applied *Moge*) and thus focused solely on self-sufficiency rather than all 4 factors under the *Divorce Act* (given that it was not unreasonable that she had not met that one specific factor)
- H was ordered to pay MORE
- **Review means support can stay the same, end, go UP or DOWN**

***Fisher v. Fisher* (2008 ONCA)**

Facts

- married 19 years, no children
- W worked to contribute to expenses as H was in school
- H was a teacher then took on jobs with boards, made 120 – 140 thousand at end
- W earned 30 000 annually, make 35 000; working often part time
- Equalized assets, she bought a 190 000 house (big step down) he bought 328 000
- H had second family (remarried a girl with kids who chose not to work)
- Trial judge balanced obligations of two families awarded 2000 – 1500 in support and “implicitly concluded that any economic disadvantage suffered by the appellant as a result of the marriage was not sufficient to warrant indefinite support
 - o Found that she was young, had employed full time work during marriage and would thus earn enough income in the next few years to be fully self-sufficient, plus she would find a new partner to share her expenses

Issue: Is W entitled to more spousal support? Did the judge err in these final findings, specifically, in how they affected his decision?

Decision: Yes

Analysis

- she did not work full time through out all of marriage (error by trial judge)
- analysis of the appellants self-sufficiency (uncertainty regarding her income is relevant, though the judge ‘speculating’ is not an error per se)
- comment on new partner = unwarranted and unsupported
- **application of all the factors (p. 310)** including his second family stating that inevitably new obligations may decrease a payors ability to pay support for a first family; these obligations need to be considered in context (ex. If remarries and has a second child, equal obligation to both children)
- **Applying the Objectives:**
 - o Financial interdependence began when H relied on W to complete his education BUT no evidence of any choices that disadvantaged her regarding her career. Economic disadvantage not in marriage but from its breakdown (reduced socio-economic status + reactive depression which interrupted employment)
 - o Self-sufficiency: not achieved simply because a former spouse can meet basic expenses on a certain income rather, it relates to the ability to support a reasonable standard of living → reject submission that she is SS on her 30 000 income
- Review: allows an application of or support without the need to prove the material change required in section 17. The expense of trial etc is often unmanageable which is why reviews are limited and why it was inappropriate in this case
- Judge erred in not making spousal order retroactive (had interim order for 2000); W incurred 12 000 in debt and only got 19 000 in disability – should be given where established that she was entitled to a larger amount and the imposition does not create a hardship

***Miglin v. Miglin* (2003 SCC)**

Facts

- parties entered into a private deal regarding spousal support
- couple was married 14 years and were equal partners in family business
- Wife took custody of children and the Husband bought her shares in the family business; agreeing to pay child support
- Under the agreement instead of spousal support the wife was to receive \$15 000 a year for a term of 5 years as a consultant (employee)
- In return she waived spousal support claim; after 5 years H refused to renew and she now has no income

Issue: Is the W bound by the contract she signed

Decision: Yes

Analysis:

- Court sets out the test for analysis of private divorce agreements
- **Stage 1**
 - o The circumstances of Execution
 - Oppression, pressure or other vulnerabilities?
 - Duration of negotiations
 - Legal assistance
 - o Substance of Agreement
 - Equitable sharing of economic consequences
 - Does it comply with the *Divorce Act*
 - *If it does not completely comply it still might okay if it shows an understanding of their marriage and their objectives*
- **Stage 2**
 - o with the backdrop of the parties intentions, is the situation no longer appropriate to accord the agreement conclusive weight?
- Application
 - o Wife does not pass stage 1 or 2 of the test. She is thus bound by the agreement.
 - o Court takes great deference to people solving their problems on their own

Ratio: Basically each party must know what they are getting themselves into

Not really a section 17 situation but still relevant if a person tries to vary a private agreement / private divorce

Dissent: a fair agreement was one that recognized the objectives under section 15.2

The agreement recognized her economic disadvantage and she was disproportionately disadvantaged by the breakdown (she had only worked for their lodge which did not leave her with a lot of skills or experience)

Lapp v. Lapp

Facts:

- married 23 years; W stayed at home for 14 years to raise the kids
- She worked pt and then ft in the latter years of their lives
- Two years after separation, H was injured in motorcycle accident and income reduced from 86 000 to 40 000 (lawsuit settled for 950 000, 1/3 legal fees)
- W had order for 1000/month, suspended when accident happened, constantly increased and decreased between 500 and 1000

Issue:

- did the judge err by increasing award from 1998 – 2005?
- Did the judge err by failing to apply the three year retroactive award?

Decision: No and NO

Analysis:

- judge increased to 2000/month totaling 200 000 (only 76 000 had been paid thus far) So 124 000 in arrears (for 1998-2000)
- There was evidence of new material circumstances allowing for review and thus the increase in spousal support
- Interim orders are set until trial, the trial judge is expected to readjust back to the time of interim order so that they accord with the findings of fact at court
- Error for increase from 2001-2005?
 - o Judge was entitled to consider the disability payments that H received BUT since he had to pay back 35 000 to sunlife (subrogated claim), the judge should have deducted this amount
- Retroactive Award: The retroactive imitation was based on child support not on spousal support
 - o This case is dealing with an adjustment of an interim order (not enforcement of a variation or final award)

ADOPTION, GUARDIANSHIP, CHILD CUSTODY, ACCESS

A. CUSTODY DISPUTES

1. GENERALLY

a. Divorce Act

- Section 4: court has the ability to deal with custody
- Section 16(1): allows the court to make custody / access orders
- Section 16(2): allows the court to make interim orders
- Section 6: can make terms and restrictions for a limited or indefinite period as they see fit
- Section 7: if you want to change your residence to a different jurisdiction, the court can provide you give 30 days notice to the other parent (allows the other parent to bring an application to stop the move of the children, or change custody)
- 16(8): the only factor to be looked at is the best interests of the child
- 16(9): court will not take into account past conduct unless relevant to the ability of that parent to take care of the child
- 16(10): in making custody order, give effect to the principle that each parent should have as much contact with each parent as is in their best interests
 - o will take account the willingness of the parent to facilitate contact.
- Section 17: vary orders
- Section 17(5): no variation unless change in needs / means of the kids
-

b. Family law Act

- can bring an application whether you are married or not
- **section 21(6)**
 - o court can make an order respecting the following things
 - day to day decisions
 - decisions on residency, education, culture, language
 - can decide who the child lives with
- **20 -23 guardians**
- Section 30 – allows court to review the decisions of a parent. Under the DS need a variation order – this is much simpler
- Section 18 – factors to consider when looking at the best interests of the child
- **PARENTING SECTIONS**
 - o S. 33(2): if want to change residence must give 60 days notice (longer than the 30 days in the DA)
 - o Court can make terms and conditions depending on the circumstances – ex. No alcohol, cannot take them out of the jurisdiction
- Section 40(2): if there is an order for contact and the person with primary residence has made sure that the contact person does not get time, despite the order. Then the court can order compensatory time if you have missed time with your kids, and may order reimbursement for expenses (if really outrageous may put in jail up to 90 days)

2. JURISDICTION

a. Provincial Legislation

L. (V.) v. L. (D).

Facts:

- settlement agreement incorporated into divorce judgment, where mother has sole custody
- father now wants shared custody, but mother and children have moved to different province

Issue: is the father entitled to joint custody

Decision: yes, so long as a parent is not deemed unfit, entitled to an ongoing relationship

Analysis:

- Section 2(1) *Divorce Act* – defines custody
- Section 16 (5) → unless otherwise ordered, a spouse who is granted access to a child of the marriage has the right to

make inquiries and to be given information

- *Section 16(10)* → a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child
- Domestic Relations Act (AB)
 - o Section 47: unless a court of competent jurisdiction otherwise orders, the joint guardians of a child are
 - the mother
 - the father if
 - he was married to the mother of the child at the time of birth of the child
 - he was married to the mother of the child and the marriage was terminated (at a certain time)
- Joint Custody
 - o The DA does not expressly contemplate an award of joint custody
 - o Defined as: a childcare arrangement where the kid lives with one parent on a regular basis and that parent has day to day care and control of the child. The other parent has generous contact with the child and a right of consultation and input in respect to all significant decisions affecting the child
 - o Canadian courts are slowly moving away from the notion that a custodial parent has presumptive rights and the non-custodial parents are virtually powerless
 - o Other provincial legislation contain rebuttal presumptions of joint custody
 - o The unwillingness of one parent to share custody should not preclude an order of joint custody

b. Divorce Act

c. *Parens Patrie*

K.K. v. G.L and B.J.L.

Facts

- mother got pregnant outside of wedlock, she was afraid her family would not support this and kept it a secret, deciding to do a private adoption
- She took great care in choosing adoptive parents, but 2 weeks after they took physical custody she changed her mind.
- The adoptive parents refused to return the child, she “unconsented” to the adoption and filed for legal recourse
- Both parties are capable and competent to be good parents (this is not contested)

Issue: Who should be given custody in this case

Decision: The adoptive parents

Analysis

- the court acts as a “father” (*parens patrie*) and makes a decision deemed to be in the best interests of the child
- Look at section 37 of Domestic Relations ordinance
 - o Where a parent or other responsible person has
 - Abandoned or deserted his infant OR
 - *Allowed the infant to be brought up by another person at that person expense for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties, the court shall not make an order for delivery of the infant to that parent UNLESS court is satisfied it would be for the welfare of the child*
- Move away from parental preference from common law and more into best interests
- The court focused on the bests interests of the child (especially since there was no clear and easy ‘more appropriate’ home), a large portion of this analysis focused on the bonding stages of early development
- The evidence was such that the child was happy and healthy in the adoptive home, he had lived there nearly since birth and had bonded with the parents and the other children; and that it would be harmful to break that bond
- There was a responsibility to pursue legal action once her rights to the child were challenged, and not to allow time for the child to bond with the caregiver (that being said parental claims should not be set aside lightly)

Not about giving preference to the parent, just about best interests of the child

3. THE FORM OF CUSTODY ORDERS

Parenting after separation Course: requirement for parents who plan to dispute over children.

- Exceptions to taking this course: kidnapping, interim custody orders, unilateral change of custody, children over 16

a. SOLE CUSTODY

Young v. Young

Per McLachlin C.J.: There is a strong presumptive right under s. 16(10) of the *Divorce Act* for maximum access/contact and therefore, a parent should not be restricted in carrying out such rights, unless the children are at risk.

b. JOINT CUSTODY

Joint Custody – where parties share decision making on major issues

Joint Physical Custody – sharing time

Colwell v. Colwell

Facts:

- kids are 1 and 3.5 years old
- father choose to restrict access to one a month

Issue: Is this an appropriate case to order joint custody against the wishes of a parent?

Decision: no

Analysis:

- There is no presumption of joint custody under the divorce act
- joint custody is often only successful if both parents are willing to cooperate – if they are not or cannot, it is not in the best interests of the child
- Court will order JC even when the parents don't want it, if there is some demonstrated level of cooperation / decision making
- while it may be granted without consent, this should only be done where it is in the best interests of the child, where the parents have displayed an ability to cooperate and communicate notwithstanding personal difference
- this was not a case where the parents could put aside their difference and make joint decisions about their children such as to support a finding that joint custody is in the best interests of the children
- distinction between divided custody (physical location changes) and joint custody (joint decision making)
- should not order JC to make the other parent feel good about themselves (and it is not an inducement to get them pay child support) and also should not order it in hopes that it will make the one parent have more contact with child

394: Definition of Joint Custody

The sharing of responsibility for making decisions by both parents, the actual physical care of the child is designated to one parent to make decision on day to day matters

K.(M.M.) v K.(U). [ABCA]

Facts:

- H and W marry, have one kid, W stays home and raises kid, H works
- Have second kid and split one month after birth, both have lived with mom since
- Trial judge granted father custody based on psych report which questioned the stability of the mothers personality
- The report was created 1 year prior to trial and despite concerns the end recommendation was for W to keep custody
- The trial judge said there was no answer to the concerns of the report despite the fact that the psychiatrist who

wrote it testified at trial and said that the past year has altered some of the conclusions due to further observation. Namely that W had successfully dealt with many of the concerns, had matured, while H had handled himself poorly in regards to the children

Issue: Did the trial judge make an error by deciding the parent with the most attractive personal characteristics should get custody?

Decision: Yes

Analysis:

- Court of Appeal overturned trial judge's decision (custody with father), which is v very rare, also did not order a new trial, just changed custody to mom
- An 'answer' to the concerns of report was given at the trial, it was apparently ignored by the judge
- Looks at lots factors including role model etc, but main issue was who has been the primary caregiver
- W is the parent that will best serve the interests of the children; they have lived with her, she has taken an active role in their life, while H may be financially able to offer them their own rooms, she can offer more time to them, her mother can assist with child care and their apartment has many amenities to afford them
- *While one must always consider tangible factors (such as residence and material wellbeing) such considerations must take a secondary position to the children's emotion, psychological and intellectual needs*

history of care

Who looked after the children before separation, what were each of their roles, was it by agreement (did they agree that one would be the primary caregiver and one would be the breadwinner)

Primary caregiver may be well established before separation, but if since separation been living with the other parent, then may be arguing history. Not the same.

***Kaplanis v. Kaplanis* → very good decision, sole custody awarded**

Facts:

- parties married in 1998 and separated in 2002
- ordered JC + go to counselor for communication skills, and that decisions about school etc would be made by an unnamed counselor if parties could not agree
- Have a 20 month old child, mother appeals order for joint custody – she led evidence that they could not communicate without screaming at one another

Issue: Is joint custody appropriate in this circumstance

Analysis

- The fact that both parents admit that the other is fit, does not mean that it is in the best interests of the child for a joint custody order
- The hope for better communication between the parents once litigation is over does not provide sufficient basis for ordering JC (there must be some evidence before the court that the parents have the ability to communicate despite their differences)
- Thus, in absence for request for sole custody by father and in absence of any detailed parenting plan by him, only choice was to give mother sole custody

Decision: Mother gets sole custody

R.A.L. v. R.D.R.

Good Decision: High conflict – remove parent causing the conflict

Facts:

- Parents had been fighting for 8 years over child
- Dispute over which school the child should attend (13 year old child)
- There was shared parenting original, then an assessment by a psychologist recommended joint custody with the mother having primary care
- Multiple expert reports of kid, initially stating in great intellect, then that he is fragile and by time of trial the child is asking for relief himself because he has been through years of torment
- Child wants to be with dad

Issue: What is the appropriate type of custody and with whom?

Decision: Mother given sole custody (interim basis)

Analysis:

- The father was continuously engaging in alienating behavior, pushing the kid away from the mother; the psychological reports indicated that he was always finding something to blame the mother for, he was egotistic and unaware of his own negative qualities and their impact on other people
- While both parents contributed to the conflict, the father was the instigator (ex. Application not to let child go to grandmas funeral because it was his week), the father did not allow her to do child thing during “his time” she missed soccer, a piano recital and her grade 6 graduation
- Father gets cut off from access until therapy and supervised visits are arranged
- **When you have a case which is high conflict and it is clear that the conflict originates with one parent, can use this case for sole custody.**

Who should have sole custody

- 1) The mental, emotional and physical health of the child and her need for appropriate care or treatment
- 2) The views and preferences of the child
- 3) The effect upon the child on any disruption of the child’s sense of community
- 4) The love, affection and ties that exist b/w the child and each person to whom the child’s custody is entrusted and to siblings
- 5) The need to provide a secure environment that would permit the child to become a useful and productive member of society
- 6) The child’s cultural and religious heritage

c. SHARED PARENTING

Cavanaugh v. Balkaron

Facts:

- kids are 17 and 13; the 17 wished to live with mom
- 13 year old expressed same wish, wanted to control when and how long visits where, wanted it to be flexible for his friends
- father does not agree to what 13 year old wants

Issue: should shared parenting be ordered?

Decision: Yes

Analysis:

- maximize parental access under section 16(10) of *Divorce Act*
- shared custody can be ordered even when kid doesn’t want it
- The trial judge said should start by looking at JC or shared custody BUT the CA said there are no longer any presumptions or default positions that regulate access or custody
- The sole determinant is what is in the best interests of the child

McCurry v. Hawkins

Facts:

- Three kids, shared custody
- Everything seems to be going fine until mom gets a new boyfriend, then things go wonky
- Ms. McCurry requests primary residence with Hawkins having reasonable access

Issue: should Ms. McCurry get ‘primary residence’

Decision: no

Analysis:

- presumption of JC and shared custody, JC should be the norm unless it is harmful

d. PARALLEL PARENTING

B. (J.E). v. B.(C).

- Facts:**
- each of the parents wants primary care of the children
 - father seems to have some anger and other issues, partially due to a severe head injury. He made unfounded and rude allegations relating to mothers unfitness, including that she gave their son genital herpes. This should animosity to the judge
 - co-parenting is impossible, he has been aggressive and unwilling to compromise

Issue: What is the appropriate form of custody?

Decision: Parallel parenting

- Analysis:**
- The Judge felt that the father was not really interested in being able to see the kids and make decision, but was engaging in the battle for the sake of the battle
 - The father held so much animosity that he should remain as far away from the mom as possible
 - Despite this and the finding that they lacked the ability for shared parenting or JC, the judge ordered parallel parenting

- 1) A parent assumes responsibility for the child during the time they are with that parent
- 2) A parent has no say or influence over the actions of the others parent while the child is in the other parent's care
- 3) No expectation of flexibility or negotiation
- 4) A parent does not plan activities for the child during the other parents time
- 5) Contact between the parents is minimized
- 6) Children are not asked to deliver verbal messages
- 7) Info about health, school, vacations is shared in writing usually in the form of an access book

e. OTHERS (SPLIT CUSTODY ETC)

4. INTERIM CUSTODY

R. v. R (ABCA)

- Facts:**
- couple separates after adopting a child at infancy, father works on home ranch and mother moves with daughter to town
 - originally alternating weeks, not working, interim order for primary residence with mom and father taking her every other weekend for four days
 - father argues for primary residency because he can spend days with daughter, where as the daycare raised the child when with mom,
 - Mother argues tender doctrine and shouldn't vary interim order

- Issues:**
- What is the appropriate form of custody?
 - What is the point of an interim order?

Decision: Father has primary residence, interim order is temporary only

- Analysis:**
- trial judge awards to father because of time, better parenting plan. Trial judge and CA reject the tender years doctrine as being no longer valid
 - Concern over penalizing mom for not working is rejected, both parents have to work, it is simply circumstance that the father can afford the day time
 - An interim order is temporary. Mom argues that should have given weight to status quo, but she mixed up the rule. Its when determining interim orders that you do not want to disturb the status quo unnecessarily; interim is makeshift until a solution is created (the working arrangement may work but that doesn't mean its in the best interests of the

child) - Interim orders are designed to minimize conflict between parties and cause the least harm to the child pending determination of the cause

Dissent - tender years doctrine may not be determinative but it is one of the most important factors and should have been considered - quality of time not quantity of time
--

Richter. v. Richter - <i>joint custody and shared parenting arrangements ought not to be ordered where the parents are in substantial conflict with one another and certainly not before trial especially when there is a significant disagreement on evidence</i> - <i>want stability and certainty not constant court applications prior to trial</i>
--

Better to be family member or parent, but will take into account the third parties attitude towards the other parent.

5. ASSESSMENT

Done to assist courts in determining custody, parenting regimes, access etc

Usually occurs when have dispute about where kid should live etc, sometime need assessments (generally done by psychologists)

- Assessor meets with each party individually, get history of that person (relevant history); get parents view of what happened during relationship, get what parents are seeking and why they are seeking that
- Will sometimes have meeting with the “new partners”
- In some cases will do psychological testing, may not do it if neither party is claiming that the other is bad, but generally do it
- Then meet with kids individually, talk about lives
- Then will have mom bring them in, then dad bring them in (see interactions)
- May talk to references
- Report will set out all background etc and then will make recommendations, these may be definitive or may not be

Reports are very costly

Tucker v. Tucker (p. 453)

- intrusive + costly so do not need to do it all times
- in order to get an assessment do not need a material change in circumstances, but it is one tool that will assist the judge
- Assessments help when the kids are not young or old, but in between 5-10, where they are not likely to straight up say that they want to live with one

If not having an assessment, do not put child on stand and don’t do an affidavit of the stand

FACTORS GOVERNING THE AWARD OF CUSTODY

a) Bests interests

- o see *K. v. K*
- o primary caregiver

b) Violence within the family

- o if allegations towards children automatically going to be looked into
- o this is for violence against or between the spouses – one of the considerations is whether the children have seen the violence, because seeing violence can cause PTSD and other emotional issues

- while the divorce act is silent on the matter the family law act (section 18(2)(6)(d)) speaks on it and defines the term family violence
- FV- includes reasonable fear and ‘correction’ on children that goes beyond what is reasonable
- Remedies
 - *M. v. M* → complete denial of access
 - *D. v. D* → Supervised access

c) **Conduct / lifestyle**

- Manner of parents only in relation to how it relates to the ability of them to manage their kids
- **Alcohol, drugs, adultery** (use to be same sex relationships)
- Only an issue if it related to ability to care for child / parent a child – if it was not an issue before you split up – maybe more valid. If you say that he had an issue before but you worked nights and he watched the kids, then not really a valid issue.
- Usually has to be things like: he drove drunk with kids in car OR passed out on access weekend and kids called having no dinner
- How do you prove what goes on during access
 - Is this that kids are reporting this? Kids are going to tell parents what they want to hear
 - Court will have orders about not having substances within 24 hours of access, can also subject the user to random drug testing but this has to be very rare and entails significant drug use
- **Smoking** around kids? Major issue now – how can you tell a parent that they cannot do a legal thing around their kids – usually court says don’t smoke in house in kids presence and not in house when they are there. Won’t say that they have to quit, but will limit it
- **Anger** (temper) issues – will order anger management courses
- **Allegations of ‘bad’ new partner OR roommates** are bad, having drinking parties, or being mean to the partners
 - Who are these people, can they be controlled, do they have contact with the kids, is there separate entrances

d) **Interference with parent child relation**

- Parenting alienation syndrome - one party knowingly or unknowingly interferes with the relation between the child and that parent such that they alienate the affections towards that other parent
- Telling the kid all the bad things that the other person did to you in the relationship, blaming them for the breakup
- Example: Parent has full access, then plans all fun activities on weekends they are not there and says ‘ oh its too bad you are going to miss that’
- Example: Your mother takes all my money, I have no money to do fun things
- Example: calling every night, telling them that you miss them
- **R.A.L. v. R.D.R.**

e) **Health**

- Of both the parents and children
- Only relates to their inability to parent the children
- If the person is caring for the kid, their health issues are irrelevant
- If its an issue that predated the separation – was it an ‘issue’ before – may be in a wheelchair but if she looked after the kids before and there was no problems then why is it an issue now
- **Health of child**
 - Which parent has altered their life to best assist this child

f) **Religious and cultural upbringing**

Young v. Young

- CA said cannot restrict the kids access to religion unless the kids do not want it or it is harmful to the kids
- SCC: sole custody = decision making at exclusion of other parent
- Is it something new OR was it always there, and its only now that it’s a problem

Van de Perre v. Edwards (SCC 2001)

- Facts:**
- child born out of affair between African American married man and white women.
- Issue:** how important is race
- Decision:** meh, one factor
- Analysis:**
- the question is which parent will best be able to contribute to a healthy racial socialization
 - Race is only ONE factor that need to be considered in determining personal identity
 - o looked at willingness of parents to expose the child to other cultures
 - o SCC said – there are two races here, not just one, but the interveners tended to look at it like there was only one race (black but not white)
 - child would be exposed to both sides of his racial and cultural heritage, since one biological parent would have custody and the other would have access (there is connection to both parental races, different than adoption cases)
 - No evidence was introduced to suggest that greater exposure to one’s racial background through custody as opposed to access was in the better interests of the child in every case
 - Even in adoption cases where it might play a more important role, race is not a determinative factor, its importance will depend on the facts
 - Generally understood that biracial children should be encouraged to identify with both races

Addition of man’s wife as a party? P. 466

- In Court of Appeal, they invited the wife to be added as a party, and together the wife + basketball player and they end up getting custody (mom had been awarded at trial)

Bachor v. Lehmann- Bachor

- Facts:**
- father makes application to allow him to hold a child dedication ceremony for the daughter at the church of God
- Issue:** can he hold this ceremony?
- Decision:** not without mom consent
- Analysis**
- At trial: “not engage in ANY religious ceremony without the mom”
 - CA: altered from ANY to specifically refer to this dedication ceremony
 - o This does not mean that she cannot be involved in any religious celebrations, rather this specific ceremony requires consent
 - The custodial parent has the sole and primary responsibility for the day to day care and major decisions with respect to education, religion, health and well being
 - Some support (Caselaw) that both parents should be able to expose the child to their religious beliefs, notwithstanding that they might be different
 - The ceremony is a public declaration to raise the kid a certain way, which is essentially appearing to chose a religion for the kid
 - Can expose to religion so long as not inconsistent to best interests of kid, but primary decision making is up to custodial parent

- Also, agreed access settlement incorporated into divorce, wants to vary. For custody judge says there has to be a material change and this lacked evidence, for access the circumstances were appropriate to allow for variation
- Change alone is not enough, the change must have altered the child’s needs or the ability of the parents to meet those needs in a fundamental way
 - Re-marriage by the custodial parent does not in and of itself constitute a material change in circumstances – has to materially affect kid or ability to parent

g) Allegations of sexual and physical abuse

- **Practice Note 8**
 - Special process to go through if allegations of above.
 - Special notification form that has to be filled out, when file documents have to serve other party and local child and family services (mandatory)
 - Once filed (in sealed envelope), CFS appoints an investigator and they determine if there are grounds for further investigation, if they say the charges are not warranted, there report usually ends the matter
 - Filed under this note, appointed a Case management judge

J.S. v. A.V.T 2008 ABQB 185

Facts:

- Couple has 4 year old daughter, they were not together when she was born, but the father and his family came to visit in hospital
- Mother also has another child
- Joint custody is granted in 2006, there is consistently problems with access such that the father has made 16 applications in regards to access and custody and it now seeking sole custody
- The mother has used a multitude of excuses including sick, soccer and breastfeeding up to age 3, she has even gone so far as to interrupt two hour access visits with breastfeeding
- Whenever the father gains some form of access or custody the mother retaliates with some form of allegations, first physical abuse on her, then kid, then gets an EPO despite child services finding no evidence of her claims (same day denied in court)
- Then she alleges sexual assaulted her, then he was suicidal, then abused alcohol, then sexually assaulted BOTH kids, then the grandfather also sexually assaulted kid
- Mother poorly uncooperative in regards to assessment and counseling – when does, the expert says he is a good dad and the mom is more focused on expressing the badness of the dad then interacting with the kid

Issue: Can the court make a change of custody to dad?

Decision: yes; father ordered primary custody (but needs to buy webcams)

Analysis:

- There was no final order so a change in circumstances was not necessary, but if it was, her erratic and alienating behavior is sufficient to warrant varying the changes
- **Effect of these behavior on kids (p. 486)** – the continued expose to one parent’s hostility to the other parent can have long term consequences on the child. The primary care of the child should be given to the parent who can put their own interests aside and their child’s first, namely, contact with both parents and their families.
- The mothers actions constitute alienating behavior – not allowing the daughter to call him dad, thwarting access and all the allegations.
- The father appears to have a better family plan and is more willing to keep the mother involved in the child’s life

Factors Affecting Best Interests: (in this case)

1. Protection of child’s psychological and emotional safety
2. Child’s need for stability
3. History of care for the child
4. Alleged violence
5. Nature, strength and stability of relationship between child and other persons in the households
6. Ability and willingness of each parent to communicate and cooperate on issues affecting the child
7. Benefit to child of developing an maintaining meaningful relationships with each guardian

h) Mobility rights

- One parent wants to move with the child, generally to another province or country
- Primary or shared custody and one parent wants to move
- Usually comes in form of variation (but can be part of initial application)

- *Divorce Act* section 16(7) – need to provide with 30 days notice if intend to move; *Family Law Act* court can require up to 60 days
- Usually in orders, there is a provision that says, if the parent is intending to move the child a certain distance away from core then they are required to give a certain number of days of notice

Gordon v. Geortz

Facts:

- mom had primary access and custody and dad has generous access
- In practice the father sometimes spent more time with kid than mom
- Mom wants to move to Australia for orthodontics

Issue: can mom take kid to Australia

Decision: yes, but overturned trial decision that kid couldn't leave Australia

Analysis:

- Is there a presumption in favor of the custodial parent or do we apply maximum contact principle
- STEPS:
 - Parent applying for change in custody must meet threshold test that there has been a change of circumstances
 - If meet test, NEW inquiry as to ability of each parent to meet needs
 - **Inquiry is based on findings of judge that made original order AND evidence of new circumstances**
 - No presumption in favor of custodial parent but their views are entitled to a great deal of respect
 - Each case turns on its own unique circumstances and the best interests of the child (predominant)
 - Focus is on best interests of child not interests and rights of parents
 - Factors to consider
 - Existing arrangement and relationship between custodial and access parent
 - Desirability of maximizing contact
 - Views of child
 - **Reason for moving ONLY where relevant to parents ability to parent**
 - Disruption to child of a change in custody AND removal from family, schools, and community
- DO NOT just SKIP to step 7; must go through all steps

Effects of Moving – increases access costs due to moving can be argued as grounds for deviating from the guideline child support amounts

Bjornson v. Creighton

- Have to consider the negative psychological, emotional effects on the parent BECAUSE this can affect the ability to parent
- In this case, the mother could go back to AB, have a higher paying job as well as family and friend support – if forced to stay in ON she would be paid less and have no support (thus interests of child are better met by allowing relocation)

MacPhail v. Karasek

Facts:

- mother wants to move child to a different city within province
- Father exercised a good deal of access, both mother and father were good parents
- Mother did not inform of intention to move, he found out when he saw the sale sign

Issue: Can she relocate?

Decision: yes

Analysis:

- trial judge skipped first step (material change) and he said the move was a step designed for the mothers needs not the kids, so she could not relocate with child
- Trial judge failed to consider effects of removing child from primary caretakers care
- CA – only consider mothers motives for moving in exceptional cases where it affects the ability to parent; thus trial judge focused on it too much while not considering other factors like that mentioned above

Spencer v. Spencer

- the move alone can be the change in circumstances. This might be the case but it is not the general rule. If the child lacks a positive relationship with the access parent, it may not be deemed a change of circumstances.
- A judge should not rely on the fact that the custodial parent will not move if the application is unsuccessful. This should not be an excuse to maintain status quo

i) Interference with access

Van De veen v. Van De Veen

The sanctions that are normally available to coerce litigants into obeying the orders of the court are:

- transferring children to custody of the other parent
- jail
- fines

Application:

- mothers alienating behavior was egregious and went on for so long that transferring custody was no longer feasible or in the children's best interests
- Jail was also not feasible as it would likely harm the child
- Fines also not feasible because of limited finances

Mother denied influencing her kids feelings towards father despite their being clear voicemails and notes to teachers, psychological assessments as well as indications in children's behavior that she was engaging in alienating behavior.

Result: could not adequately sanction her, prevented her from bringing future applications and awarded costs to father (out of the matrimonial property)

Variation Orders:

- must be a material change of circumstances
- change must be unforeseeable at time of order
- passage of time may constitute change of circumstances

Appeals

- Strong deference in family law cases (TJ has assessed witness credibility)
- Introducing Fresh Evidence on Appeal
 - o Howard v. Howard: must not have been known at the time of the trial and relevant to the issues at hand

CHILD WELFARE

Child Youth and Family Enhancement Act

- section 2: mandates when / that a social worker must go out - GOALS

13 factors (goals), 11 of which is about keeping the family together

- o use least intrusive means as possible

Measures vary from least to most intrusive

- Investigate (go out to house) and then may decide no need to get involved

1. **Family Enhancement Agreement** (not a court order)
 - Provide parents with services (ex. AADAC)

2. **Supervision Orders**
 - Application to court for court order
 - Children remain in home but under some form of supervision by child services (up to 6 months time)
 - Can have terms in them, such as, submitting to random alcohol and drug tests OR go to AADAC
 - Social worker may come visit once a month to check
 - May work with family support worker (assist finding housing, budgeting, finding resources in community)
 - If do not abide by it, then there is a breach and family services can be more intrusive

3. **Temporary Guardianship Orders**
 - Needs to show that child can safely be in the home at the present time, but with reasonable time the child can be returned
 - Takes child out of home (needs an *apprehension order*)
 - Apprehension orders are done *ex parte*
 - Standard form
 - May have a police assistance clause, if they think that the child will be difficult to remove from the home
 - Need to bring an application for what they want – if they want TGO then apply for it and it is served on the parent
 - Onus is low because it's just what the workers reasons. Sometimes the worker will state things that are not being done.
 - Example: The social worker stated all the initial concerns from 6 months ago and did not state all the success and changes that had been made over the past 6 months
 - Court is relying on the fact that the document is true and that the worker is relaying all the facts
 - **Initial custody application**
 - Ability of parents to get into court sooner to show that maybe the director should not have apprehended the child from my care.
 - 42 days to have a hearing, just to determine initial custody, not to determine the guardianship orders
 - section 21.1 of CFEA states that the moment they make an apprehension order they must bring an IC application (mandatory)
 - Not a full blown trial, ½ - 1 day application
 - Low threshold, does not take much for them to say that they have some concerns with the family
 - Not just putting them into foster, should be checking for extended family members (check for to ensure they have no criminal record or family welfare issues)
 - Once IC application is granted, next step if TGO
 - This can have terms, like those mentioned above, especially *parent psychological assessment*
 - Access orders – get specified orders rather than ‘reasonable access’
 - Will be supervised access
 - Only use one company, so swamped, so give precedent to the ones that are in an order; and the others get second so if not specified can wait weeks before seeing child
 - At least once a week, but there are factors that can increase access based on age and relationship (Ex. With a newborn, shorter more frequent access assists with bonding)
 - If they feel the home is unsafe may not be allowed to have visits there, may have to be at child services office
 - Once ordered can last
 - *Cavanaugh* report → he was in care for years, shuffled from home to home and no plans had been made for his return and he killed himself
 - Early Permanence

- Act delineates between ages of children (section 33)
 - i. Under 6 only 15 months
 - 1. 9 months with ability to grant extra 6 months if there is a good reason
 - ii. Over 6 can have 18 months
 - 1. 12 months + 6 months extension if needed (rare)
- If it is determined that the child cannot be returned to the home within a reasonable amount of time, then the director must applied for **permanent guardianship**

4. Permanent Guardianship

- Parents guardianship is terminated
- Do not supply services or family support workers
- Only term is Access
 - Not multiple times a week, because that access is for reunification BUT PGO is not to do that, so they typically ask for limited access
 - Still depends on age etc
 - If parent gets access 2 times a week but doesn't exercise access for months, then may not want to give it to them
 - If the parent has been exercising rights of access and has been having good visits (still not going to get 2-3 times a week)
 - Suppose to be in the best interests of the child, so if been good with access, then no reason for them not to get good access
- Foster to Adopt Home
 - If the child is in a home with potential to be adopted then the adoptive parent can get on the stand and say I don't want access
- **Cannot review this order**
 - In some provinces the parents can get a review if circumstances change or after a certain amount of time
 - In AB, the only person who can get a review of this order is the director (ie. the social worker)
- There are specific permanent guardianship workers – so different then the one that they were with at the beginning - harder to do because don't really meet or work with them

Under the TGO and PGO the director can still place the child with family (extended family) but access is still controlled by director AND with PGO the director can change guardianship.

Also under CFEA or Family Law Act, the extended family can apply for private guardianship (but for the former need to have had the child for one month)

- if bring application for PG, and this is granted after a PGO, then the person who gets PG, is entitled to some funding for the child
- if the PG application is granted before the PGO, then they don't have funding rights

Case: SDK

- says that the lawyers and parties are able to get ALL the information from the opposing side / director (including police reports) OR any contact reports (contact notes) from that the worker
- contact notes are all the contacts between the worker and the parents / child

DIVISION OF PROPERTY

1. MATRIMONIAL PROPERTY ACT

Section 1: Definitions

- Household Goods:

- Spouse
- Matrimonial Home: Does not have to be 'owned' by the parties for the purpose of exclusive possession

Section 2: Void Marriage

- if you know or have reason to believe the marriage is void cannot bring an action under this act

Section 3: Jurisdiction

- if the parties are both currently habitually resident in AB
- AB was the last joint habitual residence of the parties
- The parties have not created a joint habitual residence but both were resident in AB

Cannot deal with property in sask. Well, cannot order the sale of the cabin in sask, but can take into account the value of the property. So, if its in H's name.. then will take into account value in that property and use it / take it into account, when considering and dividing the property that they do have jurisdiction over

Section 5: Condition Precedent (see act)

Section 6: Time of Application (2 years from declaration of Divorce)

Section 7 Matrimonial Property Act

7(2): Exempt Property (not part of division)

- Gifts from a third party (given to ONE party)
- Inheritance
- Pre-marital property
- Damages in Tort, unless it is to compensate both spouses
- Insurance proceeds not for property (ex. From injury or accident) that was for you alone

If claiming an exemption, you have to trace the property AND if you are looking for the exemption, the onus is on you

7(3): Increase in value of exempt property (what is just and reasonable)

- not divided equally, divided by what is just and reasonable
 - o Ex. Came into marriage with Ford Focus, upgraded to Porsche. The value of the Focus is exempt, the increase in value from the focus to the Porsche is property under this section
- If have property, sell it, and then put it into another property then it is section 7(3) property
 - o Ex. 110 000 house, sell house, then put it into another house in your name alone, then fine, but if put it in joint names, you only get half of it as exempt and the other half is deemed a gift into marriage
- Property acquired from Income of an exempt property
 - o Gifted 5000 a year by Aunt which you put into RRSP, that is exempt but the income get from the RRSP is section 7(3) property
- Property acquired after divorce judgment is granted
- Includes property which is a gift from the other spouse
 - o An engagement is NOT a gift from the other spouse, it is consideration for a promise to marry
 - o Ex. Give gift to spouse of 30 000 for Christmas (too lazy to shop) – this could arguably fall under this category, if spouse puts it into something and then it increases in value

7(4): All other property that does not fall into sections 2 and 3

- Presumption of equal distribution
- Doesn't matter whose name it is under
- Presumption should not attach if its not just and reasonable (factors for this is under section 8)

Section 8: Factors for Just and Reasonable

- contribution made by each spouse to the wealth of the family (including homemaker or care of children)
- contribution, financial or otherwise, to the acquisition, improvement, management of business, farm or undertaking, operated by one or both or with a third person
- contribution, direct or indirect, on behalf of spouse, for improvement or acquisition of spouse
- income, earning capacity, liabilities and property that the person had at the time of the marriage and that each has now
- length of marriage
- when was property acquired (before or after separation)

- just because separate and apart, does not mean that what you contribute to the RRSP, is not part of matrimonial property
- **does not STOP at the date of separation** unless parties agree to this on their own, otherwise its date of trial
- terms of an oral or written agreement between the spouses
 - “oral” agreements = headache
 - pre-nups etc will be taken into account; will give some weight to it
- capital gains tax (from rental home)
- **situation where spouse has dissipated property to the detriment to the other spouse**

These are the factors to look at when dividing section 3 property or trying to dislodge the presumption

If you are married to an adulterer or an abuser (misconduct) – this does not affect division of property (although the judge may try to find a way to fit it into section 8)

- can still try and argue it... but not likely
- lazy? What about ran a business together, but I have a drinking problem and it caused us to lose the business?
- If its extreme can argue it, but the general run of the mill, or being a jerk, is not going to have an affect here

Section 9

- Court can order that one party pay money (equalization payment) or transfer an interest in property
- Can order a sale of property and direct what happens with those proceeds
- Court can declare that a person has an interest in property even though their name is not on it

Generally, look at what each person has. Example – at end of divorce suppose to have 90 000, have net worth at 60 000, then equalization may be that spouse has to pay to the other 30 000

- Can pay money over time
- Can force a spouse to give security
- Can direct sale with conditions
- Can order one party to surrender all their interest in a property
- Can order a release of dower interests
- Can order a trust (one party holds it for the other)
- Can sever a joint tenancy
- Other any thing they deem fit

Section 10

- how to deal with substantial gift given to third party
- 3 requirements
 - intention to deprive the spouse of the property
 - third party knew of this intention
 - gift was not made more than one year before the date on which the spouse commenced the action
- What can court do
 - can give property back
 - can make judgment against third party
 - can take amount transferred and put it on the side of the gifting spouses’ side of assets (so that other spouse will be entitled to half of it) (10.f)

What if all these requirements are not made out (like third party did not know)?

- Go back to section 8 (1) – *dissipation of property to the detriment of the other spouse*
- Use *Cox. v. Cox*

What does the court do? Do they divide what is left OR do they say that it still exists (regardless of whether it does or not) and put it onto the dissipating spouses side

Dissipation is assets that did exist and one party has gotten rid of them, cannot condone behavior for years (like drinking) and then say well if he hadn’t drank it all away we would have more money

Exclusive Possession Sections of the Matrimonial Property Act

Portugal v. Portugal* and *Tawiah v. Tawiah

Section 19 - orders for exclusive possession of the home.

- 19(3) – Court can impose conditions and time limits (ex. If you have exclusive possession then no third party can move in, or EP for 12 months)
- 19(4)

Section 20 – what you have to prove to get an order for exclusive possession

- can no longer continue to live together is a consideration though it is not specifically listed in the Act
- Factors listed in Act
 - o does someone else have some other form of accommodation (family)
 - o Needs of any children
 - o Financial position of each party
 - o Any other words made with respect to support or maintenance of one or both of the spouses (ex. If there was a previous order that the H pays Spousal support to W – court can look at this order)

Section 21 – takes effective notwithstanding any other orders made (ex. Sale)

Section 24 - leases premises – the person who has EP is considered to be the tenant on the lease regardless of whose name is actually on it

Section 25 – EP of household goods

Section 28 – does not affect your rights under the Dower Act

Section 30 – how to make application (must be in QB)

- can do it by way of originating notice
- interim application under statement of claim for divorce / distribution of matrimonial property
- Can make applications on a next party basis, but not likely to get it unless you can show some violence against the spouse / kids
 - o Make sure there is a provision that says, can only attend with police
- Be Aware: will need to consider how the person can pick up the kids for access

Interim Costs

Section 9 (3) (j) – interim order for anything deemed necessary

- Interim application for interim distribution of property (rare)
 - o Common argument: need it to pay down debt or to fund litigation
- Interim costs
 - o Idea is essentially same, thus courts will try to go through distribution of property rather than an award of cost because the latter seems punitive
- *Gartner v. Ewasiu* and *Tarapaski v. Tarapaski*

What if One Party Dies

Subsection 2 – commencing an action

If you don't like what you got in a will, you cannot go to the MPA. You can commence an action when the spouse dies, only IF at the time they died, you had the ability to bring an action under the Act

Subsection 3 – look at section 8 factors and look at any benefits that the surviving spouse may have obtained as a result of the death of the spouse

2. DIVISION OF PROPERTY IN COMMON LAW RELATIONSHIPS

History

- Back in the day single women had more rights in relation to property than married women, because the latter belonged to her husband
- 1936: married women's property act: allowed women to hold property in their own name when married, and if they came into marriage with property they could keep it
- Veterans War Act (after world war) property had to go in the man's name, this continued and solidified the tendency to put property under male's name
- 1968: Divorce Act (before only mechanism of divorce was adultery and had to be caught in the act); this act had new abilities to get a divorce
 - o Divorce became much more common
 - o Women could get out of relationships that they were not happy in
 - o Women started wanting property rights- but had none because he it was in his name (Lord Denning to the rescue)
- Where there was a common intention of two parties to purchase property to benefit for the two of them, may be able to make a claim for the acquisition of property (trust) + contribution to the claim = equity remedy

AB: *Trueman v. Trueman*

- o Resulting trust was found
 - Financial contribution to acquisition of property OR some other manner (ex. One saving money that buys it, while the other pays bills)
 - Intention to share
- o Wife had made substantial contributions to the property
- o Trial Judge relied on Thompson (SCC decision) which applied the rules on resulting trusts very strictly and thus she was not entitled because no common intention
- o ABCA: increasing contribution by the wife is essentially creating some form of interest in the property (distinguished Thompson such that you could prove financial contribution in more than one way)
- *Murdoch v. Murdoch*
 - o W did not do anything more than a regular farm wife, and that was not enough of a contribution; thus they could not find a common intention
 - o Laskin (Dissent): thought findings of fact of trial judge were completely wrong; overturned facts, not an ordinary farm wife → said Thompson didn't apply
 - Problem: how is it that you can after the fact prove or establish intention (in relation to the common intention to share property)
 - Identifies *constructive trust* as the solution
 - Do not need common intention, just need to show unjust enrichment
- *Rathwell v. Rathwell (SCC)*
 - o This decision did not confer the doctrine of constructive trust (because only used by three of the judges); 5 found on basis of resulting trust (all agree she is entitled)
 - o Open joint account and out in wartime savings – each had 700 – this was the only account they used throughout their life
 - o They purchased property but it was always in his name
 - o During time they were together never discussed things in terms of sharing but on testimony H said we “worked as a team” – common intention
 - o Resulting trust: start with 50%, then court can decide where to go from there

Pettkus v. Becker

Facts:

- Not involving married persons but common law
- Should we apply a constructive trust when they are not married
- Both German, move to Canada, live together. Didn't get married but he introduced her as wife and claimed such on income taxes
- Both worked separately, she paid rent and bills, he saved money, they saved lots and bought property with it, in his name
- Bought farm. He was away 5 months of the year, and she continued to keep working (400+ beehives)
- At trial got 40 beehives but no bees

Issue: Is she entitled to any part of the property

Decision: yes

Analysis

- **TRIAL:** W says they implicitly agreed to carry on an enterprise; found that her contribution to the household was intended to seduce the man into marriage (risk capital) and thus the 12 000 saved by H was due to his frugal living and superior job
- **APPEAL:** gave her 50%
- **SCC:** gets rid of resulting trust, just constructive trusts
 - o Doesn't matter if married or not, the law on trusts is the same
- She never collects money, has crappy job and ends up committing suicide

Sorochan v. Sorochan 1983

Facts:

- together 42 years, she used his name. He is a traveling salesman, she works on the property
- At one point he asked her to marry him and she said later, but it never happened
- They have 6 kids

Issue: What happens if the property is already there and you work on the property but you do not necessarily put money into the 'account' for its initial acquisition of property

Decision:

Analysis

- **TRIAL:** limited constructive trust to show contribution at acquisition
- **SCC:** it doesn't matter whether its the acquisition of the property, it can be towards maintenance, preservation or improvement of the property (still don't need intent to share)
 - o CT is a means of remedying unjust enrichment

Resulting Trust

If A & B equally pay for property but it is solely in A's name – A has legal title, A & B have beneficial, A is presumed to be holding the title in trust for A & B (resulting trust).

Peter v. Beblow

Facts:

- Common law relationship whereby 'wife' stayed home and took care of house and kids while 'husband' worked (his and hers from before)
- "Husband" often traveled for work leaving the maintenance of the farm and house to the 'wife'

Issue: Is the wife entitled to some form of compensation

Decision: yes

Analysis:

- Unjust Enrichment:

- Enrichment
- Corresponding deprivation
- Lack of juristic reason for such
- The wife's work allowed him to work more freely and to not have to pay for someone to watch the kids or clean the house or tend to the farm – this in turn gave him more time and freedom to work and the ability to put his money towards paying off the mortgage (his **enrichment**)
- The deprivation was that she was thus unable to earn as much working
- Lack of Juristic Reasoning: The husband tried to argue that she took on the job willingly and out of love for him and the kids and that this should not be compensated. This argument failed – the court held that there was no reason to distinguish domestic services from other contributions.
- When unjust enrichment occurs the person can get either a monetary award or where that is inadequate, a constructive trust
- **Constructive Trust:** The monetary award must be inadequate AND there must be a link between the contribution (services rendered) and the property in which the constructive trust is claimed
 - The contribution must be sufficiently substantial and direct as to entitle her to a portion of the profits. **The extent of the trust must reflect the extent of the contribution**
 - Property is being held beneficially for her, so she becomes the owner of the property (whether 50 or 100%)
 - Cannot just add up services rendered
 - Appellant could not be entitled to full ownership in the house because the respondent also contributed to its value as well
- In this case services calculated (as per trial judge)
 - 350/month times 12 years = 50 000+
 - Divide in half due to benefits she received
 - 25 000
 - house valued at 23 000
 - So she gets whole house

List of factors that may be helpful

1. Pl entitlement...relatively small compared to the value of the whole property
2. Defendant ... able to satisfy the Pl claim without a sale of property
3. Does the Pl have any special attachment to the property in question
4. What hardship might be caused to the DFD if the Pl obtained the rights flowing from the award of an interest in the property

Expected law to take next step – that Matrimonial legislation was unconstitutional because it did not include common law folks

- **Walsh v. Bona**
 - Not unconstitutional that common law spouses were not included because
 - People make choices whether to get married or not
 - There are adequate remedies in constructive trusts
 - **Dissent:** Idea of choice is a joke, nobody thinks about these things

The decisions in Common Law relationships have been all over the board.

Swaren v. Swaren (common law) → got 25%

J v. J (Marriage) → owns factory, no real involvement, 2 kids, got 50% - 2.5 million

In common law relationships have to really analyze who did what and how much

Swaren v. Swaren

- Cohabitated for 13 years, two kids
- Wife contributed to husband's ranch, the value of which increased substantially over the period of cohabitation
- Wife wants half of property in constructive trust

Analysis

- contribution was not sufficient for a constructive trust (got 300 000+ which was 25% of the increase in value)
- Mr. Swaren was well on his way to being a successful rancher and matched, if not did more, to contribute to the ranch
- Wouldn't give constructive trust because it would give her half of the value and that means that she would benefit from the increase in value of the ranch from the time of separation

Some provinces are starting to consider adding common law relationships to their matrimonial property act (but it is a choppy representation)

3. MATRIMONIAL PROPERTY REDISTRIBUTIONS LAWS

a. Choosing Jurisdiction

b. AB matrimonial property Act

c. Parties / Adding Parties

Nay v Nay

Facts:

- Mr. Nay transferred property to his father, claiming that it was in consideration for lots of money owed by him to this father and CIBC
- His father thus claims that he holds it in trust for Mr. Nay
- Mrs. Nay claims the transfer was simply to thwart her claim under the act – the action began two months before the transfer occurred
- The father, W. Nay, had some medical issues and for some reason was not properly added to the matter

Issue: can W. Nay be added as a party to defend

Decision: yes

Analysis:

- Under section 10 of the *Matrimonial Property Act* a spouse who transfers (or gives a gift) with the intention of defeating a claim, AND the transferee accepted such knowing the above intention, and the transfer was not more than one year before
- the action began, the court can enact remedies
 - o Or transferee to pay or transfer all or part of the property to the spouse
 - o Monetary judgment for a sum not exceeding the amount that the share of that spouse under the order is reduced as a result of the transfer?
 - o Consider the amount transferred as property of the transferee spouse when making a MP order
- W. Nay obviously thus has an interest in the above proceedings, not to mention he 'has' some of the property; when he was given notice he had just been discharged with serious medical ailments, his son took the notice to the lawyer and perhaps this caused the delay
- Not going to disrupt his property without giving him a right to be heard

d. Dissipation / Section 10 application

Cox v. Cox

Facts:

- married 20+ years, had 5 kids
- H was the sole provider, W managed home, kids and budget
- H owned shares in company which he sold to partner, the proceeds to hold in trust
- W made application under section 10, holding 'partner' as a third party (H made sale after an order not to dispose of any matrimonial assets)

<p>Issue:</p> <p>Decision:</p> <p>Analysis:</p> <p><u>Matrimonial Property Division</u></p> <ul style="list-style-type: none"> - date of separation or date of trial? <ul style="list-style-type: none"> o Value had decreased due to (a) buy-out (b)excessive spending of cash by H o General Rule in AB: date of trial (absent special circumstances stick with this) o Special circumstances: When a person willfully dissipates assets in the period between separation and trial, the valuation is better set at date of separation o TRIAL b/c no standing allegation of dissipation of shares still at trial - Exemption <ul style="list-style-type: none"> o W received 8000 in a personal injury award, funds which no longer exist as the funds were used to purchase some of the property in the house o Can it be traced? Exemption applies to original property (or its substitute) still owned by the parties o W claims bought furniture , accepted, but judge found that investing in family furnishings was also to benefit H by giving him ½ o Thus reduction reduced to 6000, and value of furniture 16 to 10 thousand - Section 8 (l) Considerations and Unequal Distributions <ul style="list-style-type: none"> o Section 7(4) the Act provides that the court shall distribute non-exempt matrimonial assets equally, unless it is unjust or inequitable to do so, considering section 8 factors (including: That a spouse has dissipated property to the detriment of the other) o Examples on p. 574 – of dissipation o Dissipation includes an element of intent, though the intent does not have to specifically be to deprive the other spouse (just to dissipate assets and this results in detriment to other spouse) o There must be an actual detriment to the other spouse o If asset is sold or otherwise reduced, it will not be deemed dissipation if it can be traced to another asset o Not dissipation is reasonable expenditure made on behalf of family - Application: Money withdrawn from the company and used as a deposit on furniture an house was not dissipation BUT the money used as interim support payments (when made out of matrimonial assets) are dissipation - Traced 60 000 that was used towards home, this is not dissipation, its traceable and still equity that W can share in <p>Note: Dissipation = squandering of money, waste, expend foolishly</p>

e. Possession of the Matrimonial Home

<p><i>Portugal v. Portugal</i></p> <p>Facts:</p> <ul style="list-style-type: none"> - Separate, both teachers, W keeps custody of kids, H pays child support - Trial judge directed that the W get possession of the home until the kids are 19 - Trial judge also said W will get credit for the mortgage payments - H contests this – they have debt of 91 000: wants it to be sold to pay off debts <p>Issue: Did the trial judge err in giving W exclusive possession of the matrimonial home</p> <p>Decision: No</p> <p>Analysis:</p> <ul style="list-style-type: none"> - Section 19 <i>Matrimonial Property Act</i> states that the court can direct that one spouse gets exclusive possession and for any amount of time the court deems necessary - Desire to not disrupt the life of the children (as much as possible) so keeping them in the matrimonial home would be best - W will not get credit for mortgage payments made by her or that would mean that she gets possession with minimal expenses (in spite of fact that H has interest in home) - Equal division and H is to get ½ of the debt paid or remaining (interest) from the proceeds of the sale of the home
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Tawiah v. Tawiah

Facts:

- W wants to keep possession of home because she 'operates' catering business out of it (basement is the office and storage, most of cooking at community centre)
- 1100 a month from it and its her only source of income
- H has paid the bulk of the expenses and the home is in his name

Issue: Can she be given exclusive possession of the home?

Decision: Yes

Analysis:

- since it is her only source of income and she makes substantially less than him, Court grants exclusive possession to her
- another factor: the tension on them
- THIS IS AN INTERIM DECISION
 - o She only gets possession until the property is settled

f. Date of Valuation and Division

Under section 37 &38 of the Act; the couple can select the date of valuation, based on their agreement. The below cases are for if the matter goes to court

***Kazmierczak v. Kazmierczak* (ABCA 2003 upheld this decision)**

Facts:

- cohabit for 2 years, marriage, 6 more years, then separate, now at trial but has been 13 years between separation and trial
- Lots of property involved, some existing before the marriage, some acquired during cohabitation and some while separated but not 'together'

Issue:

- How should the property be split ?
- is the valuation time the date of trial or the date of separation?

Decision:

- rather than equal presumption of splitting all property, did it on a case by case basis
- presumption is date of trial but because item by item dealings, did not matter

Analysis:

- The couple, when separated, were not linked at all financially or anything, neither made applications for spousal or child support
- While W was more economically poor and did not work, it was not due to the marriage but her lack of English (which was not a product of the marriage) AND her decision not to work
- Traced the property – anything that was one of the spouses only BEFORE the marriage (his house her condo) was exempt from division (did consider whether the other had contributed, but ultimately decided no)
- Traced some of the sale of that property into property acquired together
 - o Ex. H got 15 000 from sale of house, and put that down payment on their house. Judge said 7500 was gifted to her, but the other 7500 could be exempt. This meant when they sold THAT house, they were to subtract 7500 before splitting it.
- H lived in the matrimonial house with the kids. W wanted occupational rent (since the court decided they were joint tenants)
- Court said NO, first because while this is the normal case, she should have made the application 13 years ago, not accumulate and ask for it after AND had she done it then H would have likely asked for child support etc...
 - o Court decided that neither spouse was allowed to accumulate child support, spousal support or occupational rent, and ask for it now.
- All independent property obtained during separation, due to their lack of linkage (neither consulted with the other for buying or selling) was NOT split, each was entitled to the benefits and debts of those items

- **Date of Trial** is the date of valuation because:
 - o Wording of *MPA* (section 7(3) and 8(d))
 - o Use date of trial because after separation they are still joint in terms of property, debts, support
 - o The difficulty in determining the value of the assets so many years prior
- **BUT** leaves open potential exceptional circumstances where it can be date of separation

This is an unusual tactic - to go property by property, normally look at totality

Hodgson v. Hodgson 2005 ABCA

- presumptive rule that date of valuation is trial date; only in special circumstances will we depart from this
- The Court in this case did not agree that it was JUST a presumption, but that the statutory scheme made it so that you had to go from date of trial (RULE)

g. Interim Distribution of Property

Gartner v. Ewasiuk

Facts:

- W makes application to freeze ability of H and children to gift, encumber or otherwise deal with property and bank accounts that are matrimonial (**Interim Freezing Order**)
- H and W acquired assets including a company.
- After separation, H restructure the company and transferring investments (from JT to all the children) , so made gifts to the children (making kids the dfd's under section 10 of *MPA*)

Issue: Can the Court Grant an interim distribution order?

Decision: yes

Analysis:

- *Matrimonial Property Act* section 9(3)(j)
- Consider that the assets were acquired during marriage, net assets exceeded interim distribution, H had had virtually control over all the assets since separation, it can be made without serious prejudicial effect on the property, there is a fundamental imbalance between the parties in their ability to protect their respective interests
- Ordered H to pay W 200 000 as an interim and money for experts to evaluate property

Tarapaski v. Tarapaski

Facts

- Teem Energy is a matrimonial property, all shares in H's name
- W applies under RULE 221 to get 50% of shares of company
- H is agreeing equal distribution but not to the method of distribution because of potential lack of cooperation with management AND that because the exact amount the company was worth not known and judgment could be for too much

Issue:

Decision:

Analysis

- potential problems resulting from parties inability to cooperate in management of Teem could be dealt with by Monitor or imposition of shot-gun buy-sell agreement
- there was enough matrimonial property remaining if turns out the distribution was inappropriate
- caution: not about showing that it wont prejudice either spouse, need to show that it will benefit one of them

RULE 221

Court can order any matter to be tried at, before or after trial

It can make orders in relation to those matters (even such that it can render the issues no longer of importance at trial and dismiss them)

h. Section 7(2) Property

Quigg v. Quigg

Facts:

- H had 14 000 equity in house he had before marriage; it was sold and the proceeds were put into a joint tenancy home

Issue: Should the 14 000 be exempt?

Decision: yes

Analysis:

- Section 36(a): no presumption of advancement UNLESS placed in joint names – then have to show that did not intend joint ownership
- Section 7 states is the property is acquired by a spouse before a marriage it can be exempt
- W says joint property is not subject to distribution under section 7, but section 46 of the act does not support this proposition. **Joint property still comes with in the distributive provisions of the act**
- Thus 14000 was exempt before distribution

Jackson v. Jackson

Facts:

- H's mother gave him 61 500 in cash, which was used to pay down the mortgage on a jointly owned home
- The judge said it was exempt but took ½ of it as being gifted to the wife

Issue:

- is an exemption lost (in a joint interest) when the interest was transferred w/o consideration to the spouse?

Analysis:

- Trial Judge SAID: Since the \$\$ was placed in joint ownership, the wife had legal title and authority to deal with it – it was not exempt
- s. 36(2) of the MPA presumes that money deposited in the name of both spouses is deemed to be in the name of both spouses. Here, the husband failed to rebut that presumption

This is **WRONG** – money was exempt when he got it, when he put it into joint names, ½ is exempt and ½ is considered a gift to marriage

Harrower v. Harrower

Facts:

- Long marriage.
- H claimed an exemption for \$72,000 bequeathed to him.
- The money was traceable into the first matrimonial home, which had since been sold to pay debts.
- Trial J. found the \$72,000 was not traceable into the **second** home and therefore, H could not claim the exemption. H appeals.

Issue: is it exempt despite a lack of traceability?

Decision: no

Analysis:

- If the \$72,000 was put into joint names, the husband in effect gave the wife one half of the money.
- If the property cannot be traced, there is nothing to exempt from distribution. Tracing can be inferred, implied or presumed
- A gift to a spouse of a joint interest removes that joint interest from the category of exempt property; the interest held by the donor spouse remains exempt in accordance with and to the extent recognized by the Act

Application: not traceable here. Paid of debts which freed up money to lessen financing on house, but allowing this to be an exemption could lead to a person getting full title (think 100 000 house example)

Brokopp v. Brokopp

Facts:

- W's father gave them money to buy house
- Moved that house onto H's father's land
- The trial judge said the amount of the wives inheritance that was spent on matrimonial debts, was exempt

Issue: was the trial judge correct?

Decision: Partially

Analysis:

- Judge was right in stating tracing can be inferred to property that is till owned
- Error in exempting that portion of the inheritance used to dissipate debts which were not traceable to specific assets
- The dissipation of assets by one party following separation does not defeat the tracing of those assets by the other party to the date of separation
- Application: thus wife was able to trace monies, though 50% was deemed joint (given to H), so only half was exempt
- The couple put time and money into improving the land, with the understanding that it would one day belong to the son
- While there is no intention to gift to the daughter and the beneficial interest is in the son only and would normally be subject to matrimonial distribution, it is exempt because it was a gift

Sparrow v. Sparrow

Facts:

- H and his brother jointly own cottage in BC (given to them by their parents)
- Parents paid taxes on lake property and pay for upkeep
- Value: 160 000 at time of marriage, 1 000 000 at time of trial
- Trial Judge said it was matrimonial property and that H's share in the increase in value was to be divided equally between spouses

Issue: Is the cabin matrimonial property?

Decision: No

Analysis:

- error in applying presumption of equal sharing to lake property, which should have been exempt
- under the MPA the increase in value for exempt property should be distributed in a manner which is **just and equitable** (not relying on presumption)
- Application: 70 to H, 30 to W

Income tax arrears: if liability arose because the parties diverted money that should have been used to pay income taxes to paying for a lifestyle, they have both enjoyed the benefit of it (unless used for exclusive use)

Felker v. Felker

Facts:

- H wants a exemption to farm and cattle he acquired before marriage AND claims that the exemption value is greater then the value of the property so he should not have to distribute any the W
- Over many years he bought and sold cattle to pay off loans, debts and to purchase more cattle

Issue: can H trace and claim the full exemption?

Decision: yes

Ratio:

- 7(2)(c)- if property is acquired before the marriage; the value at the time of marriage or date acquired, is the amount exempt
- 7(3)(i) & 7(3)(ii) – calculate difference between value exempt and current value
- the decision to sell the herd, pay down farm debt, and then reinvest in he same assets does not destroy the exemption
- H showed that none of the exempt assets, including any proceeds of sale, was ever invested in joint title property
- The value exempt exceeded value currently in existence, thus no real application for property distribution at trial

i. Principles of Division of Divisible Section 7(4) Property

Dwelle v. Dwelle 1982 ABCA

Facts:

- H = 53 widower at time of marriage. Owns and operates very successful ranch, 2 kids
- W = 30, self employed hairdresser, 4 kids, sometimes on social assistance
- Marry. H supplies good home for kids, swimming pool, W learns to fly, he buys her planes, she helps on farm (but nothing crazy, the increase in property value is not due to their hard work)
- H buys her a duplex when she contemplates leaving, she is adulterous
- Judge splits 80 (h) – 20 (w) for increase in value of property

Issue: did the judge err in his decision

Decision: no, but added 45 000 to property of H (removed land from exemption)

Analysis:

- H's original land value is calculated and is exempt
- Increase in land is subject to section 7(2) – just and equitable distribution
- The judge did not err in considering all the factors in section 8 (he was not overly influenced by W's conduct and thus gave less weight to her work, as claimed by W)
- Do not need to go through every single factor & does not need to be divided 50-50 just because the money / property went into the family pot
- In order to overrule need to be persuaded of a material error

Note: Her property (the duplex) was deemed exempt as it was a gift from the H

Judge's opinion can carry a lot of weight. Fact that he was commenting on background in a very judgmental manner; suggesting that the judge was using factors outside of the statute. Conduct is not suppose to matter only economic misconduct is suppose to be a factor

Mazurenko v. Mazurenko

Facts:

- Transfers of farm land and land for living did occur, but each expressed to be a gift to H by parents
- H bought house and put it in joint names with daughters

Issue: Are the transfers by the parents, exempt?

Decision: no

Analysis:

- the trial judge stated that the spouses had contributed equally to running the land and thus divided it equally
- The judge found that the first transfer to H – was in contemplation of her moving back to the farm
- 1/3 of house is H's equity and thus subject to market value – to be distributed (the portions to the children are normal family benefits, and not part of MP)
- In agreeing with the trial judge the court relied on the notion that “a husband and wife carry on their married life, including their economic functions, for their mutual benefit and account and according to arrangements accepted by both for that purpose

Trenchie v. Trenchie

Facts:

- cohabitate 6 years, married for about 10, 1 kid together (W already has one)
- H brought into marriage, his car, and ½ interest in family farm (which he began working on evenings and weekends)
- Moved into W's house (owned by w's parent) and paid that rent
- H worked fulltime, W was FT, then PT, the raised son

- Bought own Matrimonial home, H paid a lot using savings
- Day moved in, W's parents gave her 25 000, as her portion of proceeds of selling house – she gave this to H to put towards house
- H sold farming equipment, gave partner his share, the used it to buy furniture in new house (his) – after separation

Issue: was it intended to be a gift of joint tenancy?

Decision: no

Analysis:

- the 25 000 was denied as being a joint gift, and was deemed a gift to W, thus exempt
- H argues that even if not a joint - gift, W gave it to him to put towards their JOINT home, thus she intended it to be divided equally (used for joint benefit): presumption of advancement kicks in, but is rebutted by W's evidence of intention
 - o She felt that she was no longer living off someone else, had her own investment
 - o Also expressed this in H's unwillingness to join bank accounts and unwilling to share his interest in the farm
- Utilized in marriage regime but not committed to it
- The whole of the 25000 is exempt
- The farm value at date of marriage, is exempt as is the interest gained because H kept it separate, interest existed long before marriage, no contribution by W to farm and its operation (no constructive trust – very separate world)

This case was before Harrower & Jackson Case - if after Harrower, would have said 12 500 is her exemption and 12 500 is part of the matrimonial regime

Pension: H argued that W id only entitled to pension for marriage, not where they lived common law before marriage. W says that she is entitled to all of it from the time they were together. The Judge stated that she was no less a wife when cohabitating and thus she is entitled to it since the period of cohabitation

Normally if it was not brought into the matrimonial property regime, but when his stuff is deemed to not have been brought in (pension) then she gets 25% and he gets 75%

j. Property to be Divided

Stock options / Bonuses / Severance

Gardiner v. Gardiner (1996)

Facts:

- married 28 years, 3 kids, all self-supporting
- W was primarily responsible for child rearing while H was breadwinner, at time of trial, W was employed outside of the house
- Concede that property is to be divided equally, except a few items...

Issue:

- 1) Is the pension of H subject to distribution under the matrimonial property act?
- 2) Are stock options issued to H through his employment, subject to distribution?
- 3) Are the bonuses given to H in 95 & 96 subject to distribution and how should they be divided?
- 4) How should they deal with the increase in W exempt property?

Decision:

- 1) Yes for the basic pension + supplemental pension
- 2) yes
- 3) No
- 4) Increase = matrimonial property

Analysis:

1) Pension Plan

- For the basic pension plan, agreed to split using the McAlister Formula:
 - $\frac{1}{2}$ * years of pensionable service * monthly benefit from plan
- Supplemental – only available if he hits age 55, he is 51
 - H says because it is not vested and because there are no employee contributions, it should not be distributed
 - W says its simply contingent on vesting, still property
 - Court: satisfied that property under AB act includes the right to a future something. While it might be difficult to value an unvested pension, it is nonetheless matrimonial property
 - While contingency affects value it does not deny it

2) Stock

- Company allocates stock to their senior staff; at time of trial some of H's were exercisable at which he got 115 000, there was still some 30 000 that were not yet exercisable
- Court said it was not income or compensation for work but rather property in the same way that a company contribute to an employment savings plan, which is matrimonial property
- H must hold $\frac{1}{2}$ of the remaining stock options in trust for W

3) Bonuses

- Received after separation – no guarantee of a bonus
- Bonuses vary with performance, he has no control and no legally enforceable right to them and so they are not subject to the matrimonial property act

4) W received 105 000 from her father. This is exempt. The money was invested. Increase is 57 000, this increase is matrimonial property and thus subject to equal division

MacDonald v. MacDonald

Facts:

- H & W divorced, original application for child support and spousal support
- W applies to increase based on fact that the amount used to determine support was salary of 8000/month = 96 000, but he has since been getting between 135 000 – 200 000 a year based on bonuses, stocks and salary
- In 1996 he was terminated, getting 21 months salary, 45 000 in pension, 7000 vacation pay - he was also required to exercise all of his stock options (getting 200 000) plus some other exercised stock and bonuses, equaling over 600 000 for the year
- W worked as a nurse then took care of kids, at which point her training become outdated and her seniority was lost

Issue: what should be used for calculating child support income?

Decision:

Analysis:

- W says bonuses, employee stock options and the severance package
- H says all of these items should be considered assets not income
- All of these items enhanced the ability of H to pay child support, either as direct income or, to the extent the income could have been used to purchase assets or increase their value
- It can be asset for MP division or Income, it wont be counted twice, if MP division then will get it excluded or exempt from income when discussing support
- Bonuses if a new thing might not be included, but since they had historically been given to H, they were to be included
- Severance package is accelerated income – intended to be ongoing income stream and thus will be added to his new money from his new job
- 2500/child per month for the three months (til end of year) then based on income + severance for the next 1.5 years so 1150 / month

D.G.M. v. K.M.M

Facts:

- DGM in anticipation of marriage purchased a lot for 120 000; title in joint names and the matrimonial home was constructed on it
- KMM sold a home she owned for 208 000, which she put in a joint bank account, a portion of which was put into the home
- DGM gave KMM a promissory note and mortgage in amount of 104 000
- DGM RRSP = 115 000; KMM – RRSP = 6000 at date of marriage
- DGM worked in family business earning 115 – 330 thousand and he indirectly owned shares in the company which was sold and he received 1.6 million. He also entered a contract for employment for 250 000/year +bonus in 5 years
- KMM was a pharmaceutical rep earning 35-75 thousand

Issue:

- Are the following items exempt:
 - o Interest in company
 - o Funds used to purchase lot before marriage
 - o KMM equity in home owned at date of marriage
- Is H's bonus matrimonial property?
- What is to be made of the promissory note?

Decision:

Analysis:

Exemptions

- Company
 - o 476 000 (value of shares at time of marriage)
 - o the company was restructured etc causing him to lose his share, but his parents owned all the equity and gave him a 40% share in the company following this restructuring (his original surrendering of shares was to help the company through a tough time)
 - o where no legal interest, he still held a beneficial interest → this change does not lose the trace value of the property
 - o the fact the shares were basically useless at one point is irrelevant, valid exemption at time of marriage (increase of shares from time of marriage to now, is divisible property)
- Lot
 - o Wants 60 000 (1/2 of purchase price) as an exemption
 - o Given, enough evidence to show tracing of money
- KMM equity in prior home
 - o W wants full exemption of 165 000 ; H says she only gets half
 - o W says there is evidence to show it was not a gift and thus rebuts the presumption of advancement (promissory note); not the amount but the fact that they were given which rebuts presumption of advancement.
- Bonus
 - o Unknown whether he will meet the requirements to get the future bonus
 - o Denied accepting less for his shares than he would have otherwise done, in consideration of this bonus – offers evidence
 - o H says this potential bonus should be treated as W bonus's are, an income
 - o NOT a deferred partial payment for the company
 - Varies with performance
 - No real control over it
 - THUS, like in other cases with these factors, bonus = income

Why was she given 21 000 (the promissory note amount – 82 000) when her exemption was 165 000?? P. 689

Sutton v. Davidson

Facts:

- H & W marry; H is terminated at job. W was an art teacher and artist
- Couple starts company so W sells paintings and teach classes, H keeps the books and is not otherwise employed

Issue: How to divide each type of property?

Analysis:

Termination Payments

- H receiver some 130000 + 55 000 (pension) from employer upon termination
- H claims it was severance, thus income, and thus not distributable
- 78 000 was from before marriage (past service) - this amount was exempt
- The rest was not exempt because compensation for the loss of the right to work and earn income started and concluded within the duration of the marriage
- **Loss of future income is distributable if the period being compensated falls within the duration of the marriage**
- Additionally he placed the money in a joint account, treating it as joint property

RRSP

- W conceded a certain portion was exempt, judge took that as the whole exemption and divided the remaining equally (just and equitable manner, and judge choose equally, that's his choice)

Line of Credit

- W took amount from that bank and transferred it to her account (sole) with exempt monies
- H argued that because she mixed exempt money with joint money, W created it so that all the money was distributable (mingling = lose exemption) – based on presumption that one half is a gift to the spouse
- Rejected this because money seized was put into an account which has never been joint and it is traceable

Inheritance received after separation

- had never been in joint names or comingled with any other funds
- It was received after separation
- Thus, exempt entirely

Corporate Interests

D.B.C. v. R.M.W

Analysis:

- court is not in a position to override the company's restriction on the transfer of shares. The company would not be obliged to register any transfer that might be ordered, as the company is not party to the proceedings.
- The bylaws clearly state that approval of the Board is needed
- While W was not in a position to completely thwart the plans of the majority (due to the amount of shares she had) she could still create unwarranted mischief (and evidence in the past had shown her willingness to do so)
- H is holding the shares in trust for W, he must direct company to pay or give W any dividend payable in respect of the shares, and he must always act in the best interests of those shares

Neither party was allowed to claim legal fees as joint debt

Pensions / WCB / Disability / RRSP

Article: Division and Distribution of Tax-sheltered Assets on Marriage Breakdown

- A pension plan is the employees money that cannot be spent until the employee stops working

RRSP

- **Value Added Valuation:** commuted value at time of marriage is subtracted from the commuted value at the time of separation and the result is that which is earned during the marriage

- Value of pension for marriage breakdown
 - o Termination: determine annual pension benefit by assuming that the employee spouse stopped working on the date of separation
 - o Retirement: considers post separation increases, try to estimate what it will be when the person retires.

Considered matrimonial property

- Two possible ways of dividing them:

- 1) Include it in the total list of property and deduct 20%-30% for federal/provincial taxes
- 2) Do a "s. 73" roll-over: Add the H+W's RRSPs together and divide by two. In a volatile market, this is the best solution. No taxes are deducted until they are sold and they are removed from the property assessment.

Pensions

- CPP/Private pensions considered matrimonial property
- Client must apply for CPP credits their self through Government of Canada website
- Canada Old Age pensions are not
- Two possible ways of dividing private pensions:
 - 1) Divide according to **McAllister** formula:
 - Number of Years Married ÷ Number of Years Worked x Monthly pension amount \$\$ x % the other party is entitled to according to MPA (in most cases 50%)
 - 2) Assess the monetary value of the pension and determine the life expectancy of the other party and pay out a lump sum
 - 3) 3) Open separate pension account within same institution and have one party transfer % to the other (common when Corp does not want money removed from its pension system)
- Date of valuation = Date of Trial
- *Note:* Some federal government pensions are valued at date of separation

WCB Benefits/Disability

- (Surprisingly) considered Matrimonial Property **Hughes v. Hughes**
- Does not fall under the "tort" earning exemptions under s. 7(3)
- Other party is usually given lump sum payout
- *Note:* One could still argue an unequal division under s. 8

Hughes v. Hughes

Facts:

- H received monies during marriage, deposited it into farm bank account and it was used for payment of operating and other expenses
-

Issue: Are WCB benefits received during course of marriage, exempt?

Decision:

Analysis:

- s. 7(2)(d)- an award or settlement for damages in tort in favor of a spouse, unless it is compensation for loss to both spouses, the market value is exempt
- should be interpreted broadly enough to include benefits analogous to damages for personal injuries (this has been the finding of other courts)
- Appeal: The legislation limited exemption to five certain categories, disability benefits, specifically WCB benefits, are not listed
 - o Might be true that get these benefits as a trade off for not suing, but also do not have to prove a tort to get benefits
 - o NOT the same, does not fall into category of damages by tort

Fresh Evidence: Generally should not be admitted if it could have been admitted at trial (with due diligence); the evidence must be relevant in that it bears upon a decisive issue or potentially decisive issue in the trial, it must be credible, and it must be such that if believed it would affect the result

Debts

Abbott v. Abbott

Facts:

- H farmed family farms, W stayed home with kids and eventually entered workforce, contributing to support of family
- H had deal with mother that he would do all the farming and she would advance funds to keep the operations going; but H did not repay these funds to his mother
- Mother made a formal demand for repayment of all the loans (750 000)

Issue: Is the matrimonial debt related to the farm loan, attributable to the wife?

Decision: partially

Analysis:

- trial judge that some of the debt was incurred pre-marriage and some of the debt was incurred to reduce matrimonial division, ultimately decided only 210 000 was to be split between the couple
- matrimonial debt is generally understood to be debt incurred during the marriage; as it relates to section 7(4) the presumption is a 50% division – but 7(2) non-exempt property does not contain this presumption

Busenius v. Busenius 2006 ABQB

Facts:

- both H and W have been fully employed throughout marriage
- disagreement over property division

Issue:

- Is H entitled to occupation rent?
- How should post-separation debts be treated?

Decision:

- no basis for OR, because the occupier is not seeking upkeep costs
- preferable to treat all post-separation debt as matrimonial property, but where it did not create an asset and is not justified as a consequence of the marriage or its breakdown, then it is just and equitable to divide the debt unequally. In this case the creator of the debt is responsible

Analysis:

- W has possession of house and claims she bought all the household goods except a few gifted items; valued them at depreciated value
- H gets pension based on when he retires – the longer he works the more his pension decreases in value. He is compelled to retire at 60 unless promoted. Fixed pension at that rate.
- Line of credit – to pay off motorhome (purchased by H), H says that's not the only reasons, plus W has used it since the separation – W was paying minimum payments, when she stopped they garnished H's pay
- H has an RRSP that he purchased using the sale of property jointly owned with his brother (this property was exempt) → there is no real evidence as to where the funds are now, it seems both RRSP's are disposed of thus judge concluded they were cashed. **Recall that the claimed exemption must end up in an identifiable asset**

Post Separation Debts

- because the law in AB is that the valuation of property occurs at the time of trial, the proper treatment of debts incurred after separation is relevant
- H claims to owe his brother 15 000, bank 29 000
- W says 15 000 of the 29 000 is matrimonial but disputes all other debts
- Debt to brother
 - o That used for legal fees is not to be attributed to W
 - o No explanation for why someone who's income is far beyond total expenses, needs to borrow money
 - o Judge did not believe it was a debt to make ends meet, but it was debt that was incurred while they were still

married though separated

- **Matrimonial property awards account for any debt that the parties expressly or implicitly agreed to incur while married**
- W argues that post-separation debt is not part of MP unless it can be shown to have benefited both parties or been necessary as a result of the marriage breakdown
- H argues that just as unexpected windfall post-separation is subject to division, so too is unexplained debt
- **Judge: Section 8(f)(l) and (m) provide sufficient direction to empower the court to divide property unequally**
 - Not satisfied that it related to marriage or its breakdown, only benefited H
- **Credit line Debt**
 - Took out 4th loan to deal with overdraft which had someone gone from 4000 to 14 000, without explanation. H did not point to what it was for.
 - It is MP but it is just and equitable to divide it unequally. 15000 to be added to overdraft at separation for a total of 21 000 to be divided equally. H is responsible for balance
- **OCCUPATION RENT**
 - No debt owing at time of separation, and H is paying property taxes, so W is essentially living rent free
 - W argues delay, thus no pay.
 - Delay has benefitted H, as home and W's pension have both increased and he would not have been entitled to those benefits if timely dealt with
 - OR in the context of MP Is the compensation for loss of access or use, the notion that as a result of the marriage breakdown one party has benefitted at the expense of the other
 - The fact that one has lived rent free is not an asset per se, but it does allow for greater accumulation of assets
 - **Claim for OR would only be applicable to meet the claim by the exclusive occupier for contribution to expenses incurred**

k. Occupation Rent / Pre-Judgment Interest

Generally pleaded when the house is unencumbered (no mortgage) such that one person is living for free and the other has to pay rent in their alternate location. Occupation rent is almost always argued at the end

***Kazmierczak v. Kazmierczak* – p. 598 list**

- OR should not be claimed if the person living in the house has the children and is not making a claim for child support or contribution towards upkeep of house
- Claims for OR and cross claims for expenses of houses or child support / spousal support should be considered together
- Occupating spouse will not be entitled to credit for the mortgage or taxes that are being paid (generally comes up when the person claims that it's a matrimonial debt and they have been paying it off so they should get credit for paying that debt)
 - Don't because the rent they are incurring is a matrimonial debt too (so if the person was living with family and not paying rent, might make a case)
 - Reduced debt but the person who does it does not get it
- If neither party can really afford to keep the house, and one person insists on keeping it, then the other person should get OR
- Rarely, if ever, should one spouse be able to bank a claim for OR and then years later try to capitalize on it

How do you Value Occupation Rent?

- Is it half of what you could have rented it out for? – this is the common method
- Is it half of the other persons rent?

Sever Joint Tenancy

- use this when one person is living in the house and won't sell it, OR in situations where it is the only significant form of property and one person will not sell it (do not go and ask for it if there are other assets that can offset the value of property)
- asking the court to sever the JT and sell the house

- tell the court what you think the listing price will be
- ask for deadlines for signing agreements, listing prices that can be accepted
- if it is completely paid off, only asset, one person has been living in it, and there is no other way to bring the equity out → controlled by one person, so ultimately has to be sold
- if close to foreclosure (not making mortgage payments) then attach letter and make application immediately

Dower Act

- keep in mind:
 - if acting for someone and after separation they buy property and put it in their name alone and live in it, if they want to sell it before the property is released, they have to get a dower act release from estranged spouse

Bankruptcy

- if one party claims bankruptcy and the other one doesn't, the one who doesn't may be left holding the bag
- the creditors do not care what you do with matrimonial property
- before they claim, ask them to talk to trustee – have to give notice to the other side right away (immediately on phone)
 - try to work something out before
- if they are not yet discharged, before property is settled, need to check with trustee before property division occurs → make sure agreement come to is not in violation of agreement to pay off
- in reality, do not usually get notice. Should not actively try to hide it

Lottery winnings

- during marriage, it will be section 7(4) property unless you can show that the money to buy the tickets came from an exempt pool
- this comes up when someone wins the lottery after separation
 - is living off winnings, income or property?
 - Usually this is seen as property and there will be an unequal distribution
 - The longer separated the more likely the person who won is going to get more than their estranged spouse

AirMiles or Other Point Cards

- Some plans will allow you to divide the points (transferred to different accounts)
- For those that do not allow for division, if cannot split up at time, then put in agreement that this is the amount that the couple has, this is how much each is entitled too, put in deadlines for when they have to use the point by, find out if consent is needed etc

I. Prenups

Most of the time these matters do not go on to trial, generally some for of settlement:

- Settlement
- division of property agreement (common law)
- Section 37. 38 of MPA
- 37 –
 - written agreement
 - provides for status, ownership and division of property
 - agreement may be entered into between two persons in contemplation for marriage (not enforceable until marriage)
 - Can be enforced at any time, dissolution of marriage
- 38
 - sets out formal requirements for an agreement to be binding (court does not have to sign off on agreement, so long as these requirements are met)
 - s. 37 agreement is enforceable if each spouse acknowledges in writing and apart from the other spouse
 - the nature of the agreement they are signing
 - aware of entitlement under act
 - no compulsion (voluntarily)

- 38(2)
 - acknowledging shall be made before a lawyer other than the one acting for the other spouse

- case: people do not need independent legal advice, just need to sign before a lawyer

SO if they made an agreement, witnessed by neighbour – not binding, need to be in front of lawyer. Likewise, if they make an agreement but the spouse won't get a lawyer, then do not have an agreement yet

Point of section 37, 38 is to allow parties to opt out of the presumption of equal division

PRENUPS

Use to have very little weight, but this has changed. One of the section 8 factors is consideration of prior agreements – so the court now affords great respect to the agreements if they are a formally sound (this is in light of all the cohabitation and common law relations)

- need to list out all assets and debts
- how specific it is depends on the parties
- Normally they want to say what is exempt, then decide what to do with replacement property, gifts received, increases in value of property
- Proportionate to contribution or 50-50?

The agreement should say that it is in contemplation of marriage and that it does not take effect until married. Should be as detailed as possible

If it is a prenuptial agreement, should have a MPA notice – I have been advised of what would happen under the act and am aware of section 37, 38

- Can be important for a person who has significant amount of property
- Especially for people who buy and sell properties, what will happen to the sales of those businesses

a. Setting Aside Property Agreements

Jang v. Jang

- Cited decision *Corbeil*
- CA – the Act itself does not require independent legal advice
- Not about lawyer offering wisdom of entering into the agreement, it is to ensure they understand the terms
- **Do not need independent legal advice**
- Be careful about this – however, if sign a legal advice certificate and you know that this is a lousy deal, that they are being taken advantage of or feel that they are under extreme pressure. Either tell them that it is not a good agreement (and get them to sign a letter that says that you have informed them of the bad deal and they still sign it) or tell them to get a second opinion
 - Law society reasons
- At very least get some idea of if there has been disclosure and what type of property there is

If meet requirements of section 38 – doesn't mean that the agreement can not be challenged on regular contract principles (undue influence etc)

Segal v. Qu

- married, had prenup, separated and enter into another agreement
- at trial H was relying on agreement that released him on spousal payments
- W challenges on grounds that
 - There was a lack of complete disclosure before she signed (in Ontario if there is not full disclosure then the agreement can be set aside, but we do not have this clause here, it may set it aside but it depends on (a) was it asked for (b) was it refused (c) was it misrepresented (d) was there an attempt to conceal (e) had there been full disclosure would they have signed it anyways)
 - Contract principles – mistake, duress, undue influence

- **Mistake:** the person who signed believed it had a certain affect when in fact it means something different (actual misunderstanding)
- **Duress:** threat of death or serious physical injury made with intent to force the person into signing the agreement (if there is then it vitiates consent)
- **Undue Influence:** abuses of power that are more subtle then coercion; the idea is that some relationships raise a presumption of undue influence (no such presumption between H & W), have to show the ability of one person to dominate the other through manipulation (etc), there is some imbalance of power
 - **Ex.** he handled all the money and I had no access, he just told me to sign off on things
 - **Ex.** History of violence, criminal convictions and victim comes into office with agreement, then may have undue influence
- **Wife was not successful on contract provisions**
- Then moved on to argue that the contract was unconscionable
 - There must be an inequality between the parties, a praying on one which causes that person to act with scrupulous care of the other
 - Grossly unfair
 - Subjective portion – did the stronger party take advantage of the weakness of the other party
- Ontario court acknowledged that agreements are often made when parties are upset and so it appears that one party is taking advantage of the other – keep this in mind when looking at them, not the same as a straightforward contract dispute because of the matrimonial nature

Rick v. Brandsema

Cites Miglin Case (p. 780)

- because of the uniqueness of the negotiating environment, bargains entered into between spouses on marriage breakdown are not and should not be seen to be subject to the same rules as those applicable to commercial contracts negotiated between to parties of equal strength
- Test
 - One party vulnerable to the other
 - Does the agreement comply with the objectives of the act
- Important part of this case:
 - P. 781
 - Duty to make full and honest disclosure of all relevant financial info is required to protect integrity of negotiations undertaken in these uniquely vulnerable circumstances
 - Deliberate failure to disclose may render judicial interference where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation
 - Basically, if varies from MPA then better have a good reason for it
 - Whether court will intervene depends on each case
 - Deliberateness of lack of disclosure, statutory compliance

If there are reasons for deviating, put the reasons in the preamble to the agreement – “for the reasons of their varying roles in the relationship

20 000	40 000
	500 000
Total: 502 000	TOTAL: 1 000 000
Debt: Mortgage 100 000	
Net: 402 000	1 000 000
Exemptions: 65 000	50 000
Final total: 337 000	950 000

Taxes: Reduce taxed on RRSP (20 – 25%); same thing with investments which are subject to capital gains tax

If these parties want to keep the assets.

Add two together (337 000 + 950 000) – 1 287 000

They should each have half = 643 500

$643\,500 - 337\,000 = \text{short: } 306\,500 = \text{equalization payment that H owes W}$

If the section 7(3) was not being split equally then you add that amount to the exemption. The unequal division is subtracted from their total (as an exemption). Recall that in most cases it will be divided 50%

Taxes would be calculated under debts – if taking off taxes in RRSP's for after tax value you would also have to use the after tax value for the 50 000 exemption