

## **Part 7 – Child and Spousal Support**

Only minor changes to child support are made in order to modernize the language and to codify case law. In 2002, the Federal government completed a comprehensive review of the Federal Child Support Guidelines, which are used in British Columbia to calculate child support.

Some changes to spousal support are made, largely in order to provide clarity within the existing scheme including the following:

- align provincial spousal support factors and objectives more closely with the Divorce Act (Canada);
- clarify the criteria and tools used to determine entitlement, duration and amount of spousal support;
- explicitly permit periodic reviews;
- clarify the inter-relationship between spousal support and property division;
- provide ways in which spousal support orders or agreements may be changed; and
- establish guidelines respecting the effect of the paying spouse's death on support obligations.

Spousal Support Advisory Guidelines are not referred to in the Family Law Act and will remain advisory. Although the guidelines are widely used in British Columbia, they do not fit every situation and cannot be applied in all cases.

This Part also contains a terminology change with regard to payments for children and spouses. It eliminates the use of “maintenance” and replaces it with “support,” which is used in the Divorce Act (Canada) and the Federal Child Support Guidelines (Canada).

### **Parental support repealed**

The Family Law Act does not carry forward the parental support obligations in section 90 of the Family Relations Act. The parental support provision was immediately repealed upon the passing of the Family Law Act to prevent further applications for parental support. Any cases for parental support commenced prior to the passing of the Family Law Act will continue.

## **Division 1 – Definitions**

This Division clarifies the definitions used in this Part. Some specific definitions are added to promote clarity. For instance, non-parent guardians, litigation guardians and step-parents' have different support duties than parents. It is important that these types of guardians and parents are clearly distinguished in this Division.

### **Section 146 Definitions**

- Section 146 provides interpretive guidance on how terms will be used in this Part.

## **Division 2 – Child Support**

This Division sets out obligations respecting the duty to pay child support. Only minor changes to child support are made in order to modernize the language and to codify case law where it would be useful.

In 2002, the Federal government completed a comprehensive review of the Federal Child Support Guidelines, which are used in British Columbia to calculate child support and therefore few substantive changes were required. The Child Support Guidelines are mandatory and have been used with great success across Canada.

Areas where changes were made to codify the case law include:

- clarifying that parents have the primary obligation to pay child support and stepparents and non-parent guardians have an obligation that is secondary to parents, and
- clarifying the limits of a parent's obligation to provide support. For example, that the obligation ends if the child voluntarily withdraws from parental care.

### **Section 147 Duty to provide support for child**

- Section 147 defines when there is a duty to provide support for a child. The section retains the obligation to support a child as found in the Family Relations Act but clarifies when the obligation ends and limits the obligations of non-parent guardians and step-parents.
- This section codifies the case law respecting when an obligation ends. If a child is under 19 and is a spouse or has voluntarily withdrawn from the charge of their parent or guardian, the support obligation ends. The obligation is revived if the child returns home. This approach reflects current case law and Alberta's Family Law Act contains similar provisions.
- Whether the withdrawal was voluntary requires a consideration of whether the child's circumstances at home are objectively intolerable. If a child leaves the home, for example, where there was abuse or because they are kicked out, the parent continues to have a duty to support the child. On the other hand, the parent is not obligated to pay support for an 18 year-old who has voluntarily left home to live independently or for a youth who wants to move out because they do not like rules.

- The section also provides that the obligation on non-parent guardians is secondary to that of a child's parents. For example, a grandparent who has guardianship to assist parents who are going through difficulties caring for a child has only a limited duty to pay support for the child, while the parents retain the primary duty.
- It retains the obligation on a step-parent to support a child but adds a clarification about the level of the obligation of the step-parent. To codify the case law, the stepparent's obligation is expressly made secondary to that of a child's parents and gives discretion to a judge to determine what level of support may be appropriate, considering the child's standard of living and the length of time the child lived with the step-parent. In addition, section 149 [Orders respecting child support] provides further clarity respecting step-parents by ensuring that a child support order may only be made against a step-parent where the step-parent is separated from the parent.

### **Section 148 Agreements respecting child support**

- Section 148 retains the ability to file agreements with regard to child support in a court registry so that they may be enforced under the Family Law Act or the Family Maintenance Enforcement Act as if they are an order of the court.
- Like agreements respecting parenting arrangements, agreements respecting child support may only be made at the time of the event to ensure the agreement is appropriate in the circumstances.
- The test for changing a child support agreement in court (by setting it aside and replacing it with an order) approximates the test for changing a child support order. Unlike property or spousal support agreements where certainty and finality are more important objectives, child support agreements must be able to be easily changed as the child's and parents' circumstances and incomes change.

### **Section 149 Orders respecting child support**

- Section 149 describes who may apply for a support order and provides the child standing to apply on their own behalf.
- It limits the application of an order against a stepparent. This ensures that they first meet the criteria establishing whether they have a duty to pay support, and also provides that the stepparent must be separated from the parent. This is to prevent one parent from seeking child support from the other parent's spouse where that step-parent continues to be in a relationship with the other parent.
- This section clarifies that an order for child support against one person does not prevent a child support order to be made against another person responsible for child support. This codifies the case law.
- Section 149 carries over section 91 of the Family Relations Act which describes who may apply for a support order and section 93, which provides the authority for a court to order support.

## **Section 150 Determining child support**

- Section 150 establishes what a court must consider in determining the amount of child support. It also provides guidance to parties and to a court with respect to making or upholding agreements respecting child support. An agreement with regard to child support may be set aside if it does not comply with this section.
- Establishes the Federal Child Support Guidelines as the starting point for determining the amount of child support. Deviation from the Child Support Guidelines is allowed in limited circumstances.
- Section 150 provides flexibility so that parties may agree to an amount of child support that is different from the Child Support Guidelines if reasonable arrangements have been made. The guideline amount must be considered when determining reasonable arrangements but the arrangements cannot be seen to be unreasonable only because the guideline amount is different. For example, the parents may agree that the payor pays less because they are also paying for all of the special expenses, thereby offsetting the guideline amount.
- Section 150 also provides flexibility for the court to order amounts of child support that are different from the Child Support Guidelines where other financial arrangements or special provisions have been made that benefit the child such that it would be inequitable order the guideline amount. For example, one parent may give up their right to compensation for their portion of the family home so the other parent and child can remain there with the child with the understanding that this would be compensated for through a reduction in child support.
- Section 150 carries over sections 93(1)(a), 93(2), 93.1 of the Family Relations Act but with clarifications respecting when the guidelines may be diverged from and clarifications to ensure agreements and consent orders are treated consistent to one another.

## **Section 151 If parentage at issue**

- Section 151 allows a court to determine the parentage of a child if parentage is denied in a application for child support.
- It also allows a court to order testing to determine parentage (i.e. DNA testing).
- Orders under this section may be made even if there is no application for a declaration of parentage under Part 3 – Parentage of the Family Law Act. Only Supreme Court may make a declaration of parentage under Part 3, since this declaration establishes parentage for all purposes of the law (for example, inheritance laws). However, the Provincial Court has jurisdiction under section 193 of the Family Law Act to make an order under section 151 for the purposes of establishing child support.
- Section 151 carries over the policy underlying section 94 and 95.1 of the Family Relations Act.

## Section 152 Changing, suspending or terminating orders respecting child support

- Section 152 describes the circumstances under which a court may change, suspend or terminate an order respecting child support.
- It expressly provides for retroactive variation of child support orders, if appropriate. Often arrears accrue as a result of blameworthy conduct, in which case arrears are not easily reduced. However, under the Family Relations Act, payors sometimes experienced hardship where their income was reduced but they could not get their order changed in a timely manner and, therefore, were in arrears of child support through no fault of their own. Retroactive variation will allow for these situations to be appropriately remedied.
- The section expands on and clarifies the circumstances under which a court may vary a child support order. In addition to a change in circumstances, as provided for in the Child Support Guidelines, a court may also change an order if there is evidence of a substantial nature that was not available previously or evidence of a lack of financial disclosure. This will discourage payors from hiding income and ensure they do not financially benefit from doing so at the expense of their children.
- Section 152 carries over and adds to section 96 of the Family Relations Act.

## **Division 3 – Child Support Service**

The child support service provisions allow certain registries to provide an administrative service to automatically recalculate child support every year where there is an order for child support based on the Child Support Guidelines.

Generally, this division replaces section 93.3 of the Family Relations Act. This new division continues to provide authority for the child support service and the recalculation project. The new division breaks apart section 93.3 into more manageable sections and clarifies the scope of authority. Except for minor changes, this division does not substantively change section 93.3 of the Family Relations Act.

### **Section 153 Definitions**

- Section 153 provides interpretive guidance on how specific terms will be used in this division.
- It carries over section 93.3(1) of the Family Relations Act respecting child support service, recalculated amount, and statement of recalculation.

### **Section 154 Establishment of child support service**

- Section 154 continues the child support service and the recalculation project and provides its scope of authority.
- Primarily the service operates a recalculation project in which child support orders are periodically recalculated in accordance with the Child Support Guidelines based on increases or decreases in the income of the payor parent or guardian.
- Sections 93.3(2) and (3) of the Family Relations Act are carried over with minor changes for clarification.

### **Section 155 Recalculation of child support**

- The section provides the authority for the child support service to recalculate child support and sets out the process, requirements and limits of the service. The child support service operates to recalculate child support orders made in designated court registries.
- Section 155 carries over section 93.3 (4), (5), (5.1) and (9) of the Family Relations Act with minor changes for clarification

### **Section 156 Correction of recalculation**

- This section allows for correction of clerical, typographical, arithmetical and accidental errors or omissions. Section 156 carries over sections 93.3 (9.1), (9.2) and (9.3) of the Family Relations Act.
- The section also expands the service's ability to undertake a correction on its own initiative. Section 93.3 (9.2) of the Family Relations Act restricted the ability for the child support service to correct mistakes only if requested by a party.

### **Section 157 Changing, suspending or terminating recalculated amounts**

- Section 157 provides for the rules for applicants or recipients to apply to change, suspend or terminate a recalculated amount. Sections 93.3 (10) to (13) are carried over with minor changes for clarification.

### **Section 158 Information to be given to child support service**

- Section 158 carries over sections 93.3 (6) to (8) with minor changes which describe the child support services' authority to require information to be provided and the rules related to the person's obligations to provide information.

### **Section 159 Notices**

- Section 93.3 (14) of the Family Relations Act is carried over, with minor changes which allow for regulations to set out rules governing when notice is deemed to have been given and the manner in which it may be given.
- The use of regulations to determine the manner of notice is a change from the current situation which allows deeming for the purposes of when notice is given.

## **Division 4 – Spousal Support**

This division addresses spousal support. Minor changes to spousal support are made in order to provide clarity within the existing scheme and codify the case law. These changes include:

- aligning provincial spousal support factors and objectives more closely with the Divorce Act;
- clarifying the criteria and tools used to determine entitlement, duration and amount of spousal support;
- explicitly permitting periodic reviews;
- clarifying the inter-relationship between spousal support and property division;
- providing ways in which spousal support orders or agreements may be changed; and
- establishing guidelines respecting the effect of the paying spouse's death on support obligations.

The Spousal Support Advisory Guidelines (Canada) are not referred to in the Family Law Act and will remain advisory. Although the Spousal Support Advisory Guidelines are regularly used in British Columbia and have been strongly endorsed by the British Columbia Court of Appeal in determining amount and duration of spousal support, they do not fit every circumstance.

### **Section 160 Duty to provide support for entitled spouse**

- Section 160 provides the framework for establishing spousal support obligations.
- A duty to provide spousal support exists only where an entitlement to spousal support exists, taking into consideration the objectives of spousal support as set out in section 161. If a duty to provide spousal support exists, the amount and duration of spousal support is determined under section 162.
- Finding entitlement is a precondition to use of the Spousal Support Advisory Guidelines which are used by most practitioners and courts.
- Section 89 in the Family Relations Act does not refer to entitlement nor does it provide clear guidance on the process courts should undertake to determine it. The case law clearly establishes entitlement as a critical component, but there is a lack of clarity respecting how this is addressed in the law. This section codifies the case law and clarifies the ambiguity.

### **Section 161 Objectives of spousal support**

- Section 161 sets out the objectives of spousal support used to determine whether an entitlement to spousal support exists.
- These objectives are different from the Family Relations Act factors and are more closely aligned with the Divorce Act.
- The section replaces part of section 89 of the Family Relations Act which established for the obligation to provide support to a spouse.

- It also retains the self-sufficiency obligation by providing, as an objective, that a spouse becomes self-sufficient in a reasonable period of time. This, in conjunction with the ability provided in section 166 to consider misconduct that prolongs or aggravates the need for spousal support, ensures that the recipient of support must make reasonable efforts to reduce the need for support.

### **Section 162 Determining spousal support**

- This section sets out the factors to consider when determining the amount and duration of spousal support based on the conditions, means, needs and other circumstances of each spouse.
- The factors adopted in this section are more closely aligned with the Divorce Act than those in section 93(4) of the Family Relations Act.

### **Section 163 Agreements respecting spousal support**

- Section 163 describes what an agreement for spousal support may and may not provide for. A spousal support agreement may provide for the circumstances that will end or change spousal support, including if a person begins to live with another person, but an agreement that the recipient spouse abstain from sexual relations after separation is not binding.
- The section retains the ability under section 121(2)(b) of the Family Relations Act to file a spousal support agreement and have it enforced under the Family Law Act and the Family Maintenance Enforcement Program like an order of a court. This streamlines the process for enforcing an agreement.

### **Section 164 Setting aside agreements respecting spousal support**

- Section 164 describes the circumstances under which a court may set aside or change the terms of a spousal support agreement (by setting it aside and replacing it with an appropriate order).
- This section restricts the ability for judges to set aside spousal support agreements in order to promote finality and certainty, while also allowing for some flexibility to adjust spousal support amounts where circumstances have changed.
- Where certain formalities are met (written, signed and witnessed), a spousal support agreement may only be set aside if it meets one of the two tests provided.
- First, a spousal support agreement may be set aside if there was a procedural defect in the creation of the agreement, such as where there was failure to disclose property, or one spouse took improper advantage of the other's vulnerability.
- Second, if the agreement was procedurally fair when it was entered into, then the court may only set aside an agreement on substantive grounds in the limited circumstances where it would be substantially unfair. Some factors that may be considered include changes since the agreement was made and the degree to which the parties relied upon and lived by the agreement. This would allow the court to make adjustments to spousal support amounts where circumstances have changed, like it can with a court order.

### **Section 165 Orders respecting spousal support**

- The section carries over the substance of the spousal support related provisions in section 91 and 93(1 ) of the Family Relations Act to authorize judges to order spousal support and clarified who may apply for a spousal support order.
- The section limits a court’s ability to make an order respecting spousal support where the spouses have an agreement. This is to ensure spouses can rely on their agreement to be upheld, except where the agreement is set aside under the limited conditions set out in section 164.

### **Section 166 Misconduct of spouse**

- Section 166 limits the court’s ability to consider misconduct of a spouse when determining support. For example, consideration of who left the relationship or whether there was an affair is not allowed to be taken into account when determining spousal support.
- The exception to this rule is that the court may to consider misconduct of a spouse where a spouse has engaged in conduct that either prolongs the need for support or reduces the means from which support could be paid. For example, support may be reduced where the recipient refused to look for or accept appropriate employment. Alternatively, a payor’s request to reduce the support paid may be refused where they have, without excuse, gone from full-time to part-time employment.
- This section is similar to 15.2(5) of the Divorce Act.
- The Family Law Act continues the duty on the person receiving support to become self-sufficient as provided for in sections 89 and 96 of the Family Relations Act. Section 161(d) [Objectives of spousal support] of the Act provides for the objective that a spouse becomes self-sufficient in a reasonable period of time. This, in conjunction with the ability to consider misconduct that prolongs or aggravates the need for spousal support ensures that the recipient of support must make reasonable efforts to reduce the need for support.

### **Section 167 Changing, suspending or terminating orders respecting spousal support**

- Section 167 allows a court to change, suspend or terminate a spousal support orders, replacing section 96(1) of the Family Relations Act.
- It expressly provides for retroactive variation of spousal support orders. Under the Family Relations Act, payors may experience hardship where their income is reduced but they cannot get their order changed in a timely manner and therefore are in arrears through no fault of their own.
- The section expands the circumstances under which a judge may change a spousal support order. In addition to where a change in circumstance has occurred, a spousal support order may also be changed if there is new evidence available or there is evidence of a lack of financial disclosure.
- The new factors promote full and frank disclosure of relevant information required to make the order, and ensures the court may revisit the issue and make appropriate changes where there is evidence that would have resulted in a different order.

- This section also provides greater clarity respecting when a court may change a spousal support order that has expired and sets out limits to reapplying for support after the obligation has ended.

### **Section 168 Review of spousal support**

- Section 168 allows agreements or orders to provide for reviews of spousal support, codifying an extensively used practice in British Columbia.
- Reviews allow spouses or a judge to re-examine the terms of a spousal support agreement or order at a certain time or upon the happening of a certain event without first establishing a change in circumstances as is required for applications to change, suspend or terminate a spousal support order. This allows parties to try out an arrangement to see if it is appropriate or to anticipate changes to the need for support as their lives evolve. For instance a review may be done when the recipient of support finishes upgrading their employable skills.
- Reviews facilitate settlement. It may be easier for spouses to agree if they know their agreement is not for all time and can be revisited once the dust settles post-separation. Reviews also increase the likelihood of agreement in situations where there is a lot of uncertainty, for example, where it may not be clear how long it will take for a spouse to get accepted into and to complete training.

### **Section 169 Review of spousal support if pension benefits**

- Under the Family Relations Act, because the receipt of a pension is foreseeable, it has not been considered a change in circumstances for the purposes of changing, suspending or terminating a spousal support order. However, often agreements or orders do not provide for a review of spousal support upon receipt of pensions, due to oversight of the parties.
- Section 169 builds-in an automatic review for agreements that don't provide a review under section 168 and either spouse begins receiving a pension.

## **Division 5 – General**

This division sets out the general support provisions that apply to both child support and spousal support.

### **Section 170 Matters that may be provided for in support orders**

- Section 170 provides that an order for support may include terms about how the payments are made, including lump sum or periodic payments.
- It provides a court with flexibility to provide or secure support in a way that is suitable to the circumstances.
- This section provides authority for a court to make orders to secure support through a life insurance policy, where the payor has life insurance. As well, it provides authority for a court to order support to be binding on the estate of the payor, if the payor were to die. Both of these provisions have been used widely by practitioners in British Columbia when making agreements for parties.
- The section replaces and expands section 93(5) of the Family Relations Act.

### **Section 171 Support obligations after death**

- Section 171 establishes rules and promotes a consistent approach relating to support obligations where the payor dies.
- The section provides factors the court must consider before a court may make an order that support binds the estate under section 170. These factors balance the obligation of the party to provide support to their child or spouse with other factors, such as the size of the estate, the prejudice to other beneficiaries of the estate and whether the child is entitled to part of the estate.
- If the court orders that support binds estate, upon death of the payor, the personal representative may apply to set aside, change, suspend or terminate the order. This ensures the personal representative has the authority to resolve any issues or claims.
- If an order or agreement is silent respecting whether support binds the estate, the recipient of support has standing to request support continue and bind the estate.
- This section allows for a flexible, yet consistent, approach on this issue. It provides for ongoing support after death where appropriate without unduly constraining the estate. It requires a court to turn their mind to the issue of what happens if the payor were to die, and make an order appropriate to the circumstances. For instance, a court could decide it is more effective to order a party maintain life insurance to secure support than to bind the estate.

### **Section 172 Separate support amounts required**

- Section 172 requires a court to provide separate amounts for child support and spousal support in an order.
- This is to avoid challenges with changing or enforcing orders for child or spousal support, because child support and spousal support are determined based on different criteria and orders may have different end dates.
- Section 172 carries over the substance of section 93(6) of the Family Relations Act.

### **Section 173 Priority of child support**

- Section 173 provides that in making an agreement or order respecting spousal support and child support, priority must be given to child support. If an order or agreement cannot be made for spousal support, or a reduced amount is provided, because there are limited resources and child support takes priority, the reasons must be given. If the child support is subsequently reduced or terminated, spousal support may be adjusted.
- It allows for the prioritization of child support over spousal support in situations where resources are insufficient while not forcing parties to permanently relinquish their entitlement to spousal support.
- Section 173 carries over and expands section 93.2 of the Family Relations Act.

### **Section 174 Reducing or cancelling arrears**

- Section 174 provides the ability to reduce or cancel spousal support arrears if it would be “grossly unfair” not to do so.
- The retention of a more stringent standard for cancelling or reducing arrears reflects the fact that these liabilities result from a party’s non-compliance with an order, such as a refusal to pay the amount determined under the Child Support Guidelines.
- Where a payor has a bona fide reason for not paying the amount provided in the order, such as where their employment was reduced, they may seek a variation of the order from the court under section 167. In this case, the court may, if appropriate, make a reduction of support retroactive to avoid arrears accruing.
- Section 174 carries over in part sections 96(2) to (3.2) of the Family Relations Act.