

## Part 1 – Interpretation

This Part defines terms and provides some general principles of interpretation for the Family Law Act.

### Section 1 Definitions

- Section 1 changes some definitions and adds others that are needed to interpret the Act. It amends and creates definitions necessary to support interpretation of the other sections in the legislation.

**The following table lists each definition in the Family Law Act, followed by the definition in the Family Relations Act, if any, and the rationale for any change or inclusion.**

<b>“Child”</b>
<b>FLA definition:</b> “child”, except in Parts 3 [ <i>Parentage</i> ] and 7 [ <i>Child and Spousal Support</i> ] and section 247 [ <i>regulations respecting child support</i> ], means a person who is under 19 years of age;
<b>FRA definition:</b> “child” means a person who is under the age of 19 years
<b>Rationale:</b> <ul style="list-style-type: none"><li>• No substantive change</li></ul>
<b>“Child support guidelines”</b>
<b>FLA definition:</b> “child support guidelines” means the child support guidelines, provided for under section 247, for calculating child support;
<b>FRA definition:</b> “child support guidelines” means the child support guidelines established by regulation under section 129 for the calculation of maintenance awards;
<b>Rationale:</b> <ul style="list-style-type: none"><li>• No substantive change</li></ul>

**“Contact with a child” or “contact with the child”**

**FLA definition:**

**“contact with a child” or “contact with the child”** means contact between a child and a person, other than the child’s guardian, the terms of which are set out in an agreement or order;

**FRA definition:** None.

**Rationale:**

The Family Law Act does not use the terms “custody” and “access.” It replaces them with a new model for parenting after separation in Part 4. Under this new model, “contact” is the time that a person who is not the child’s guardian, including a parent who is not a guardian, has with the child.

**“Court”**

**FLA definition:**

**“court”** means

- (a) the Supreme Court, or
- (b) to the extent that it has jurisdiction to make an order, the Provincial Court;

**FRA definition:**

**“court”** means the Provincial Court exercising the jurisdiction referred to in section 6, or the Supreme Court;

**Rationale:**

- No substantive changes.

**“Excluded property”**

**FLA definition:**

**“excluded property”** means property that would otherwise be family property but is excluded under section 85 [*excluded property*];

**FRA definition:** None

**Rationale:**

The Family Law Act introduces a new scheme in Part 5 for dividing family property on relationship breakdown. “Excluded property” is an important concept in this new scheme. This definition directs the reader to the section that sets out what property is excluded property.

### “Family debt”

**FLA definition:**

“family debt” means family debt as described in section 86 [family debt];

**FRA definition:** None.

**Rationale:**

Unlike the Family Relations Act, Part 5 of the Family Law Act sets out how family debt is to be treated on relationship breakdown. This definition directs the reader to the section that sets out what is included in family debt.

### “Family dispute resolution”

**FLA definition:**

“family dispute resolution” means a process used by parties to a family law dispute to attempt to resolve one or more of the disputed issues outside court, and includes

- (a) assistance from a family justice counsellor under Division 2 [Family Justice Counsellors] of Part 2,
- (b) the services of a parenting coordinator under Division 3 [Parenting Coordinators] of Part 2,
- (c) mediation, arbitration, collaborative family law and other processes, and
- (d) prescribed processes;

**FRA definition:** None.

**Rationale:**

A pillar of the Family Law Act is to encourage out-of-court resolution of family law disputes through more collaborative and flexible processes, namely family dispute resolution.

## **“Family dispute resolution professional”**

### **FLA definition:**

**“family dispute resolution professional”** means any of the following:

- (a) a family justice counsellor;
- (b) a parenting coordinator;
- (c) a lawyer advising a party in relation to a family law dispute;
- (d) a mediator conducting a mediation in relation to a family law dispute, if the mediator meets the requirements set out in the regulations;
- (e) an arbitrator conducting an arbitration in relation to a family law dispute, if the arbitrator meets the requirements set out in the regulations;
- (f) a person within a class of prescribed persons;

**FRA definition:** None.

### **Rationale:**

This definition identifies the types of practitioners who are considered to be family dispute resolution professionals under the Family Law Act. It provides a regulation-making authority to set minimum qualification requirements and practice standards for practitioners.

## **“Family justice counsellor”**

### **FLA definition:**

**“family justice counsellor”** means a person appointed as a family justice counsellor under section 10 (1) [family justice counsellors];

**FRA definition:** None.

### **Rationale:**

This definition modernizes the term “family court counsellor” used in section 3 of the Family Relations Act to better reflect the current roles and terms used.

**“Family law dispute”**

**FLA definition:**

**“family law dispute”** means a dispute respecting a matter to which this Act relates;

**FRA definition:** None

**“Family member”**

**FLA definition:**

**“family member”**, with respect to a person, means

- (a) the person’s spouse or former spouse,
- (b) a person with whom the person is living, or has lived, in a marriage-like relationship,
- (c) a parent or guardian of the person’s child,
- (d) a person who lives with, and is related to,
  - (i) the person, or
  - (ii) a person referred to in any of paragraphs (a) to (c), or
- (e) the person’s child,

and includes a child who is living with, or whose parent or guardian is, a person referred to in any of paragraphs (a) to (e);

**FRA definition:** None.

**Rationale:**

This broad definition is important for the definition of “family violence” and for Part 9- Protection Orders of the Family Law Act since protection orders are only available between family members.

## “Family property”

### **FLA definition:**

“family property” means family property under section 84 [*family property*];

**FRA definition:** None

### **Rationale:**

The Family Law Act introduces a new scheme in Part 5 for dividing family property on relationship breakdown. This definition directs the reader to the section that provides the detailed framework for determining what property is family property.

## “Family violence”

### **FLA definition:**

“family violence” includes

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
  - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
  - (ii) unreasonable restrictions on, or prevention of, a family member’s financial or personal autonomy,
  - (iii) stalking or following of the family member, and
  - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

**FRA definition:** None.

### **Rationale:**

This definition is included to give all family justice participants a clear and common understanding of what family violence is for the purposes of the Family Law Act.

## “Guardian”

### **FLA definition:**

“guardian” means a guardian under section 39 [parents are generally guardians] and Division 3 [Guardianship] of Part 4;

### **FRA definition:**

"guardian" means the person who has all the powers and duties under section 25 respecting a child;

### **Rationale:**

While the changes to the definition may appear minor, the roles and responsibilities associated with the concept in Part 4 of the Family Law Act are a significant change from the Family Relations Act. The roles and responsibilities associated with the concept are clarified with the list in section 41 in Part 4.

## “Parent”

### **FLA definition:**

“parent” means a parent under Part 3 [Parentage];

### **FRA definition:**

"parent" includes

- (a) a guardian or guardian of the person of a child, or
- (b) a stepparent of a child if
  - (i) the stepparent contributed to the support and maintenance of the child for at least one year, and
  - (ii) the proceeding under this Act by or against the stepparent is commenced within one year after the date the stepparent last contributed to the support and maintenance of the child;

### **Rationale for change:**

This definition defines “parent” in terms of legal parentage. Part 3 of the Family Law Act provides a comprehensive framework for determining who is a legal parent for all purposes of the law.

The definition in the Family Relations Act did not define who had legal parentage. Rather, the definition provided for an expanded meaning of parent for the purposes of that Act to include guardians of the person and stepparents. This expanded definition does not mean that these

people become legal parents, but rather that under the act they will be treated in the same way as a parent; wherever the act talks about a “parent” it also means a “guardian” or a “step-parent”. These expansions are carried forward in the Family Law Act, but are located in the relevant part of the Act: Part 7-Child and Spousal Support, section 146 [*Definitions*] and 147[*Duty to provide support for child*] in.

### **“Parental responsibilities”**

**FLA definition:**

**“parental responsibilities”** means one or more of the parental responsibilities listed in section 41 [*parental responsibilities*];

**FRA definition:** None

**Rationale:**

The Family Law Act introduces a new model for parenting after separation. It includes the concept of parental responsibilities, which are the responsibilities that guardians have respecting children. The definition directs the reader to the section that lists the parental responsibilities.

### **“Parenting arrangements”**

**FLA definition:**

**“parenting arrangements”** means arrangements respecting the allocation of parental responsibilities or parenting time, or both;

**FRA definition:** None

**Rationale:**

This definition provides an umbrella term to describe the allocation of parental responsibilities and parenting time.



**“Parenting coordinator”**

**FLA definition:**

“**parenting coordinator**” means a person who may act as a parenting coordinator under section 14 [parenting coordinators];

**FRA definition:** None.

**Rationale:**

This definition directs the reader to the section that explains who may act as a parenting coordinator.

**“Parenting time”**

**FLA definition:**

“**parenting time**” means parenting time as described in section 42 [*parenting time*];

**FRA definition:** None.

**Rationale:**

The Family Law Act does not use the terms “custody” and “access.” It replaces them with a new model for parenting after separation in Part 4 of the Act. Under this new model, parenting time is the time that a guardian has with a child.

The definition directs the reader to the section that provides a detailed explanation of what parenting time is.

**“Police officer”**

**FLA definition:**

“**police officer**” means a person who, under the Police Act,

- (a) is a provincial constable or municipal constable or has the powers of a provincial constable or municipal constable, or
- (b) is a constable other than a constable referred to in paragraph (a) and is within a prescribed class of constables;

**FRA definition:** None.

**Rationale:**

This definition is broad and includes both municipal police and the RCMP. It is important in relation to the enforcement of protection orders made under Part 9 of the Family Law Act.

**“Spouse”****FLA definition:**

“**spouse**” means a person who is a spouse within the meaning of section 3 [*spouses and relationships between spouses*];

**FRA definition:**

"**spouse**" means a person who

- (a) is married to another person,
- (b) except under Parts 5 and 6, lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender,
- (c) applies for an order under this Act within 2 years of the making of an order
  - (i) for dissolution of the person's marriage,
  - (ii) for judicial separation, or
  - (iii) declaring the person's marriage to be null and void, or
- (d) is a former spouse for the purpose of proceedings to enforce or vary an order.

**Rationale:**

The time limits related to being a spouse have been moved from the definition section to section 198 [Time limits] of the Family Law Act. The definition directs readers to the interpretation section – section 3 [Spouses and spousal relationships] - for additional details.

Substantive change: Extends the definition of spouse to include common-law couples for the purposes of property and pension division and common-law couples who have lived together for less than two years, if they have a child together, for other purposes under the Family Law Act.

**“Written agreement”****FLA definition:**

“**written agreement**” means an agreement that is in writing and signed by all parties;

**FRA definition:** None

**Rationale:**

The definition establishes criteria for written agreements under the Family Law Act.

**The following table lists the definitions that are not carried forward from the Family Relations Act in section 1 or replaced by Family Law Act definitions, followed by the rationale.**

Family Relations Act definitions	Rationale
<p><b>“guardian of the estate of a child”</b> means the person who has all the powers and duties under section 25 respecting the estate of a child;</p>	<p>The Family Law Act will not distinguish between guardian of the estate and guardian of the person. Instead guardianship will be defined through distribution of parenting responsibilities.</p> <p>The term “guardian of the estate of a child” is no longer used in British Columbia law. Where the Public Guardian and Trustee Acts as an institutional guardian for a child, they will be the child “property guardian.” The authority to act as a “property guardian” is set out in section 51 [If a child has no guardian] of the Infants Act. The scope of their power to act is set out in the Public Guardian and Trustee Act.</p>
<p><b>"guardian of the person of a child"</b> means the person who has all the powers and duties under section 25 respecting the person of a child;</p>	<p>The Family Law Act will not distinguish between guardian of the estate and guardian of the person. Instead, guardianship will be defined through distribution of parenting responsibilities.</p> <p>The term “guardian of the person of a child” is no longer used in British Columbia law. Where the Ministry of Children and Family Development acts as an institutional guardian for a child, they will be the child’s “personal guardian.” The authority to act as “personal guardian” is set out in section 51 [If a child has no guardian] of the Infants Act. The scope of their power to act is set out in the ministry’s statutes.</p>
<p><b>“child support order”</b> means a maintenance order, as defined in section 87, for the maintenance and support of a child;</p>	<p>The Family Law Act uses the descriptive phrase “order respecting child support” rather than this defined term.</p>
<p><b>“Nisga’a child”</b> has the same meaning as in the Nisga’a Final Agreement;</p>	<p>This definition has been moved to section 208.</p>
<p><b>Nisga’a Final Agreement”</b> has the same meaning as in the Nisga’a Final Agreement Act;</p>	<p>This definition has been moved to section 208.</p>
<p><b>“Nisga’a law”</b> has the same meaning as in the Nisga’a Final Agreement.</p>	<p>This definition has been moved to section 208.</p>

<p>“Nisga’a Lisims Government” has the same meaning as in the Nisga’a Final Agreement;</p>	<p>This definition has been moved to section 208.</p>
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## **Section 2 – General Interpretation**

- Section 2 provides general guidance on how references to agreements and orders are to be interpreted throughout the Family Law Act.
- It also provides general guidance on how references to parents and guardians are to be interpreted throughout the Family Law Act.

## **Section 3 – Spouses and Relationships Between Spouses**

- Section 3 of the Family Law Act expands the definition of “spouse” to include common-law spouses, who have lived together for at least two years, for the purposes of property and pension division.
- Under the Family Relations Act spousal support provisions applied to common-law couples, but property and pension division provisions did not. Therefore, common-law spouses had to rely on constructive trust claims to deal with property division, which were complex, expensive, rarely successful, and often resulted in unfair outcomes.
- The number of common-law relationships is on the rise (increasing three times faster than marriages) and it is important to have a clear and effective law that applies to these relationships to avoid expensive and protracted court cases. Saskatchewan, Manitoba, Quebec, Nova Scotia, Northwest Territories and Nunavut include common-law couples in all aspects of their family law, including property division. Other areas of law, including wills and estates and income tax, already extend the same rights and responsibilities to common-law couples as to married couples.
- Section 3 also includes as a “spouse” people who have lived together in a marriage-like relationship for less than two years if they have a child together. This applies to spousal support but does not apply to property or pension division.
- Section 3 provides interpretive guidance to ensure “former spouses” are treated like spouses for the purposes of making applications.
- Section 3 establishes the start date for a relationship between spouses and provides guidance for determining the date of separation. The start and end dates of a spousal relationship are important to determine when rights or responsibilities accrue under the Family Law Act, particularly respecting property division.
- Married and common-law spouses retain the ability to make choices about the structure of their relationships and the obligations flowing from them. They may agree to opt-out of the property division regime and make alternate arrangements through a written agreement.

## **Part 2 – Resolution of Family Law Disputes**

This Part encourages the use of out-of-court dispute resolution processes – family dispute resolution – where appropriate. It includes obligations to disclose information to ensure that family dispute resolution is effective. It also includes obligations on family justice professionals to assess for family violence to ensure the use of family dispute resolution processes is appropriate.

It clearly states that agreements may be used to resolve disputes under the Family Law Act and sets the stage for out-of-court dispute resolution.

Family dispute resolution offers simpler, speedier, and less costly ways to resolve post-separation disputes and will further the best interests of children.

### **Division 1 – Resolution Out of Court Preferred**

The Division addresses duties and responsibilities of parties and family justice professionals in resolving family law disputes. It includes a general duty to fully disclose information for the purposes of resolving a family law dispute. Full and true information is important to ensure fair and lasting agreements. It also places a duty on family dispute resolution professionals to assess for family violence and inform clients of appropriate dispute resolution options.

#### **Section 4 Purposes of Part**

- Section 4 emphasizes that out-of-court dispute resolution processes and resolution through agreements are not simply add-ons to litigation but are the preferred option, with court as a valued, but last, resort.
- This focus on family dispute resolution signals an important shift from the Family Relations Act, which was criticized for being litigation-focused and for assuming that every dispute would end in a trial.

#### **Section 5 Duty to disclose**

- Section 5 requires full and truthful disclosure early in the process to promote early settlement by ensuring that the parties have all the information required for fair and sound decision-making. Information gaps can fuel or prolong conflict and can affect the fairness of agreements.
- It will apply to all persons involved in a family law dispute, including during the period before a court proceeding is commenced when the parties try to resolve their dispute through an agreement.

- Other sections of the act also deal with disclosure and work in conjunction with this provision.
  - Agreements made without appropriate disclosure may be set aside if challenged in the future: see for example, section 93 [Setting aside agreements respecting property], section 164 [Setting aside agreements respecting spousal support].
  - Where an agreement is set aside based on non-disclosure, the court may also penalize the person if they entered into an agreement knowing they were not disclosing significant property under section 214 [Orders respecting agreements].
  - If a court proceeding is started, the court has the power to order disclosure under section 212 and may enforce these orders under section 213. These sections give both courts a range of tools to deal with situations where disclosure is delayed, incomplete or false.

## **Section 6 Agreements respecting family law disputes generally**

- Section 6 provides the general framework for agreements and emphasizes that agreements are a viable, independent and binding option for resolving disputes. In addition to expanding the role of agreements in family law, the Family Law Act simplifies and clarifies the rules respecting agreements.
- There are additional rules respecting specific types of agreements in other parts of the Act:
  - section 44 [Agreements respecting parenting arrangements]
  - section 50 [Agreements respecting guardianship]
  - section 58 [Agreements respecting contact]
  - section 92 [Agreements respecting property division]
  - section 127 [Agreements respecting division]
  - section 148 [Agreements respecting child support]
  - section 163 [Agreements respecting spousal support]
- This section carries over from the Family Relations Act the exception to general contract law that family law agreements are binding whether or not consideration is exchanged.
- It allows that a minor, who is also a parent or spouse, may enter into agreements with regard to matters covered by the Family Law Act. The section eliminates the current need for the minor to seek consent of the Supreme Court. These changes were made to better reflect the case law.

## **Section 7 Replacing agreements**

- Section 7 makes clear that an agreement can be used to change a previously-made agreement. It clarifies that, unless otherwise stated, the new agreement replaces only the terms changes, while the remainder of the agreement continues.
- This clarification is especially important for agreements related to the care of children because parenting arrangements will need to change as children grow and change.

## **Section 8 Duties of family dispute resolution professionals**

- Section 8 imposes obligations on family dispute resolution professionals to ensure that their clients are aware of the most appropriate and effective services for resolving their disputes, based on the clients' circumstances.

- The provision requires family dispute resolution professionals to screen for family violence and assess whether certain dispute resolution processes are appropriate.
- Having regard to the assessment, family dispute resolution professionals must advise parties of the processes, services, and facilities available to them;
  - to ensure that parties are making informed decisions about the range of options available for resolving family law disputes; and
  - to maximize opportunities for early, co-operative settlement in order to reduce the emotional and financial costs of separation.
- Family dispute resolution professionals also have a duty to advise parties that the best interests of the child must govern agreements and orders respecting children.
- Family dispute resolution professionals include: family justice counsellors; parenting coordinators, family law lawyers, family law mediators and family law arbitrators.
- A related section is section 197 [Complying with duties respecting family dispute resolution] which requires lawyers to certify that they have discussed appropriate dispute resolution processes with their clients prior to making a court application.

### **Section 9 Duties of parties respecting family dispute resolution**

- Section 9 allows for future development of mandatory programs and out-of-court services to assist families.
- This section allows for a flexible approach to program development and does not mandate any particular process.
- In British Columbia, some mandatory processes are already being used successfully. For example, most parents must attend a Parenting After Separation program before their first appearance in Provincial family court. As well, at some Provincial Court registries (family justice registries), parties must meet with a family justice counsellor before their first appearance in family court. Family justice counsellors provide them with information and can direct them to services and programs that will help them resolve their family law disputes effectively, often without the need to go to court.



## **Division 2 – Family Justice Counsellors**

The Division carries forward from the Family Relations Act a legislative structure for the work of family justice counsellors who are employed by government. It provides information about the role of family justice counsellors, the confidentiality of information in their possession, and the compellability of family justice counsellors in court proceedings.

### **Section 10 Family justice counsellors**

- Section 10 sets out the role of family justice counsellors who are Ministry of Justice employees who work in Family Justice Centres and Justice Access Centres throughout the province.
- The section more clearly describes the role of family justice counsellors in terms of what assistance they can provide.
- The name of these counsellors has been changed from “family court counsellor” to “family justice counsellor” to more accurately reflect their role.
- Family justice counsellors are dispute resolution professionals who, by government policy, must meet family mediation practice standards set by Family Mediation Canada.
- Section 10 carries forward section 3 of the Family Relations Act.

### **Section 11 Confidentiality of information**

- Section 11 carries forward the Freedom of Information and Protection of Privacy Act exceptions in section 3(4) and (5) of the Family Relations Act.
- This section makes clear the scope of confidentiality respecting family justice counsellors and their work to eliminate the confusion that resulted from section 3 of the Family Relations Act with respect to what information may be disclosed during and after family dispute resolution.
- The services that family justice counsellors provide are confidential because they offer dispute resolution assistance that includes settlement negotiations. Confidentiality is a critical element of negotiations to ensure that parties provide the information required to obtain a fair and lasting settlement.
- This section and the regulations to be made under it describe what information may be disclosed and to which other government employees who assist family justice counsellors, this confidentiality extends.
- The use of regulations to set out what types of information may be disclosed allows for the list to be changed to match the evolution of the service.



## **Section 12 Family justice counsellors not to be compelled**

- Section 12 protects settlement discussions assisted by family justice counsellors from disclosure in court proceedings. Non-compellability also covers those employees who have access to the confidential information because they assist the family justice counsellor. This section makes it absolutely clear that records and notes are not compellable – an area that was ambiguous under the Family Relations Act.
- Regulations will set out the exceptions to non-compellability. The use of regulations to set out the exceptions allows for exceptions to change to match the evolution of the service.

## **Section 13 Information obtained while receiving assistance**

- Section 13 states the general rule that all information disclosed during sessions with a family justice counsellor is confidential and may not be used by a party in a subsequent court proceeding.
- It also sets out some exceptions to the general rule. A party may use the information if:
  - the other party agrees to its use;
  - the information is a third party report, such as income tax returns, property assessment or best interest of the child assessments;
  - another piece of legislation requires it to be disclosed; or
  - it is a concluded agreement that resolves the family law dispute or it is the agreement that the parties signed to enter into mediation with the family justice counsellor.
- Section 3 of the Family Relations Act applied a blanket confidentiality requirement, which was a problem because in certain circumstances, such as releasing the final agreement, confidentiality was inappropriate.

## **Division 3 – Parenting Coordinators**

This Division provides specific legislative supports for parenting coordination. Parenting coordination is a relatively new process that involves aspects of settlement negotiation, mediation and adjudication. It developed initially in the United States as a way to give families experiencing high levels of conflict an option other than court to assist in the management and implementation of a parenting agreement or order. It is being used in British Columbia and other provinces. It does not involve creating or changing parenting arrangements, but attempts to help parents resolve any disagreements that arise with regard to how parenting agreements or orders are put into effect. It requires a legislative framework because it involves a form of adjudication.

### **Section 14 Parenting coordinators**

- Section 14 establishes that requirements to be a parenting coordinator will be set out in the regulations.
- Parenting coordination is a relatively new dispute resolution mechanism that is being practiced in British Columbia. Parenting coordinators help high-conflict families implement agreements or orders respecting parenting arrangements using a mediation-arbitration approach. It is being used in many other jurisdictions in North America and originated in the United States.

### **Section 15 When parenting coordinators may assist**

- Section 15 establishes the general rules respecting when a parenting coordinators may act, how long the parenting coordinators may act for, and how parenting coordination ends.
- Parenting coordinators do not assist the parties in coming to agreement about their parenting arrangements; they help parents carry out their already determined parenting arrangements.
- A parenting coordinator may become involved by way of a written agreement or court order.
- This section allows judges to order parenting coordination whether or not the parties consent. It is important to give judges the authority to require attendance because the couples who benefit most from this process usually have high levels of conflict and are unlikely to agree to attend.
- The term of a parenting coordination process is limited because it not designed to be permanent but to end when parents become able to resolve disagreements on their own.

### **Section 16 Information sharing for parenting coordination**

- Section 16 ensures that parenting coordinators will be able to obtain the information they need to make determinations.

## **Section 17 Assistance from parenting coordinators**

- Section 17 establishes that parenting coordinators may resolve issues that arise in implementing parenting agreements and orders in two ways. They may help the parties negotiate a resolution and, where resolution through agreement is not possible, they may, within a limited scope, make a binding decision for the parties. The limited scope is set out in section 18.
- For example, if the parenting arrangements say that dad will pick up the children on Thursday, but the parents cannot agree where the pickup will be, the parenting coordinators could decide and the parties would be bound by that decision.

## **Section 18 Determinations by parenting coordinators**

- Section 18 establishes the rules relating to determinations made by parenting coordinators.
- Parenting coordinators may only make determinations respecting implementation of an agreement or order respecting parenting arrangements, contact with the child, or other matters which are included in the regulations. They may not make any decisions respecting property. Providing for the possibility of allowing parenting coordinators to determine other matters by way of regulations provides flexibility to make changes as the practice evolves.
- The scope of the matters for which a parenting coordinator may resolve or determine must be set out in the agreement or included in an order.
- Section 18 provides that, in making determinations, a parenting coordinator must consider only the best interests of the child.
- A parenting coordinator may make determinations at any time, including without having attempted consensual resolution first, if appropriate.
- The section allows for oral determinations, but they must be put in writing as soon as practicable.
- A determination is binding on the parties from the date it is made, or another date specified by the parenting coordinators.
- If filed in the court, a parenting coordinator's determination is enforceable as though it were an order. This is the same way agreements respecting parenting arrangements are treated in the Act.

## **Section 19 Confirming, changing or setting aside determinations**

- Section 19 allows parties to ask a court to review determinations made by a parenting coordinators.
- This section limits the grounds on which the court may change or set aside determinations made by parenting coordinators in order to enhance the success of out-of-court settlement processes.
- These limits are similar to those covering family law arbitration awards.

## Part 3 – Parentage

This part provides a comprehensive scheme for determining who a child’s parents are, whether the child is born through natural or assisted reproduction. The scheme treats children equally, regardless of the circumstances surrounding their birth, protects children’s best interests and promotes stable family relationships.

Legal parentage is important to establishing a child’s identity, for example, family name, family relationships, and cultural heritage. Inheritance rights also flow from the parent-child relationship.

This Part establishes parentage for all purposes of the law in British Columbia. A person who is defined as a parent under this Part is a parent under all laws of British Columbia.

The former law was inadequate for determining parentage for the many B.C. children who are born through assisted reproduction. The only legislation that spoke to parentage was the Law and Equity Act which states that a person is the child of their natural parents. This Part replaces the parentage provision in the Law and Equity Act.

In addition to providing for the rules that determine parentage where assisted reproduction is not used, this Part provides certainty regarding the legal relationship between a child born through assisted reproduction and their parents and clarifies the role of a donor or surrogate. In many respects this Part is similar to the new Uniform Child Status Act recently adopted by the Uniform Law Conference of Canada.

It is important not to confuse parental status and parenting roles and responsibilities. Other British Columbia acts and other Parts of the Family Law Act, for example, Part 4 - Care of and Time with Children and Part 7 - Child and Spousal Support, recognize that people who are not parents may take on a parenting role and responsibilities in relation to a child, despite not being legal parents. Defining, other non-parents as “parents” for a particular purpose under a law does not grant legal parentage. It simply means that they will be treated in a similar way as a parent for a particular purpose. For example, section 146 under Part 7 Child and Spousal Support provides a definition of “parent” that includes a step-parent. This does not mean that the step parent is a legal parent. It only means that for the purpose of support, a step parent may have similar obligations to a parent.

## **Division 1 – General Matters**

This Division addresses definitions and provides some general principles for Part 3.

### **Section 20 Interpretation**

- Section 20 defines terms for the purposes of Part 3. They are new definitions.

### **Section 21 Void and voidable marriages**

- Section 21 carries forward section 95(2) of the Family Relations Act respecting void marriages, but with gender-neutral language to reflect the fact that same-sex couples may legally marry.
- This section also deems parties to a voidable marriage to be married until a declaration of nullity is made, for the purpose of parentage presumptions.

### **Section 22 Effect of Part**

- Section 22 carries forward, in part, the effect of section 61(2) of the Law and Equity Act.
- It clarifies that the new parentage rules do not act retroactively with regards to dispositions of property which occur before the coming of force of the Family Law Act. For instance, the terms of a will in which disposition of property has already been made will not be reopened.

## **Division 2 – Determining Parentage**

This Division sets out the basic rules that apply throughout British Columbia law to determine parentage of a child born through natural or assisted reproduction, including surrogacy.

### **Section 23 Parentage to be determined by this Part**

- Section 23 carries forward the effect of section 61(1) and (3) of the Law and Equity Act. The Law and Equity Act provided parentage rules that applied for all purposes of the law. However, it did not adequately address situations where assisted reproduction is used. These Law and Equity Act provisions are repealed by the Family Law Act.
- The section provides that for all purposes of the law of British Columbia, Part 3 of the Family Law Act determines who a child's legal parents are. This ensures that the legal status of a child is consistent in all British Columbian laws.
- Section 23 also expands on the rule for interpreting references to relationships in instruments and enactments by replacing “by blood or marriage” as used in section 61(3) of the Law and Equity Act with “by birth, blood or marriage” in the Family Law Act.

### **Section 24 Donor not automatically parent**

- Prior to the Family Law Act there was no legislation in British Columbia dealing with the legal relationship of donors of genetic material to children born as a result of a donation, which resulted in uncertainty.

- Section 24 provides a general rule that, if assisted reproduction is used, a donor of genetic material is not a parent of a child conceived and born using the donor's genetic material.
- A donor cannot be declared a parent by virtue of the donation, even though there is a genetic link between the child and the donor.
  - There is an exception to the general rule that a donor is not a parent if the donor and the people who would be the child's parents (i.e., birth mother and her partner) agree before the child's conception that all three will be the parents of the resulting child.
  - Similar to section 23, section 24 provides a rule for interpreting references to relationships "by birth, blood or marriage" in instruments and enactments in relation to donors.

### **Section 25 Parentage if adoption**

- Section 25 carries forward from section 61 of the Law and Equity Act the principle that if a child is adopted, the child's parents are as set out in the Adoption Act.

### **Section 26 Parentage if no assisted reproduction**

- Section 26 carries forward the rule in section 61(1)(a) of the Law and Equity Act that if a child is born through natural conception, the child's parents are their birth mother and biological father, and modernizes the language used.
- Section 26 also carries forward the rebuttable presumptions of paternity in section 95(1) of the Family Relations Act. In the Family Relations Act, these presumptions apply if parentage is at issue in a claim for child support. Section 26 expands the application of the presumptions in the Family Law Act to determining who a child's father is in all cases where assisted reproduction is not used.
- The section carries forward the provision in section 95(3) of the Family Relations Act that if more than one man may be presumed to be the father under the presumptions, no presumption of paternity may be made.

### **Section 27 Parentage if assisted reproduction**

- Section 27 provides the general rule for determining parentage if assisted reproduction is used in a child's conception: a child's parents are the birth mother and the person married to or in a marriage-like relationship with the birth mother at the time of conception.

### **Section 28 Parentage if assisted reproduction after death**

- Section 28 provides rules for determining who a child's parents are if assisted reproduction is used to conceive the child and the person who provides the reproductive material dies before the assisted conception. It sets out the circumstances in which the deceased person will be considered to be a parent.
- This section only applies where the person who provides the reproductive material and subsequently dies intended to be a parent along with their surviving spouse or partner. It does not apply to donors.
- The rules in section 28 have implications for the related field of wills and estates. B.C. wills and estate law has been amended to provide inheritance rights for posthumously



conceived children. While posthumously conceived children will presumptively have the same rights of inheritance as any other children of the deceased person, it is only after birth that they will be able to assert these rights against relatives other than their deceased parent.

### **Section 29 Parentage if surrogacy arrangement**

- Prior to the Family Law Act, there were no statutory provisions for determining parentage where surrogacy is used and judges used their inherent discretion to make declarations of parentage in surrogacy situations.
- Section 29 provides rules for determining who a child's parents are where assisted reproduction involves a surrogacy arrangement, without requiring a court application for a declaration of parentage.
- This section defines a surrogacy arrangement as an arrangement where a person or couple who intend to be parents enter into an arrangement with a woman, who does not intend to be a parent, under which the woman agrees to give birth to a child conceived through assisted reproduction with the intention of relinquishing the child to the intended parents after the child's birth.
- If the surrogacy agreement is in writing and otherwise complies with section 29 and is carried out according to its terms, the intended parents are the child's legal parents.
- If there is a surrogacy agreement, but the surrogate does not consent to surrender the child after the child's birth, the agreement is not sufficient to require her to relinquish the child. The agreement can only be used as evidence of the parties' intention with regards to parentage where, for example, a declaration for parentage is sought from the court in the matter.

### **Section 30 Parentage if other arrangement**

- Section 30 provides for an exception to the rule that a donor may not be a parent.
- It provides for the possibility that where assisted reproduction is used, a child may have more than two parents in certain limited circumstances:
  - intended parents, who are in a relationship with each other, and a birth mother who wants to be a parent, or
  - a birth mother and the person she is in a relationship with, and a donor who wants to be a parent.
- There must be a written agreement between all parties prior to the assisted conception of the child that provides that all parties be parents.
- If any party to the agreement withdraws or dies before conception, the agreement is revoked.
- Establishing rules regarding the circumstances under which there may be more than two parents ensures a consistent approach and provides greater certainty for children and families when planning for children where assisted reproduction is required.

### **Section 31 Orders declaring parentage**

- Section 31 authorizes the court to make declarations of parentage. Prior to the Family Law Act, the court used its inherent jurisdiction to make declarations of parentage.
- This section provides a mechanism for the courts to determine parentage in cases which the parentage provisions do not otherwise cover or where there is a dispute about who the parents are.

### **Section 32 New evidence**

- Section 32 allows the court to consider new evidence when a court had previously made an order declaring parentage or dismissed an application for such an order.

### **Section 33 Parentage tests**

- Section 33 provides authority for the court to order parentage tests where required, for example, where a presumption of parentage is challenged.
- It provides authority for the court to order a party to pay all or part of the cost of the test.
- The section allows the court to take into account a person's failure to comply with an order for a parentage test when making a determination of parentage.
- Section 33 carries forward section 95.1 of the Family Relations Act.

## **Division 3 – Orders made outside British Columbia**

This Division addresses how to deal with declaratory orders of parentage made by a court or tribunal outside of British Columbia. There are separate provisions dealing with orders made elsewhere in Canada and orders made outside Canada.

### **Section 34 Definitions**

- Section 34 defines terms used in this division.

### **Section 35 Recognition of Canadian extraprovincial declaratory orders**

- Section 35 provides that declarations of parentage made in another province or territory must be recognized in British Columbia, and have the same effect as if made here.
- A B.C. court may decline to recognize a declaration of parentage made elsewhere in Canada if evidence becomes available that was not available when the original declaratory order was made or the court is satisfied that the order was obtained through fraud or duress.

### **Section 36 Recognition of non-Canadian extraprovincial declaratory orders**

- Section 36 provides for recognition of declarations of parentage made by courts or tribunals outside of Canada in certain circumstances.

## **Part 4 – Care and Time with Children**

Part 4 establishes a new regime for care and time with a child. This Part, probably more so than any other Part in the Act, represents the greatest departure from the previous Family Relations Act. Not only does it add clarity to the law surrounding time and care with children, but it also changes the framework for looking at family law issues where children are involved to promote a more collaborative approach to parenting after separation, where appropriate.

There are several key elements to this new framework. A key element is the change to the “best interests of the child” test to include family violence. There is also a change in terminology from custody and access to parental responsibilities, parenting time and contact. Division 6 creates a framework for addressing cases where a parent wishes to relocate with a child, which tend to be very high conflict cases. British Columbia is the first Canadian jurisdiction to provide a much-needed relocation framework.

### **Division 1 – Best Interests of Child**

This Division modernizes the best interests of the child test, which must be used when determining parenting arrangements. A number of changes have been made, including:

- making the best interests test the “only” consideration rather than the “paramount” consideration;
- including an overarching consideration, to “ensure the greatest possible protection of the child’s physical, psychological and emotional safety;”
- making the test applicable to all decision-makers, rather than only judges; and
- expanding the list of best interests factors to include the history of care of the child, the impact of family violence and consideration of relevant civil or criminal proceedings.

#### **Section 37 Best interests of child**

- Section 37 carries over and expands section 24 of the Family Relations Act. In the Family Relations Act, the best interests of the child were the “paramount consideration.” Section 37 directs that, in making decisions about parenting arrangements or contact with a child, a decision-maker must consider only the best interests of the child.
- This section expands the requirement to consider the best interests of the child beyond decision-making by judges, to include decision-making by guardians and all individuals party to a child-related agreement. A child’s best interests must always be in the forefront when parenting issues are discussed.
- Section 37 provides an overarching direction to “ensure the greatest possible protection of the child’s physical, psychological and emotional safety” and provides a list of factors to consider when determining what is in a child’s best interest. The expanded list modernizes the Family Relations Act to better reflect current social values and research.
- Important changes to the best interest of the child factors include:
  - a change in determining whether to consider the views of the child from “if appropriate” in the Family Relations Act to “unless it would be inappropriate.” This change shifts the presumptive starting point: the child’s views will be considered unless there is a reason why they should not be, rather than starting from the position that the views will not be considered unless justified;

- inclusion of family violence as a factor. The addition of family violence addresses an important gap in the law and recognizes that violence – even if directed exclusively at the spouse – can still be harmful to a child; and
- inclusion of any relevant prior civil or criminal proceedings as a factor. This requires decision-makers to consider the involvement of parties in other proceedings that are relevant to the safety, security or well-being of the child and promotes greater information-sharing between the family, child protection and criminal systems where children are involved.

### **Section 38 Assessing family violence**

- Section 38 provides guidance for decision-makers on how to assess family violence as a factor in considering the best interests of the child.
- This approach is designed to produce a more nuanced risk assessment and avoid a one-size-fits-all approach regarding parenting arrangements in cases where there has been family violence. Research shows that family violence is not all the same. This approach takes into account research showing that different types of violence carry different levels of future risk.
- This section is adapted from a similar provision in New Zealand’s family law, which is often considered to be a best-practice.

## **Division 2 – Parenting Arrangements**

This Division includes significant changes to the terms used to describe those with responsibility for children and to describe time spent with children. The changes generally adopt terminology used in Alberta’s Family Law Act, which have been met by broad positive response.

The emotionally-laden terms “custody” and “access” are eliminated and replaced by the more neutral terms “guardianship” and “parenting time” to emphasize a relationship of responsibility towards a child. “Guardianship” signifies responsibility for children and “parental responsibilities” describes the responsibilities that guardians have. The references in the Family Relations Act to “guardianship of the person of the child” and “guardianship of the estate of the child” are not carried forward in the Family Law Act.

Other terminology changes include the use of “parenting time” to describe time with a child by a guardian and “contact” to describe time with a child by a non-guardian.

The Division begins with a new default guardianship provision. With few exceptions, the parents of a child who reside with the child are automatically their guardians and do not lose these responsibilities if they separate.

### **Section 39 Parents are generally guardians**

- Section 39 carries over section 29 of the Family Relations Act with some important changes.
- This section establishes the starting position that parents who live with their child are guardians. This is different from the general rule under the Family Relations Act, which provided that when parents separate, the parent with whom the child usually resided has, by operation of law, sole custody and guardianship of the person of the child.
- The change emphasizes that a parent’s responsibility towards their child does not change only because the parents have separated. If the parent was a guardian before separation,

The Family Law Act came fully into force on March 18, 2013.

This document was developed by the Ministry of Justice to support the transition to the Family Law Act.

It is not legal advice and should not be relied upon for those purposes.

the parent remains a guardian after separation, unless the parents make an agreement, or the court orders that the parent is not a guardian of the child.

- This section clarifies that a parent who has never lived with a child is not that child's guardian. There are three exceptions:
  - where the parent is an additional parent under section 30 of the Act, which allows for three parents in limited assisted reproduction circumstances. This is important because these three parents may never have had the intention to live together but did all intend to be the child's parents and guardians;
  - where the person is a parent, they may become a guardian by agreement. This is the only circumstance in which a person may become a guardian by agreement under the Act; and
  - where a parent regularly cares for their child but does not live with the child. This may occur where a child is born in a short relationship where the parents did not live together, but both parents have been involved in the child's life.
- This section also carries over section 29(4) of the Family Relations Act to clarify that a step-parent does not become a guardian by virtue of the marriage or marriage-like relationship between a child's guardian and that another person.

### **Section 40 Parenting arrangements**

- Section 40 sets out the framework for the making of parenting arrangements. "Parenting arrangements" is defined to include parental responsibilities and parenting time.
- Only a guardian may have parental responsibilities and parenting time.
- This section provides the default that unless an agreement or court order provides for a different allocation, each guardian has all parental responsibilities.
- This section also provides that there are no presumptions about what type of parenting arrangement is best for a particular child. Although this section allows for an agreement or order for equal or shared parental responsibilities and parenting time if that is appropriate in the circumstances, it provides that there are to be no presumptions that equal parenting time and equal parental responsibilities are best for children.
- The parenting arrangements must be made in the child's best interest considering their particular circumstances. The act allows for a flexible and tailored approach to making parenting arrangements and allocating parental responsibilities.

### **Section 41 Parental Responsibilities**

- Section 41 contains the list of "parental responsibilities" that a guardian must exercise in the best interests of their children. This section is intended to provide guardians and decision-makers with guidance when making parenting arrangements.
- The list includes responsibilities that were previously covered by the phrases "guardian of the person of the child" and the "guardian of the estate of the child" in section 25 of the Family Relations Act. The Family Relations Act provided very little guidance with regard to what responsibilities guardians had toward their child.
- Institutional guardians (the Public Guardian and Trustee and a director under MCFD legislation) now receive their authority to act under the Infants Act, which is a better fit than the family law statute.

## **Section 42 Parenting time**

- Section 42 defines a child’s time with a guardian as “parenting time” during which the guardian may make day-to-day decisions and has day-to-day care, control and supervision of the child. Subject to any limits provided for in an agreement or order, the guardian may parent the child as they see fit during their parenting time.
- A person who had “access” under the Family Relations Act has “parenting time” under the Family Law Act, if they also had “custody” or “guardianship”. If the person had “access”, but did not have “custody” or “guardianship” under the Family Relations Act, then they have “contact” as set out in Division 4 of the Family Law Act.
- The time that a guardian with custody had with a child under the Family Relations Act is also “parenting time” under the Family Law Act.

## **Section 43 Exercise of parental responsibilities**

- Section 43 establishes that, as with all decisions regarding a child, a child’s guardian must exercise their parental responsibilities in the best interests of the child.
- It allows a guardian to authorize another person to temporarily exercise certain parental responsibilities if the guardian is unable to do so. This ability does not extend to all parental responsibilities. The parental responsibilities that cannot be temporarily exercised by another person are:
  - making decisions respecting where the child will reside;
  - making decisions respecting the child’s cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child’s aboriginal identity;
  - starting, defending, compromising or settling any proceeding relating to the child, and
  - identifying, advancing and protecting the child’s legal and financial interests.
- Authorizing a person to temporarily exercise some parental responsibilities is not a transfer of guardianship. The authorized person does not become a guardian, but rather temporarily exercises the responsibilities on behalf of the guardian.
- The British Columbia Law Institute’s report recommended allowing a type of temporary guardianship to deal with care of a child during a guardian’s temporary incapacity or unavailability, such as where the guardian is doing military service in a foreign country.

## **Section 44 Agreements respecting parenting arrangements**

- Section 44 in part carries over the policy of section 121(2) (a) and section 122(1)(a) of the Family Relations Act.
- This section provides specific rules about agreements respecting parenting arrangements. Clarifying that agreements may be made to create enforceable parenting arrangements will increase certainty and will encourage parents to use agreements to manage their affairs.
- To be binding, an agreement about parenting arrangements after separation must be made on or after separation. Because children’s needs change over time, it is impossible to know prior to that time what arrangements may be in the child’s best interests.
- This section allows written agreements respecting parenting arrangements to be filed with the court so they may be treated and enforced like a court order. It streamlines the enforcement of agreements.

- Section 44 provides a safeguard for agreements respecting parenting arrangements. If the agreement is not in the best interests of the child, the court must set it aside and replace it with an appropriate order.

### **Section 45 Orders respecting parenting arrangements**

- Section 45 authorizes a court to make orders about parenting arrangements where the parents are not living together.
- It also authorizes a court to include provisions that facilitate implementation of parenting arrangements including the use of family dispute resolution processes, such as parenting coordination.
- Orders for supervised parenting time are authorized, if appropriate.
- It makes clear that, to ensure a streamlined approach, an order with respect to parenting arrangements may be made at the same time as an application respecting guardianship.

### **Section 46 Changes to child's residence if no agreement or order**

- Section 46 applies where there is no existing agreement or order and there is an application for an order respecting parenting arrangements that involves a change in location of a child.
- This is different from a relocation application under Division 6. Division 6 applies where there is an existing agreement or order respecting parenting arrangements. Section 46 is needed because the situation is unique and falls somewhere between an ordinary application for parenting arrangements and a relocation application under Division 6.
- Like a relocation application, it is important for the court to consider the reasons for the move. However, it is not appropriate to use the presumptions in Division 6, which are based on the fact that the parties already have an agreement or order respecting parenting arrangements made in the best interests of the child. In relocation situations, some deference should be given to those pre-established arrangements. In the situation described by this section, there is no rationale for the same deference.
- This section directs the court to consider the reason for the change in residence, in addition to the best interests of the child and prohibits consideration of whether the guardian would move without the child.

### **Section 47 Changing, suspending or terminating orders respecting parenting arrangements**

- It establishes the need for a “change in circumstance” in order to change an order respecting parenting arrangements.
- This section authorizes a court, with regard to an order about parenting arrangements, to:
  - change the terms of the order;
  - suspend the operation of the order for a period of time; or
  - terminate the order.
- Section 47 carries over from section 20 of the Family Relations Act.

### **Section 48 Informal parenting arrangements**

- Section 48 provides guidance respecting the period of time between the date of separation and the date that a formal agreement or court order is made with regard to parenting arrangements.

- Generally, it applies where the parents are guardians by operation of law and both are playing a role in the child's life, although they have not solidified their parenting arrangements through an express agreement.
- Each guardian has a duty to consult with each other in circumstances where there are informal parenting arrangements, unless it would be unreasonable (e.g., minor day-to-day decisions) or inappropriate (e.g., risk of family violence).
- Where there is no agreement or order and there have been informal parenting arrangements for a sufficient period of time that those arrangements are a normal part of the child's routine, this section says that one of the guardians cannot unilaterally change the arrangements. If a guardian wants to change these arrangements, they can formalize an agreement or seek an order.

### **Section 49 Referral of questions to court**

- This section allows guardians to apply to court for directions respecting issues affecting a child so that judges can ensure that decisions made by a guardian are in the best interests of the child.
- Section 49 carries over section 32 of the Family Relations Act.

## **Division 3 –Guardianship**

This Division deals with how guardianship of children is obtained and terminated by agreement, court order or appointment.

### **Section 50 Agreements respecting guardianship**

1. Section 50 allows for agreements respecting guardianship to be made between parents of the child. This carries forward the policy in section 28 of the Family Relations Act.
2. It also allows for the transfer of guardianship through agreement under the Adoption Act or the Child, Family and Community Services Act to allow the director to transfer guardianship to the prospective parents or guardians under those acts.
3. This section prevents the transfer of guardianship by agreement in all other cases. Under the Act, unless the person is a parent of the child, a court order is needed for guardianship. This is more restrictive than section 34(2)(b) of the Family Relations Act, which did not restrict who could obtain custody under an agreement. This additional restriction was added to promote children's safety by ensuring there is court oversight in all cases where a non-parent is seeking guardianship of a child.



## **Section 51 Orders respecting guardianship**

- This section authorizes the court to make a guardianship order or to terminate a person's guardianship. The authority to remove a guardian does not apply to removing the director's guardianship under the Adoption Act and the Child, Family and Community Service Act. This prevents a person, after the child has been adopted or removed, from bringing an application to have the director's guardianship terminated.
- Subsection (2) provides the ability to establish rules to ensure information relevant to the best interest of the child is brought before the court, including in relation to criminal or child protection history. This section applies to all non-parents as well as to the few parents who are not guardians by default (i.e. those who have never lived with the child). This section also applies where the parties are seeking an order by consent. This responds to recommendations made by the Representative for Children and Youth.
- Section 51 requires the consent of a child who is 12 years or older to the appointment of a person as the child's guardian, unless the person seeking guardianship is a parent or the court is satisfied that the child's best interests require the appointment.
- This section addresses section 54.1 of the Child Family and Community Services Act which refers to a situation in which, after a continuing custody order has been made, the director grants "custody" to another person. Section 51 equates this to a grant of "guardianship" under the Family Law Act.
- Section 51 carries forward sections 30 and 35 of the Family Relations Act with respect to appointing or revoking guardianship and making custody orders.

## **Section 52 Who is entitled to notice**

- This section lists those people who, subject to a court-ordered exemption, must be served with notice of an application for guardianship.
- It requires that notice be given to all parents, guardians or others with whom the child resides and who have care of the child, unless the child is the subject of a continuing custody order or another person has temporary custody of the child under section 54.1 of the Child Family and Community Services Act or permanent custody under s. 54.01(5) of that Act.
- Section 52 carries forward section 22(1) of the Family Relations Act as well as the policy objective of section 30.1(2) of the Family Relations Act.

## **Section 53 Appointment of guardian in case of death**

- Section 53 provides a way for guardians to appoint a guardian to take over responsibility for their child upon their death and, if there is no such appointment, provides a default to determine who exercises the parenting responsibilities of a deceased guardian.
- In addition to authorizing the use of a will, it allows a guardian to use a prescribed form to make the appointment.
- The section eliminates the limitation currently in section 50(1) of the Infants Act that allows only a "parent" of a child to appoint a testamentary guardian. Under the Act, all guardians, whether or not they are also parents, have the ability to appoint a testamentary guardian. The British Columbia Law Institute's report recommended elimination of the distinction between parents and non-parent guardians.

- The section says that if a guardian dies without appointing a guardian and there are surviving parent-guardians, those parent-guardians take all the parental responsibilities that the deceased guardian had.

### **Section 54 Loss of guardian**

- This section provides that upon the death of a child's guardian, if a surviving parent is not also a guardian they do not automatically become the child's guardian and therefore does not take the parental responsibilities of the deceased guardian.
- Section 54 carries over section 29(2) of the Family Relations Act.

### **Section 55 Appointment of standby guardian**

- Section 55 authorizes a guardian facing a terminal illness or permanent mental incapacity to provide for the orderly transition respecting the care of their children by appointing a standby guardian. This is intended to promote certainty and stability in the care of children.
- The appointment takes effect when the appointing guardian, while still alive, is unable because of the illness or mental incapacity to attend to their responsibilities. The standby guardian must consult with the appointing guardian, to the extent possible and appropriate. Upon the appointing guardian's death, the standby guardian remains guardian of the child.
- These appointments are executed in a prescribed form in the same way as a will. The appointment must include a description of conditions upon which the standby guardian takes responsibility and may include a requirement for a medical doctor or other designated person to verify that conditions have been met.
- The section also deals with the possibility of a competition between appointments. The section provides that, unless the standby appointing document indicates otherwise, the standby guardian becomes the child's guardian on the death of the appointing guardian despite any other document, such as a will, that contains a different appointment
- Standby guardianship developed in the United States and a number of states have legislation surrounding its use. The British Columbia Law Institute's report supported the use of standby guardianship.

### **Section 56 Limits on appointments**

- Section 56 says that appointments for testamentary or standby guardians must be made in the best interests of the child only and restricts an appointing guardian from granting greater parental responsibilities than the appointing guardian has.

### **Section 57 Appointments must be accepted to take effect**

- Section 57 codifies the common-law requirement that appointments of guardianship do not take effect unless the appointed person either expressly or impliedly by the person's conduct accepts the appointment.

## **Division 4 – Contact with a Child**

“Contact” refers to a child’s time with someone who is not a guardian. It replaces the concept of “access” for non-guardians in the Family Relations Act. A contact person does not have parental responsibilities for the child.

### **Section 58 Agreements respecting contact**

- Section 58 sets out the specific rules about agreements between guardians and non-guardians respecting contact with a child to encourage parties to use written agreements to manage their affairs.
- It requires that an agreement with respect to contact must be made with all of the guardians who have parental responsibility under section 41 (c) of the Act for making decisions about who the child may associate.
- An agreement respecting contact with a child may be filed in the court registry, so that it may be treated and enforced like a court order. This streamlines the enforcement of agreements.
- The section provides a safeguard in that if an agreement respecting contact is not in the best interests of the child, it must be set aside and replaced by an appropriate court order.
- Section 58 carries over the policy of section 121 (2) (a) and section 122 (1) (a) of the Family Relations Act.

### **Section 59 Orders respecting contact**

- This section authorizes a court to make orders for contact including the type of contact and terms associated with it. For example, contact might take the form of time with the child or telephone or written contact.
- It clarifies that non-guardian parents and grandparents may apply for contact. The inclusion of grandparents in this section does not prevent grandparents from applying for orders for guardianship, parenting arrangements or parenting time in appropriate circumstances.
- The section authorizes orders for supervised contact, if appropriate.
- It provides that an “access” order made under the Child Family and Community Service Act is a “contact” order for the purposes of the Bill.
- Section 59 carries forward and clarifies section 35 of the Family Relations Act.

### **Section 60 Changing, suspending or terminating orders respecting contact**

- Section 60 carries over from section 20 of the Family Relations Act the need to establish a “change in circumstance” to change an order respecting contact.

## **Division 5 – Compliance Respecting Parenting Time or Contact with a Child**

This Division provides remedies to address the denial of parenting time or contact as well as failure to exercise time with a child. The remedies include moderate sanctions or tools (e.g., an order for mediation or counselling), but also provide for the potential that some situations will require an escalation in sanctions. Some different remedies are proposed for denial and failure to exercise access to recognize the different circumstances in which such problems arise.

Including options to address non-compliance is intended to clarify the law and provide effective remedial tools while at the same time maintaining sufficient flexibility to address the unique facts of each case. Options which fall on the preventative side of the continuum such as counselling could reduce the costs of separation by helping to resolve underlying issues, thereby avoiding future difficulties.

The division draws on the approach taken in other jurisdictions, both inside and outside of Canada, including Australia, New Zealand and some U.S. states.

### **Section 61 Denial of parenting time or contact**

- The Family Relations Act did not have specific remedies for disputes over time with a child. The remedies were quasi-criminal tools, such as contempt proceedings or applications under section 128(3) of the Family Relations Act, which provided for enforcement of access orders through the Offence Act. They were rarely used and were ineffective and ill-suited to this type of parenting dispute.
- Section 61 establishes an enforcement regime for judges to ensure parties respect each other's parenting time and contact arrangements.
- This section provides a limit to ensure that applications are made with regard to recent denials only by requiring applications to be brought within 12 months of the denial.
- It provides a range of remedies, from preventative to punitive, that a judge can order when there is a denial of parenting time or contact, including:
  - requiring parties or their children or both to attend family dispute resolution, counselling or other services;
  - compensatory time;
  - reimbursement of expenses incurred as a result of the denial; and
  - requiring the offending party to provide security or pay a fine of up to \$5,000.
- This section gives judges the discretion to allocate the cost, if any, of family dispute resolution, counselling or supervised transfer of children to facilitate parenting time or contact.

### **Section 62 When denial is not wrongful**

- Section 62 provides examples of circumstances in which a denial of parenting time or contact is not wrongful.
- Most remedies for denial of parenting time or contact are only available when the parenting time or contact was wrongfully denied. However, even where the denial was not wrongful, the court may, if appropriate, order compensatory time to the guardian to make-up for the missed time with their child.

## **Section 63 Failure to exercise parenting time or contact**

- Section 63 lists orders that can be made when a person fails repeatedly to exercise the parenting time or contact agreed to or granted in an order.
- These remedies are more limited than those for denial of time, since it may be at odds with the child's best interest to force a relationship with an uninterested adult by using punitive remedies.
- This section gives judges the discretion to allocate the cost, if any, of to facilitate parenting time or contact.

## **Section 64 Orders to prevent removal of child**

- Section 64 provides for two types of orders with respect to removal of a child.
- The first type allows a court to restrict a person from taking a child out of a certain area. This type of order is often used currently. For example, an order might say that neither parent may take the child out of the Lower Mainland without the other parent's consent. This type of order is generally about parenting together and making sure each guardian knows where the child is.
- The second type is used where there is concern that a person may remove and not return that child. In these circumstances, the court may take action to stop the person from leaving with the child, such as surrendering passports or providing security to motivate the person to stay.
- This section clarifies that these orders do not apply to the situation where one parent wants to move as those applications are different and are to be dealt with under Division 6 [Relocation]. This ensures a person cannot thwart the effect of a relocation order by inappropriately making a non-removal application.

## **Division 6 – Relocation**

This Division addresses the issue of moving away after parenting arrangements have been established in an agreement or court order. Relocation is an increasingly common event in children's lives after their parents separate or divorce, and disputes over relocation are difficult to resolve and tend to result in litigation.

Most often, this situation arises where one parent wishes to move to another city, province or country with the child. This move could impact the relationship between the child and the other parent and will require a change in the parenting arrangements. As a result, often the other parent does not agree with the move.

The Family Relations Act did not specifically address relocation, and the case law is unclear. Critics have called relocation law "rock, paper, scissors territory" and say that its uncertainty and unpredictability fuel litigation, prolong disputes, and interfere with parents' ability to plan.

There is a difference between how guardians are treated under this Division and how persons with contact with the child are treated. Guardians have parental responsibilities toward the child and are charged with raising the child; whereas persons with contact have time with a child but do not have any parental responsibilities or decision-making authority. Although both guardians and persons who have contact with a child are entitled to notice of a relocation, only a guardian can apply to prevent a move. A person with contact is provided notice to ensure there is adequate opportunity to make appropriate contact arrangements.

The Division's goal is to introduce some certainty to this area of the law by mandating notice of a proposed move, defining what constitutes a relocation and directing courts about both circumstances that should be considered and those that should not. The introduction of certainty will reduce the need for lengthy litigation and, thus, reduce the costs associated with disputes over relocation.

### **Section 65 Definition and application**

- Section 65 establishes criteria for what is considered to be a "relocation". "Relocation" is defined in a child-centred way that takes into account the specific circumstances of individual families. It focuses on the impact of the proposed move on the child's primary relationships.
- Usually relocation disputes arise where a guardian wants to move with the child. However, relocation includes situations in which a guardian intends to move but does not intend to move the child. Although these types of cases are often less disputed than cases where the guardian intends to move with the child, this provision ensures that notice is given so that appropriate adjustments to parenting arrangements may be made to minimize the impact on the child.
- This section also makes clear that Division 6 applies only when parenting arrangements already exist. If parenting arrangements do not already exist, then parents must make an application to determine parenting arrangements under Division 2, and section 46 [Changes to child's residence if no agreement or order] applies.

### **Section 66 Notice of relocation**

- Section 66 describes the circumstances in which notice of a proposed relocation must be given, and to whom.
- This section requires a guardian of a child who plans to relocate, with or without the child, to give 60 days' notice to other guardians or persons having contact with a child. The notice must contain the date of the proposed relocation and the name of the city, town or area of the new residence.
- The notice period allows for an opportunity to discuss the issue and, if a relocation is agreed upon, to work out new parenting arrangements.
- The section allows a court to grant an exemption to the requirement to give notice if satisfied that either:
  - the existence of family violence would create a risk if notice were given; or
  - there is no ongoing relationship between the child and the person who would be entitled to notice.

### **Section 67 Resolving issues arising from relocation**

- Section 67 encourages co-operation between the guardian proposing to move and those whose relationship with the child may be affected by the move by imposing a duty to use best efforts to resolve issues arising from the move. The goal is to reduce the need for litigation and, thus, reduce the costs associated with disputes over relocation.
- This section makes it clear that the obligation to attempt to resolve the dispute does not prevent the starting of an application for an order if that is necessary. If the parties resolve the issue before the court hearing, they do not need to continue in court.

- Only guardians can ask the court to prevent a move. A person with contact must be given notice of a move, but this is to ensure they can make alternate arrangements for that contact.

### **Section 68 Child may be relocated unless guardian objects**

- Section 68 allows a move to occur unless an application is filed objecting to the move within 30 days after notice is given.
- This eliminates the need for a moving guardian to wait the entire 60 days before planning the move if another guardian does not object to the move, by requiring the other guardian to raise their objection within 30 days. The parties would then have some time to resolve the dispute before the intended move date.
- This section balances the needs of an objecting guardian to have sufficient time to object and the needs of the moving guardian to make plans for the move.

### **Section 69 Orders respecting relocation**

- Section 69 provides guidance to the court with regard to determining whether relocation should be granted or prohibited and introduces a degree of certainty into the law.
- This section provides the factors that a court must consider when determining whether to grant a relocation. The court must consider the factors listed in the general best interests of the child test in section 37 and must also specifically consider whether the proposal to move is made in “good faith” and whether reasonable and workable alternate parenting arrangements have been proposed.
- It deals with situations in which the guardians of a child do not have substantially equal parenting time. The moving guardian, who has the majority of the time with and care of the child, must show “good faith” reasons for the move and must provide reasonable and workable alternate parenting arrangements that will maintain the relationship between the child and other guardian. If the court is satisfied that those two things are established then there is a presumption in favour of the move, unless the objecting guardian satisfies the court that the move is not in the best interests of the child.
- The section also deals with situations in which the guardians have substantially equal parenting time. In such a case, both parents play a significant role in the child’s day-to-day life and it may be difficult to maintain this relationship if there were a move. Therefore, the threshold is higher and the moving guardian has full responsibility for satisfying the court that the proposal to move is made in “good faith,” reasonable and workable alternate parenting arrangements have been proposed, and the move is in the best interests of the child.
- This section gives the court guidance about what to consider in determining whether the proposal to move is made in “good faith”, including the reasons for the move, whether the move is likely to enhance the general quality of life of the child and moving guardian, whether notice requirements were met and whether the guardians’ written agreement or order restricts relocation. The good faith requirement is designed to prevent relocations from occurring where the moving guardian is trying to move in order to undermine or limit the child’s relationship with the other guardian.
- It prohibits a court from inquiring into and considering whether a guardian would still relocate if the application to relocate the child were refused. This question is an impossible one for a guardian to answer, with very little probative value for the decision the court has to make.

The Family Law Act came fully into force on March 18, 2013.

This document was developed by the Ministry of Justice to support the transition to the Family Law Act.

It is not legal advice and should not be relied upon for those purposes.

## **Section 70 If relocation permitted**

- Section 70 authorizes the court to make necessary changes to the parenting arrangements to facilitate a relocation and to make orders to ensure compliance with a relocation order. Compliance is especially important in these cases, because otherwise the move could undermine the relationship between the child and the non-moving guardian.
- This section restricts the court's discretion to make fundamental changes to the parenting arrangements by requiring that the existing arrangements be preserved to the extent reasonable.
- Restricting the discretion that courts may exercise in adjusting existing parenting arrangements prevents a re-examination of the entire parenting arrangements structure. The existing parenting arrangements were either the result of an agreement between the guardians or a court order made in the child's best interests. While the physical relocation of the child or one of the guardians will necessitate changes, the court must try to adjust the arrangements in such a way as to preserve the current roles played by the guardians.

## **Section 71 Not a change in circumstances**

- Section 71 prevents an application to change parenting arrangements based only on the fact that a court refused to allow a guardian to change the location of a child.
- Section 47 of the Family Law Act requires a change in circumstance before a change to an order respecting parenting arrangements is made. While an unsuccessful application to move coupled with other questionable decisions by a guardian may justify a change in parenting arrangements based on the best interests of the child, an unsuccessful proposal to move on its own is insufficient justification for such a change.
- This section is important because, otherwise, a relocating guardian may forego a relocation where it would be in the child's best interests because of fear an unsuccessful application could result in a significant change to the parenting arrangements. There have been challenging cases where a parent applied for permission to move the child, only to have the court reject the move and then transfer custody to the other parent without further basis for the decision. This section provides clarity and ensures that where a relocation is denied, the status quo is maintained with respect to the parenting arrangements unless there is another change of circumstances.



## **Division 7 – Extraprovincial Matters Respecting Parenting Arrangements**

This Division provides for how orders respecting parenting arrangements and contact from jurisdictions outside British Columbia are to be dealt with in British Columbia.

It carries forward Part 3 – Extraprovincial Custody and Access Orders from the Family Relations Act. Changes were made to the structure and terminology to reflect the new terminology of the Family Law Act, (i.e. the use of “guardianship”, “parenting arrangements” and “contact,” and the elimination of “custody” and “access”), but no substantive changes were made.

### **Section 72 Definitions and interpretation**

- Section 72 carries forward the definitions for “extraprovincial order” and “extraprovincial tribunal” from the Family Relations Act.
- This section assists a court in determining in which jurisdiction a child is considered to be “habitually resident”. It is an important concept in international conventions dealing with determining which jurisdiction (provinces, country, state, etc.) should have jurisdiction over the issues of a particular child.
- It clarifies that the removal of a child from a jurisdiction, or a child’s retention in a jurisdiction, has no bearing on a determination about the child’s habitual residence, unless there is acquiescence or undue delay in challenging the removal or withholding.

### **Section 73 Purposes**

- Section 73 carries over section 43 of the Family Relations Act and describes the purposes of this Division.

### **Section 74 Determining whether to act under this Part**

- Section 74 is used when there is an issue of which jurisdiction the order should be made in.
- This section provides a test for when a British Columbian court may take jurisdiction in a child-related case.
- As well, it provides authority for a court to take jurisdiction in cases where the child may suffer serious harm, even though the court would otherwise not have jurisdiction.
- Section 74 allows a court to decline jurisdiction even if the tests are met if it is satisfied that another jurisdiction is more appropriate place to hear the case.
- It carries forward sections 44(1), 45 and 46 of the Family Relations Act.

### **Section 75 Recognition of extraprovincial orders**

- This section addresses when a court must recognize an order made in another jurisdiction with regard to the care of a child and the effect of recognition.
- This section provides that an extraprovincial order must be recognized in British Columbia if certain criteria are met, and if recognized, the order has the same effect and may be enforced in the same manner as one made under the Family Law Act.
- It provides that a court faced with conflicting extraprovincial orders must recognize the one most consistent with the best interests of the child.
- Section 75 carries over section 48 of the Family Relations Act.

## **Section 76 Superseding extraprovincial orders**

- This section provides authority to a British Columbian court to make a different order even though there is a recognized extraprovincial order, in circumstances where there is a risk of serious harm or where the circumstances have changed such that the best interests of the child are affected.
- This is an exception to the general rule that says only the most appropriate court should make decisions respecting a child.
- Section 76 carries over sections 49 and 50 of the Family Relations Act.

## **Section 77 Wrongful removal of child**

- This section allows a court, in cases in which it cannot take jurisdiction under section 74 of the Act, to nevertheless make orders for temporary or interim relief in wrongful removal or retention situations.
- It provides what a court can do in such situations. It may, for example, make an interim order that it considers to be in the child's best interests, or order a party to return the child to another jurisdiction.
- Section 77 carries over section 47 of the Family Relations Act.

## **Section 78 Extraprovincial evidence**

- This section provides the authority for British Columbian courts to request evidence or attendance of witnesses in other jurisdictions for the purposes of resolving issues related to guardianship, parenting arrangements or contact.
- This section creates a new definition for "senior legal executive" that describes the office with whom communication will be necessary in order to either obtain or provide needed evidence.
- Section 78 carries over the intention of section 51 of the Family Relations Act.

## **Section 79 Referral to court**

- This section continues the reciprocal relationship whereby the Ministry of Justice is obligated to provide the same assistance given to British Columbia courts in cases where other jurisdictions make requests.
- Section 79 carries over section 52 of the Family Relations Act.

## **Division 8 – International Child Abduction**

This Division carries over Part 4 – International Child Abduction of the Family Relations Act. This Division is necessary to ensure the continued application of the Convention on the Civil Aspects of International Child Abduction in British Columbia.

### **Section 80 International child abduction**

- This section addresses the Hague Convention on the Civil Aspects of International Child Abduction to ensure the continued application of the Convention on the Civil Aspects of International Child Abduction in British Columbia.
- It deals with administrative requirements of the convention such as appointing a “Central Authority”. The Central Authority is the office that assists parents and guardians with locating children in other jurisdictions. It is also responsible for communication and coordination with other jurisdictions with regard to ensuring the return of children to British Columbia.
- This section identifies the Attorney General as the “Central Authority” for British Columbia.
- Section 80 carries over section 55 of the Family Relations Act.

## Part 5 – Property

The Family Law Act moves to an excluded property model that involves less judicial discretion, particularly at the initial stage of identifying which assets are subject to division. It will no longer rely on a two-stage process of identifying the property subject to division and then determining if that property has an “ordinary use for a family purpose,” as provided for in the Family Relations Act.

Family property will include all real and personal property owned by one or both spouses at the date of separation unless the asset in question is excluded, in which case only the increase in the value of the asset during the relationship is divisible. Whether an asset was ordinarily used for a family purpose will not be relevant in deciding if it is family property.

The exclusions include:

- property acquired before or after the relationship;
- gifts or inheritances;
- damage awards and insurance proceeds with some exceptions; and
- some kinds of trust property.

This resembles the approach taken under the Alberta Matrimonial Property Act.

The property division scheme will apply to all married spouses, as well as to unmarried spouses who have lived in a marriage-like relationship for at least two years. The inclusion of unmarried spouses in the property division scheme recognizes that the number of common-law relationships is on the rise and that common-law remedy of constructive trusts inadequately protects the interests of this growing number of unmarried spouses. It also makes for greater consistency in the treatment of unmarried spouses in family law generally and across related laws, including wills and estates, spousal support and income tax law, which already treat common-law families the same as married families.

These changes make the law simpler, clearer, easier to apply and easier to understand for the people who are subject to it. British Columbia historically had a higher than average level of property division disputes in court; the broad flexibility and discretion in this area created uncertainty and promoted litigation. As well, the excluded property division model is a better fit with people’s expectations about what is fair: they share the property and debt that they accrue together during their relationship.

## **Division 1 – General Rules**

This Division sets out the general principle that spouses are equally entitled to family property and equally responsible for family debt.

### **Section 81 Equal entitlement and responsibility**

- Section 81 sets out the principle that spouses are entitled to share property and debt owned by one or both of them at the time of separation. It clarifies the starting point and rationale underlying the division of family property regime and provides that, subject to any agreement or order, spouses are both entitled to family property and responsible for family debt regardless of their respective use or contribution.
- A single trigger event- the date of separation- replaces the four triggering events in the Family Relations Act (separation agreement, order that there is no possibility of reconciliation, divorce order, order declaring the marriage a nullity). The trigger event defines the scope of the scope of the property to be divided
- Using separation as the triggering event means that spouses will not be required to go to court or negotiate a separation agreement to trigger entitlement to an interest in family property. This accords with the recommendation of the Family Justice Reform Working Group and accords with most people's expectations; it makes intuitive sense for spouses to use the date of separation as the point from which to disentangle their overlapping financial lives.
- It is intended to also eliminate problems that can arise under the Family Relations Act if, for example, a spouse died or declared bankruptcy between the date of separation and the occurrence of the triggering event.
- Section 81 replaces section 56 of the Family Relations Act.

### **Section 82 Rights and remedies of third parties**

- Section 82 ensures that the interests, rights, and remedies of third parties like creditors, guarantors or assignees, are not effected by a division of family property and in particular division of family debt.

## **Division 2 – Determining Family Property and Family Debt**

This Division sets out the rules for determining what is to be divided, that is, what constitutes family property and family debt and how to determine value for the purposes of the division.

### **Section 83 Interpretation**

- Section 83 describes interpretative principles for this Part.
- It clarifies what does and does not constitute “separation” for the purposes of establishing the triggering event to determine what is within the scope of property to be divided.
- There is much case law on what does and does not constitute “separation” and this provision is not intended to be exhaustive but to simply provide some guidance.

### **Section 84 Family property**

- Section 84 establishes a regime that classifies all of the spouses’ debt and property at separation as family property unless it is excluded under section 85 of the Family Law Act. If property is excluded, any increase in the value of the excluded property during the relationship, is included as divisible property.
- This section provides a clear and closed list of what is family property. This will promote settlement by making it easier to predict outcomes.
- This section replaces section 58 of the Family Relations Act which identified divisible family assets based on whether the property was “ordinarily used for a family purpose.” The “family use” test has not been carried over; whether an asset was ordinarily used for a family purpose is no longer relevant in deciding if it is family property.
- Property division disputes under the Family Relations Act were heavily litigated because the law was so discretionary. In addition to the discretionary “family purpose” test, the law was unclear about the treatment of certain kinds of property, such as gifts, inheritances, ventures, court awards and income tax refunds.

### **Section 85 Excluded property**

- Section 85 establishes a shift to an excluded property model that involves less judicial discretion, particularly at the initial stage of identifying which assets are subject to division.
- The following is excluded from family property:
  - pre-and post- relationship property;
  - gifts and inheritances to one spouse;
  - settlements or damage awards, except that part meant to compensate both spouses or to replace wages;
  - non-property-related insurance proceeds, except that part meant to compensate both spouses or to replace wages; and
  - some kinds of trust property
- Business property is not singled out for special treatment as it was under section 59 of the Family Relations Act.

- The spouse claiming that property is excluded property has the burden of proof to demonstrate the property is excluded.

### **Section 86 Family debt**

- Section 86 describes family debt for the purposes of division. The starting point is that all debts incurred by either spouse during the relationship are to be equally divided.
- There is an exception for debt incurred after the date of separation where it is incurred to maintain family property. Since both spouses generally continue to benefit from the family property until it is divided, both are presumed to be responsible for the cost of maintaining that property until that time.
- If equal division of family debt is significantly unfair, the division may be adjusted under section 95 of the Family Law Act.

### **Section 87 Valuing family property and family debt**

- Section 87 describes how and when the value of property and debt is to be determined.
- It establishes a valuation date that is either the date of an agreement or the date of a court hearing dividing the property. A different date may be selected by agreement or court order.
- The Family Relations Act did not provide any guidance on setting a date for valuing family property. This resulted in criticism that judicial discretion with respect to determining valuation dates was too broad and resulted in too much uncertainty. This uncertainty, in turn, made negotiating settlements more difficult.

## **Division 3 – Before an agreement or final order is made**

The Division sets out certain types of orders which may be made before a division of property or debt is finalized by agreement or court order. These include orders for interim division of property to fund activities designed to resolve the dispute and orders for use of property or to protect property from disposition which could defeat a claim.

### **Section 88 Orders under this Division**

- Section 88 authorizes applications to court under this division prior to an agreement or final order.

### **Section 89 Orders for interim distribution of property**

- Section 89 authorizes judges to make orders for interim distribution of property prior to final resolution of the issues to assist in making assets available to economically-disadvantaged spouses who need them to achieve a fair division of family property.
- The Family Relations Act did not explicitly authorize orders respecting the interim distribution of family property, although case law provides some authority to order interim distribution in very limited circumstances.

### **Section 90 Temporary orders respecting family residence**

- This section provides for exclusive occupation of a family residence or possession or use of personal property to the exclusion of the other spouse.
- It authorizes the Supreme Court, which has exclusive jurisdiction over property issues, to make a temporary order for a specified period of time for exclusive occupation of a family residence or exclusive use and possession of personal property stored at the family residence.
- These temporary orders do not allow a spouse to materially alter the family residence or personal property nor do they grant a proprietary interest in either.
- Section 90 carries over sections 124 and 125 of the Family Relations Act.

### **Section 91 Temporary orders respecting protection of property**

- This section provides authority for orders restraining a spouse from disposing of property.
- It also ensures that spouses do not dispose of property to undermine the fair division of family property.
- Section 91 carries over section 67 of the Family Relations Act.



## **Division 4 – Dividing Family Property and Family Debt**

This Division provides that spouses may make agreements to divide their property and debt as they wish and limits the court's ability to interfere with those agreements. It authorizes the court to order an unequal division of family property and family debt if it would be significantly unfair not to having regard to a set of factors. It also makes it clear that the court must not order the division of excluded property except in limited circumstances. As well, it sets out various orders that the court may make to give effect to the division of property and family debt.

### **Section 92 Agreements respecting property division**

- Section 92 clarifies that spouses may make property agreements:
  - dividing family property or family debt or both;
  - dividing property or debt unequally;
  - including property or debt that would not by statute be included;
  - excluding property or debt that would otherwise be included; and
  - choosing a different valuation method for family property or family debt.
- The section clearly states that, subject to the court's limited ability to set aside a property agreement under section 94, spouses have autonomy to depart from the Family Law Act with respect to property division.

### **Section 93 Setting aside agreements respecting property division**

- Section 93 of the Family Law Act provides the basis on which all or part of a property agreement may be set aside, using a two part approach:
  - First: was the agreement procedurally fair at the time it was made, based on the criteria in section 93(3)? If not, the court is to set it aside and make an order dividing property, unless the order that it would make would substantially the same as the agreement.
  - Second: even if procedurally fair, the court may set aside the agreement and replace it with an order dividing property if the substance of the agreement is “significantly unfair” having regard to the limited criteria set out in section 93(5).
- The criteria the court must consider to determine if an agreement is procedurally flawed are whether:
  - a spouse failed to disclose significant property or debts or other information relevant to the negotiation of the agreement;
  - a spouse took improper advantage of the other spouse's vulnerability including the other spouse's ignorance, need or distress;
  - a spouse did not understand the nature or consequences of the agreement; and
  - other circumstances that would, under the common law, cause a contract to be voidable in whole or in part.
- The criteria that the court must consider to determine if the substance of an agreement is “significantly unfair” is:
  - the length of time that has passed since the agreement was made;
  - the intention of the spouses; and

- the degree to which the spouses have relied on the agreement.
- Section 65 of the Family Relations Act provided much broader discretion for judges to interfere with an agreement. The test was whether the agreement was “unfair” having regard to a number of factors. Section 68 of the Family Relations Act did not provide any guidance to judges on when a property agreement should be set aside.

### **Section 94 Orders respecting property division**

- Section 94 prevents a court from making an order respecting the division of property or debt that is already dealt with by an agreement unless it first sets aside part or all of the agreement in accordance with section 93.
- The Family Relations Act property division provisions were criticized for setting the threshold for review too low and providing courts’ with too much discretion to change agreements dividing property. It created uncertainty for spouses as to whether their agreements would be upheld.

### **Section 95 Unequal division by order**

- Section 95 sets out the factors for the Supreme Court to consider in ordering an unequal division of family property, family debt or both.
- It limits judges’ discretion to divide family property unequally between spouses.
- The section changes the threshold for dividing family property unequally from whether it would be “unfair” not to do so to whether it would be “significantly unfair” not to do so. It is intended to create a higher threshold and make the test for unequal division stricter.
- Judges still have some flexibility to take into account a spouse’s unique circumstances and divide property unequally, but may only do so based on a more limited basis than under the Family Relations Act.
- This section allows a court to use an unequal division of property to compensate for situations where spousal support is insufficient to meet the spousal support objectives.
- The Family Relations Act was silent on how property division should interact with spousal support; while property division and spousal support are separate issues in law, in practice, they overlap.

### **Section 96 Division of excluded property**

- Section 96 provides judges with flexibility to divide excluded property, but only in very limited and defined circumstances in order to not open this area to uncertainty.
- Excluded property may be divided only in two situations:
  - family property or family debt located outside British Columbia and cannot practically be divided; or
  - it would be significantly unfair not to divide excluded property considering the duration of the relationship and a spouse’s direct contribution to the preservation, maintenance improvement or management of the excluded property.

## **Section 97 Giving effect to property division**

- Section 97 authorizes the Supreme Court to make determinations and orders needed to give effect to a division of property or debt under this part, for example:
  - declare ownership or right of possession;
  - order title to be granted to a spouse;
  - require compensation be paid; or
  - order partition or sale of property.
- This section carries over section 66 of the Family Relations Act with changes to reflect that “family debt” is specifically dealt with in this part.

## **Division 5 – Enforcing and Protecting Property Interests**

This Division carries forward from the Family Relations Act provisions for enforcing and protecting property interests by filing documents in the land title office or personal property registry. It also makes clear that rights under this part augment and do not eliminate rights under equity or any other law.

### **Section 98 Definitions**

- Section 98 provides guidance on how specific terms will be used in this division.
- Although the substance of the other provisions in this division has not changed, the structure has and the definitions have been added to provide clarity in view of the new structure of the provisions.

### **Section 99 Filing in land title office**

- This section describes how filing with a land title office is to occur.
- It carries over the ability for parties to an agreement to protect interests by registering their interests against the property.
- The content of section 63 of the Family Relations Act is divided between this section and the next two sections.

### **Section 100 Filing in personal property registry**

- This section allows parties to an agreement to protect interests by registering their interests against the property in the personal property registry.

### **Section 101 Orders for postponement, cancellation or discharge**

- Section 101 provide the Supreme Court with the ability to order the appropriate registrar to cancel or postpone a notice or agreement under the land title office or postpone or discharge a registration with the personal property registry.
- It authorizes the Supreme Court to order the cancellation or postponement of a charge where a spouse cannot or unreasonably refuses to do so.

### **Section 102 Donor of gift is party to agreement**

- Section 102 carries over section 61(9) of the Family Relations Act to provide that a person who gives a gift to one or both spouses on the condition that it not be disposed of without that person's consent is deemed to be a party to a property agreement between the spouses for the purposes of changing or enforcing the agreement with respect to the gift.
- It allows a person who gives a gift conditionally to have a say in how the gift is dealt with in a property agreement between the spouses.

### **Section 103 Enforceability of interest in property**

- Section 103 carries over section 64 of the Family Relations Act.
- It clarifies that the provision in the Land Title Act about the effect of unregistered interests applies to a spouse's interest in land under the Family Law Act.
- The section provides that if a third party does not have actual notice of a spouse's interest in property, other than land, the interest cannot be enforced against that person.
- The section is intended to clarify that the relationship between the Land Title Act and the Family Law Act is preserved.

### **Section 104 Rights under this Part**

- Section 104 carries over section 69 of the Family Relations Act.
- This section establishes the primacy of the Family Law Act over the Partition of Property Act.

## **Division 6 – Jurisdiction and Choice of Law Rules**

When a dispute crosses borders, complex questions arise about where a claim for property division can or should be made (jurisdiction) and which province, state or country's law governs the resolution of the dispute (choice of law). As families become increasingly mobile, more and more couples will have spent time outside British Columbia during their relationship and are more likely to have assets outside B.C.

This Division adds provisions to be used by the B.C. Supreme Court to decide whether it has jurisdiction to hear a property division case, when it should decline to exercise that jurisdiction and which province, state or country's law should govern a dispute.

The provisions are based on the *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Cases* adopted by the Uniform Law Conference of Canada in 1997. In 1998, the British Columbia Law Institute recommended that British Columbia adopt the Uniform Act because the common law is inconsistent with family law principles and is too complex and technical, which makes resolving these cases expensive and time consuming.

Most other provinces have some provisions dealing with jurisdiction, or choice of law or both. British Columbia will be the first in Canada to adopt the *Uniform Act*. Because the *Uniform Act* is a model only, each province must adapt the legislation to fit within its own legislative scheme when it is adopted. Therefore, although the structure, and in some cases, the wording may diverge from that used in the *Uniform Act*, the intention of this Division is to fully reflect the principles of the *Uniform Act*.

For more details and for greater interpretive assistance, please see the annotated the Uniform Act at: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1j1>

The commentary below provides the corresponding provision of the *Uniform Act*.

### **Statistics:**

According to the 2006 census, from 2001-2006, almost 165,000 people (4.3% of British Columbia's population) moved here from another province and just over 206,000 people (5.3% of the population) moved here from another country.

Due to high immigration over the last two decades, the province's foreign-born population has continued to increase. According to the 2006 census, almost 1.2 million people (27.5% of the population of British Columbia) were born in another country.

### **Section 105 Definitions and interpretation**

- Section 105 provides interpretive guidance on how terms will be used in the regime governing conflicts of law and property orders and agreements.

### **Section 106 Determining whether to act under this Part**

- The B.C. Court Jurisdiction and Proceedings Transfer Act, which came into effect in 2006 and sets out the circumstances in which a British Columbia court has jurisdiction to hear a case, is inconsistent with family law principles and does not include most of the

circumstances relevant to determining a “real and substantial connection” for establishing jurisdiction in family property cases.

- The Family Relations Act was silent on how conflict of laws problems relating to family property should be resolved.
- Section 106 describes the circumstances where the Supreme Court has authority to make an order where there is an issue of which jurisdiction is the appropriate jurisdiction to deal with the matter.

### **Section 107 Applicable internal law**

- Section 107 describes what internal law is to be used under the choice of law rules in section 108.
- This section ensures that the most appropriate law applies to property division.

### **Section 108 Choice of law rules**

- Under the Family Relations Act, choice of law in family property cases were governed by the common law; this fostered complex, technical, time-consuming and expensive litigation.
- Section 108 sets out rules ensuring that the appropriate internal law applies to both agreements and orders for the division of family property and debt.
- Two main differences between this provision and the common law choice of law rules are:
  - this provision requires the same law to be applied to all property in dispute, rather than different laws for movable and immovable property.
  - the rules that govern choice of law under this provision are not based on the characteristics of the property in dispute.

### **Section 109 Extraprovincial property**

- Section 109 authorizes judges to make orders respecting extraprovincial property in cases where it would be appropriate to do so.

## **Part 6 – Pension Division**

*The materials in this Part were prepared with the assistance of Thomas G. Anderson, Q.C.*

The British Columbia Law Institute, in its May 2006 Report, *Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act*, concluded that the pension division provisions of the Family Relations Act work well, but there are some important areas where refinements and additional guidance is required.

In some cases the complexity of pension plans means that the current provisions do not cover every eventuality, causing losses to former spouses and the risk of professional negligence claims against lawyers. Similarly, any uncertainty in the law makes pension administration more difficult and costly.

The changes in this Part are designed to clarify the law of pension division and to protect the economic well-being of both married and common-law spouses. In combination, the changes will simplify separating the economic lives of former spouses, while promoting the financial security of both.

## **Division 1 – General Matters**

This division defines terms used in this part and makes it clear that the part applies to effect a division of pension benefits unless an agreement or order provides otherwise. It also sets out the rules for bringing old agreements and orders under this part and for designating a spouse as a limited member.

### **Section 110 Definitions**

- Section 110 carries forward and expands upon section 70 of the Family Relations Act.
- It provides interpretive guidance for terms used in Part 6 – Pension Division.

### **Section 111 Benefits to be determined in accordance with this Part**

- Section 111 carries forward section 71(1) and (3) of the Family Relations Act.
- It provides that if a spouse is entitled to an interest in a member's pension benefits under Part 5, this part governs determining a spouse's share of benefits under a pension, unless an agreement or order provides otherwise.
- If an order or agreement doesn't mention the benefits, they are deemed to belong to the member, although this would be subject to the court's jurisdiction under Part 5.

### **Section 112 Original agreements and orders**

- Section 112 consolidates and modifies sections 76(4), 80(2), 80(2.1) and 80(2.2) of the Family Relations Act by establishing rules for determining how orders and agreements made under that Act for pension division can be incorporated into the rules of Part 6 of the Family Law Act.



- The problem is that many pre-Family Law Act and pre- Family Relations Act agreements and orders provide for dividing a defined contribution account by a deferred division that will take place when the member dies, terminates employment or retires. The spouse's share is often determined on a pro rata basis (called the "Rutherford formula" or a "Rutherford Order") that takes into account pensionable service accruing to the date of pension commencement. Such a formula cannot apply, without modification, to a defined contribution account, because a defined contribution account is divided by an immediate transfer of the spouse's share. This provision, to be supplemented by the regulations, will provide a template for bringing these arrangements under the umbrella of Part 6 of the Family Law Act.
- This change was a recommendation in the BCLI report, Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act ("BCLI Report").
- A defined contribution account consists solely of contributions made to the plan and net investment returns. When the member retires, the funds in the account can be used in several ways to provide retirement income: by making withdrawals in the same way as under a Life Income Fund, for example, or by using the funds to purchase an annuity for the member.

### Section 113 Designation of limited members

- Section 113 carries forward and enlarges upon subsections 72(1), (2) and (5) of the Family Relations Act.
- The section sets out the situations in which a spouse may become a kind of member of a plan (called a "limited member") and also specifies the rights of a limited member. A spouse is entitled to become a limited member if the spouse will receive a share of benefits at a later date or over time.
- This section recognizes that a spouse must be a limited member in more situations than was recognized under the Family Relations Act, such as for dividing benefits in a supplemental plan, or if the administrator of a defined contribution account consents to the spouse keeping benefits in the plan.
- A spouse ceases to be a limited member, when the spouse's entire share is transferred from the plan.

## Division 2 – Division of Benefits in Local Plans

This division sets out the rules for dividing benefits in local plans both before and after pension commencement. A “local plan” is defined in section 110 and, very broadly, includes plans in which the member has accrued benefits from employment in B.C. There are rules covering local plans where benefits:

- are determined under a defined contribution provision;
- are determined under a benefit formula provision;
- are determined under a combination of a defined contribution and a benefit formula provision; and
- are being paid to a member as a pension.

### Section 114 Local plan – benefits determined under defined contribution provision

- Section 114 carries forward section 73 of the Family Relations Act which provides that if a defined contribution account in a local plan is to be divided before the member retires, the division is by immediate transfer of the spouse’s interest to a pension vehicle (e.g., an RRSP) for the spouse, unless the administrator agrees to continue to administer the spouse’s share.
- The Family Relations Act did not expressly deal with the rights a former spouse had when a member receives benefits from a defined contribution plan by making withdrawals.
- Under the Family Law Act, immediate transfer options are used, so long as the benefits remain in the defined contribution account, unless the administrator consents to continue administering the spouse’s share in the plan. If the funds in the defined contribution account have already been used to purchase an annuity for the member, division is under section 117.
- The section adopts the BCLI Report recommendation.
- **The value of a defined contribution account** consists solely of contributions made to the plan and net investment returns, so that its value is determined by the account balance. Because of this, it can be divided immediately by a transfer from the plan. This is in contrast to where benefits are determined, in whole or in part, by a benefit formula provision, where the true value of the benefits is often not reached until the member is eligible to have the pension commence, and so the division is deferred until that time.

### Section 115 Local plan – benefits determined under benefit formula provision

- Section 115 is a modified version of section 74 of the Family Relations Act and provides rules dividing benefits in a local plan that are determined under a benefit formula provision where the pension division arrangements take place before pension commencement. If the pension has commenced, the division is under section 117.
- Under section 74 of the Family Relations Act, a spouse received a share by becoming a limited member of the plan. As a limited member, the spouse could choose between taking

the share by a lump sum transfer (to a locked-in RRSP, for example), or as a separate pension. The lump sum transfer option was available at any time after the member became eligible to have the pension commence. In contrast, the separate pension option was available only if the spouse waited until the member chose to have the pension commence.

- Under the Family Law Act, the spouse no longer has to wait until the pension commences to choose the separate pension option, and like the lump sum transfer, it is available once the member is eligible to have the pension commence.
- The value of benefits determined by a **benefit formula provision** is often quite different from the contributions made to a plan (and net investment returns on those contributions). For these plans, the future pension that will be paid is determined by the benefit formula. Part 6 specifies that the division take place no earlier than when the member becomes eligible to have the pension commence because, in most cases, this places a more accurate value on the former spouse's share (division before that date would often produce a substantially discounted value).

### Section 116 Local hybrid plans

- A **hybrid plan** is a plan where benefits are determined by a combination of a defined contribution provision and a benefit formula provision, or, where there is an option to choose between these provisions at pension commencement (either by the member's election or the plan rules).
- Section 116 carries forward and amplifies section 75 of the Family Relations Act which provides the options available to a spouse for dividing benefits in a hybrid plan where the pension division arrangements take place before pension commencement.
- This section recognizes more situations that can arise where benefits are determined by some combination of a defined contribution provision and a benefit formula provision.
- Section 75 of the Family Relations Act was structured on the assumption that the main benefit is determined by a benefit formula provision and the additional portion is determined by a defined contribution provision. However, there are some hybrid plans that have the opposite structure, with the main benefit determined by defined contribution principles and the additional portion based on defined benefit principles. In some cases, the plan provides rules that direct when all of the benefits are determined by one provision or the other, and, in other cases members are permitted to make this choice at pension commencement. Section 116 of the Family Law Act provides rules for all of these situations.
- The section adopts the BCLI Report recommendation.

## **Section 117 Local plans after pension commencement**

- Section 117 carries forward section 76(1), (1.1) and (2) of the Family Relations Act.
- It provides rules for dividing benefits in a local plan where the pension consisting of lifetime periodic payments has commenced (different rules apply if the pension consists of withdrawals from a defined contribution account).
- In this case, the monthly income stream is divided between the parties. If the spouse dies first, the member resumes receiving all the benefits. If the member dies first, the spouse receives the survivor benefits payable under the form of pension elected by the member.
- More direction concerning the spouse's entitlement to the survivor benefits is set out in section 124(5). Under that section, if the member's pension is a joint pension with a spouse, the spouse owns the survivor benefits. A limited member who is a beneficiary of survivor benefits under a pension is entitled to all of the survivor benefits (subject to the entitlement, if any, of another limited member).

## **Division 3 – Division of Other Benefits**

This division sets out the rules for dividing benefits in the following cases (which are not covered in Division 2):

- annuities;
- benefits under a supplemental pension plan;
- benefits for specified individuals;
- disability benefits; and
- benefits in an extraprovincial plan.

### **Section 118**

- Section 118 clarifies that an annuity privately purchased by a member and an annuity purchased by an administrator on behalf of a member are both to be treated in the same way, by the rules under section 117 that apply when a pension consisting of lifetime periodic payments has commenced (different rules apply if the pension consists of withdrawals from a defined contribution account).
- The Family Relations Act pension division rules have been interpreted as applying to an annuity purchased by a plan administrator on behalf of a member, but there is some doubt as to whether it applies to a privately purchased annuity. In principle, there is no reason why the pension division rules should not apply equally in both cases.
- The section adopts the BCLI Report recommendation.

### **Section 119 Supplemental pension plans**

- Section 119 provides detailed rules governing the division of benefits that are supplemental to benefits in a local plan.
- Under the Family Relations Act, benefits in a supplemental plan are divided by the same rules that apply to extraprovincial plans – the former spouse is entitled to a share of the income stream when it becomes payable.
- The problem with this approach is that it is usually not possible to provide the former spouse with any security for that share and payment typically ends when the member dies.
- Under the Family Law Act, in contrast, if the pension has not yet commenced, the former spouse is entitled to take the share as a separate pension. If the pension has already commenced, then the same rules under section 117 that apply to pensions being paid under a local plan apply. It is also open to the administrator to consent to using any of the rules that would apply had the benefits been under a local plan.
- The spouse's share of the supplemental benefits is subject to the same terms and conditions as the member's share. If the member's share is adjusted, suspended or terminated, the spouse's share is adjusted, suspended or terminated as well. In these cases, recourse is provided in section 120.

- The section adopts the BCLI Report recommendation.

### **Section 120 Compensation for lost supplemental benefits**

- Section 120 establishes rules for protecting a spouse from loss of benefits in a supplemental pension plan caused an act or omission by a member. If a spouse's benefits are adjusted, suspended or ended, and the member is to blame, the spouse has a claim for compensation.
- The section adopts the BCLI Report recommendation.

### **Section 121 Benefits for specified individuals**

- Section 121 provides rules for dividing pensions for specified individuals.
- Under the Family Relations Act, just as with benefits in a supplemental plan, these were dealt with by the rules that apply to benefits in extraprovincial plans and subject to some important limitations. (See the notes to section 119).
- Under the Family Law Act, if the member has benefits in a plan for specified individuals, the spouse becomes a limited member of the plan and receives the share by a separate lifetime pension when the member elects to have the pension commence. Other options are also available, with the consent of the administrator.

### **Section 122 Disability benefits**

- Section 122 provides rules that apply when an agreement or court order provides for dividing disability benefits payable under a pension plan.
- The Family Relations Act also addresses dividing disability benefits, by stipulating that after the spouse reaches age 60, these are subject to the rules that apply after pension commencement, leaving in doubt what arrangements are possible before the former spouse reaches that age.
- Under the Family Law Act, there is no age limit for when a former spouse is entitled to receive a share of disability benefits payable under a plan.
- Under British Columbia law, disability benefits, with a few exceptions such as WCB benefits, are considered to be divisible between spouses on marriage breakdown. The court generally reapportions 100% of disability benefits to the disabled person, but in those cases where it is appropriate for the former spouse to receive a share, the Family Law Act provisions will allow that.
- The section adopts the BCLI Report recommendation.

### **Section 123 Extraprovincial Plans**

- Section 123 carries forward section 77 of the Family Relations Act which sets out the rules for dividing benefits in an extraprovincial plan. Very broadly, these are plans where the benefits accrued from employment outside B.C.

- In these cases, section 123 provides for the application of the pension division rules set out in the legislation governing the plan. In appropriate cases, however, a B.C. court may order that the monthly income stream be divided between the parties.
- This section also addresses the former spouse's entitlement if survivor benefits are payable. The member must, if possible, designate the spouse as beneficiary under the plan to the extent of the spouse's interest.

## **Division 4 – Death of Member or Limited Member**

This division provides rules for dealing with issues respecting the division of benefits when a member or limited member dies.

### **Section 124 Death of member or limited member**

- Section 124 carries forward and clarifies section 78 of the Family Relations Act.
- If the member dies before pension commencement and before the limited member receives the proportionate share, the deferral of the division ends, and the limited member's share of the benefits must be determined as of the day before the death of the member.
- This is an important change from the Family Relations Act, which instead gives the former spouse a share of the survivor benefits payable on the death of a member. Survivor benefits can vary significantly, and using that approach means that the former spouse could conceivably receive far less and, in some cases, far more, than if the benefits were divided during the member's lifetime.
- Deferring receipt of a share of the benefits should not result in overcompensating or under-compensating the limited member if the member dies before pension commencement and before the limited member receives the proportionate share of the benefits. The Family Law Act provision means that the same result applies whether the benefits are divided before or after the member's death.
- The section adopts the BCLI Report recommendation.
- As under the current Family Relations Act, if the limited member dies before receiving the proportionate share, it is paid to the limited member's estate.

### **Section 125 Entitlement to preretirement survivor benefits**

- Section 125 revises the policy of section 72 (3) and (4) of the Family Relations Act that impacts a member's authority to designate beneficiaries. Under the Family Relations Act there was a question concerning the extent to which a member may change a beneficiary designation after a spouse was designated a limited member.
- Section 125 provides that entitlement to the member's share of any survivor benefits is determined by the usual principles that apply (which are, first to the member's spouse; if there is not spouse, to the beneficiary designated by the member; and, if there is no beneficiary, to the member's estate).
- The former spouse entitled to a proportionate share of benefits under Part 6 is fully secured for the proportionate share. There is no need to provide additional security through a beneficiary designation. This change will prevent the former spouse from receiving an unintended windfall. The portion of the benefits over and above the former spouse's share will go to another beneficiary named by the member (for example, a child or other dependent) or to the member's estate.
- The section adopts the BCLI Report recommendation.



## **Section 126 Waiving pension or postretirement survivor benefits**

- Section 126 clarifies rules for waiving a share of benefits, including survivor benefits.
- Their counterpart is found in section 80(1)(b) of the Family Relations Act, which permits a spouse to waive any claim to benefits. By implication, this would also permit a personal representative of a deceased limited member to waive payment to the limited member's estate. (In most cases where this would be considered, it will be the member's children who want to make sure the surviving parent has adequate retirement income.) Section 126 expressly provides that a personal representative can make this waiver.
- This section also permits a spouse entitled to survivor benefits under a pension that has commenced to waive those benefits, provided it is done expressly. (Payments would still be made to the spouse, who would have to pay them to the person entitled, unless the administrator consents to do this instead.)

## **Division 5 – Other Matters Respecting Pension Division**

This division provides rules for dealing with other issues respecting the division of benefits in pension plans:

- agreements respecting division;
- determining compensation;
- reapportioning benefits;
- clarifying division of benefits;
- changing division of benefits in unusual circumstances; and
- dividing benefits retroactively.

### **Section 127 Agreements respecting division**

- Section 127 carries forward, with changes, sections 62, 75.1(b) and section 80(1) of the Family Relations Act. This section allows parties to agree that the spouse receive more than half the benefits and to waive CPP credit splitting.
- This is in contrast to the Family Relations Act, which provides that an arrangement giving a spouse more than a half share can only be done by court order. In practice, court orders to this effect were made by consent, so that the requirement, quite apart from protecting either party, merely added an unnecessary layer of costs and wasted registry time.

### **Section 128 Determining compensation**

- Section 128 carries forward sections 80(3) and (4) of the Family Relations Act and applies where the parties agree, or the court orders, that the spouse's share of benefits be satisfied by a compensation payment. The payment must be calculated as prescribed under the regulations, although it is possible for the parties to agree, or the court to order, that the regulations do not apply.
- This section also provides that spouse can agree with the administrator to receive the share by lump sum transfer in circumstances not provided for under the legislation. In that case, however, the lump sum transfer must be calculated as prescribed under the regulations, unless the court orders otherwise.

### **Section 129 Reapportioning benefits**

- Section 129 carries forward section 75.1(a) of the Family Relations Act.
- This section provides the Supreme Court with the discretion to reapportion entitlement to benefits under a plan in cases where it is necessary, appropriate or convenient and the circumstances would otherwise require the member to pay support, or a share of the benefits as they are received.

### **Section 130 Clarifying division of benefits**

- Because pensions are complex financial vehicles, there may be circumstances where questions arise about the parties' arrangements, or the requirements of the Family Law Act.
- If those questions arise, section 130 authorizes the Supreme Court, on an application by the member or the spouse, to give directions or make additional orders at any time to facilitate or enforce the division of the benefits between them.

### **Section 131 Changing division of benefits in unusual circumstances**

- Section 131 carries forward section 75.1(1)(b) of the Family Relations Act. It empowers the Supreme Court to revise pension division arrangements to depart from the usual Part 6 rules if those rules are inappropriate because of the terms of the plan, or changes in those terms since the agreement or order to divide the benefits was made.
- The section clarifies that an order directing the method of division is binding on the administrator. The administrator must be served with notice of an application and permitted to make submissions when the application is heard.

### **Section 132 Retroactive division of benefits**

- There are significant differences between the rules that apply to benefits before pension commencement and after lifetime periodic payments have commenced (although there is no difference if the pension consists of withdrawals from a defined contribution account).
- Before pension commencement, the former spouse will receive a secure share of the benefits (by a lump sum transfer, or in the form of a separate pension). After pension commencement, typically the former spouse is entitled to only a share of the income stream, which will end when the member dies.
- If the parties have not sorted out the pension division arrangements before pension commencement, the former spouse will usually apply for a restraining order. Delaying commencement of the pension can prejudice both parties (because it means foregoing monthly payments), unless arrangements can be made so that the division is retroactive to a reserved pension commencement date.
- Section 132 establishes rules for dealing with these situations. It provides for retroactive division if the conditions set out in the provision are met.
- The section adopts the BCLI Report recommendation.

## **Division 6 – Administrative Matters**

This division governs administrative matters respecting the division of benefits in pension plans.

### **Section 133 Information from plan**

- Section 133, carries forward section 82 of the Family Relations Act which sets out the rules relating to information that an administrator may provide to a spouse who claims an interest in benefits. But the section (and the regulations) provide more direction concerning the treatment of private information.
- The section adopts the BCLI Report recommendation.

### **Section 134 Agreement or order required for division of benefits**

- Section 134 clarifies that Part 6 does not apply unless there is an agreement or court order dividing the benefits between the spouses. (In contrast, under the Family Relations Act, at one time arguments were often made that Part 6 applied even in the absence of an order or agreement.)
- The section adopts the BCLI Report recommendation.

### **Section 135 Information required by plan**

- Section 135 ensures that an administrator can insist on being provided with the information necessary to administer the division of benefits. This can include a requirement to provide satisfactory evidence about entitlement.
- The parties or their lawyers do not always have the full name of the pension plan in question. For example, the member may know the plan only by some short form designation, or the name of the plan may have changed. As a practical matter, identifying the member's employment in the agreement or order will be sufficient to identify the pension plan in most cases.
- The section adopts the BCLI Report recommendation.

### **Section 136 Notice or waiver**

- Section 137 provides that where a notice or waiver is required under Part 6, it must be given in the form and in the manner set out in the regulations.

### **Section 137 Implementing division of benefits**

- Section 137 sets out the rules administrators must follow with respect to dividing benefits. It provides that, except where retroactive division rules apply, the administrator is required to divide only those benefits that become payable within a prescribed period after the administrator receives the relevant information set out in this provision.
- This provision also sets out circumstances in which the administrator may delay division because to do so would be advantageous to a spouse.
- The section adopts the BCLI Report recommendation.

### **Section 138 Adjustment of member's pension**

- Section 138 carries forward section 84 of the Family Relations Act, with minor wording changes. It provides that after benefits are divided, the administrator must adjust the member's benefits as required under the regulations.

### **Section 139 Transfer of commuted value of separate pension or share**

- Section 139 carries forward section 79 of the Family Relations Act, which authorizes an administrator to require a limited member to accept a transfer of commuted value in any case where the administrator could require a member to do so under the Pension Benefits Standards Act. This will usually be a case where the limited member's share is less than a prescribed amount.
- Section 139 goes one step further than this, by also allowing a limited member to apply for a transfer of the commuted value of the limited member's share in any circumstances that a member may do so under the Pensions Benefits Standards Act.
- This section is intended to ensure that the transfer options and requirements are the same for both limited members and members.

### **Section 140 Administrative costs**

- Section 140 carries forward, with revisions, section 81 of the Family Relations Act. Like the Family Relations Act, section 140 permits administrators to charge an administrative fee. Unlike the Family Relations Act, section 140 also permits the administrative fee to be deducted from the payment of benefits.
- The Family Law Act also updates the fees that may be charged, which have not changed since Part 6 of the Family Relations Act came into effect in 1996. The administrative fees were never intended to fully cover the costs of administering pension division arrangements. The purpose of increasing the fees is to bring them to a level that constitutes a realistic contribution towards the costs of administering the pension division but not a complete indemnity. The fees will be set by regulation.

### **Section 141 Income tax**

- Section 141 carries forward and expands on section 76(3) of the Family Relations Act which says that where a plan makes separate payments to a member and spouse, the plan must make separate source deductions from the spouse's share and the member's share.
- This section clarifies that the member and spouse are each responsible for paying income tax on their respective shares of the benefits. It also provides that a person required to pay income tax on the other's share can claim reimbursement from other.
- The requirement to reimburse for income tax paid on the other person's behalf is common in agreements and orders and setting it out as a legislative requirement will simplify the drafting of agreements and orders.
- The section adopts the BCLI Report recommendation.

### **Section 142 Claim does not relieve duty to administer benefits**

- Section 142 provides that a spouse's unperfected claim to an interest in a member's benefits does not relieve the administrator of the duty to act on directions given by the member. The obligation is on the spouse to perfect the claim to an interest. Merely stating that a claim is being made is not a ground for putting everything on hold until that claim is established.
- If, in these circumstances, a spouse wants to preserve options, it will be necessary get the member to agree or to apply for a restraining order. Otherwise, the administrator's obligation is to administer the pension benefits as required under the plan text and governing legislation.
- This does not necessarily mean that an administrator owes no duties to the spouse. Section 143 provides for circumstances where an unperfected claim places a notice obligation on the administrator.
- The section adopts the BCLI Report recommendation.

### **Section 143 Administrator's duties**

- Section 143 carries forward the policy of section 85 of the Family Relations Act and clarifies that an administrator who, in good faith, takes specified steps will not be liable to a spouse, member or other person.
- The need to limit the administrator's exposure to liability is important because of:
  - the dollar amount involved in dividing benefits (often this is the most valuable family asset);
  - the complexity of family law; and
  - the complexity of pension plans.
- This change addresses BCLI recommendations to provide administrators with greater protection from liability to a spouse. It is also intended to provide more direction on how an administrator can discharge obligations owed to a spouse claiming an interest.

### **Section 144 Trust of survivor and pension benefits**

- Section 144 expands upon section 83 of the Family Relations Act, which provides that a person who receives survivor benefits in which a spouse has an interest, holds those benefits in trust for the spouse.
- Experience has highlighted the need for a trust in any case where a third party receives pension benefits belonging to the spouse, and also cases where the spouse receives a greater share than intended.
- The section adopts the BCLI Report recommendation.

## **Section 145 No further entitlement after division of benefits**

- Section 145 clarifies the general policy that, after having received the share of the member's benefits, a spouse or limited member has no further entitlement to any share of those benefits.
- The Pension Benefits Standards Act confers various rights on a person who qualifies as a spouse, such as survivor benefits, but provides that entitlement ends two years after separation, or after the benefits are divided under the Family Relations Act. This section consolidates this principle, and also confirms that it applies in circumstances where a share of the benefits is waived.
- The section adopts the BCLI Report recommendation.

## **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 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.

## **Part 8 – Children’s Property**

Other Canadian provinces give parents the authority to manage small amounts of property in trust on their child’s behalf and some also have criteria to govern the appointment of trustees where the trust is larger. In British Columbia, the Public Guardian and Trustee administers children’s trusts, regardless of their size. Parents can go to court to get an order to make them responsible for a child’s trust, but the time and expense may outweigh the amount at issue. Families also say that the fees associated with this service are relatively high for small trusts, and some say this approach undermines families’ autonomy.

The children’s property regime in the Family Law Act allows parents and guardians to manage children’s property under a certain value without the need for a court order appointing them as trustees. The monetary limit for this will be established by regulation.

The legislation also sets out criteria to govern the court appointment of trustees where the trust is larger. The children’s property regime is largely modelled on Alberta’s Minors’ Property Act.

The children’s property regime is intended to promote the value of family autonomy by allowing a guardian (usually a parent) to manage small trusts for their child. In this way, families can avoid the fees associated with professional trustees.

At the same time, to reduce the risk of mismanagement of the child’s property, the Act builds in safeguards, including limits on the value and type of property that the guardian may manage without court appointment, as well as the use of written acknowledgements of receipt of property.

### **Section 175 Definitions**

- Section 175 creates definitions necessary to support interpretation of the other sections in this Part.

### **Section 176 Guardian not automatically entitled to receive property**

- Section 176 clarifies the law that a parent or guardian is not automatically a trustee of a child’s property.
- This does not change the law. Under the Family Relation Act, a parent or guardian must have been appointed a trustee in order to administer their children’s trusts.

### **Section 177 Delivery of any property to trustee**

- Section 177 clarifies that a person may discharge their duty to deliver property to a child by providing that property to a trustee.

### **Section 178 Delivery of small property**

- Section 178 establishes the framework that allows a child’s guardian, usually a parent, to manage small trusts for children without the need for a court order. A person who has a duty to deliver property to a child may deliver it to the guardian of the child, who will act as trustee, so long as the property falls within the scope of small property.

- There is no obligation to pay the small trust to the guardian. A person with a duty to deliver property to a child may instead chose to deliver the property to the Public Guardian and Trustee if the Public Guardian and Trustee will accept it.
- This section promotes the value of family autonomy by allowing a guardian to manage small trusts for their child. It allows families to avoid the fees associated with professional trustees so that more of the trust is retained for the child.
- This section also provides safeguards to reduce mismanagement of the child’s property, including:
  - limits on the value and type of property that the guardian may manage without court appointment, the details of which will be set out in regulations;
  - the use of written acknowledgements of receipt of property to reduce the risk of mismanagement of the child’s property;
  - the requirement that the guardian administering small trusts must act as a trustee and therefore the Trustee Act requirements can apply.
- There are some British Columbian acts that provide that settlement monies for a child must be given to the Public Guardian and Trustee and there are others that provide the authority to give settlement monies to either the Public Guardian and Trustee or a trustee. This regime does not impact the provisions in other acts. This section does not impose an obligation to pay small settlements to guardians. It only provides it as an option to allow for a more flexible approach where the settlement funds are under a limited threshold. For example, this section does not mandate ICBC to pay small settlements for a child to a guardian, but does allow for ICBC to adjust their practice to do so if they feel it is appropriate.
- The monetary limit or value of the property to qualify as a small trust, will be set out in regulations, which will be drafted prior to the Act comes into force. This will allow the amount to be adjusted over time.

### **Section 179 Appointment of trustee by Supreme Court**

- Section 179 establishes the framework for court appointment of a trustee of children’s property for larger trusts.
- This section provides a trust-specific best interest test to govern court appointment and allows the court to impose terms or conditions to protect the child’s interest and to tailor the appointment to suit the circumstances.
- The inclusion of factors for the court to consider in deciding whether to appoint a trustee for larger trusts will add greater clarity to the statute by establishing consistent standards for judges to use.
- A trustee’s powers are defined and limited by the court order or the trust document only. A trustee does not have any form of guardianship over a child.

### **Section 180 Subsequent applications respecting trustee**

- Section 180 allows a court to make changes to an appointment of a trustee if it is in the best interest of a child. These changes include requiring a trustee to provide an accounting or terminating the trustee's appointment and ordering the trustee to reimburse the child if necessary.
- The section allows a flexible approach and provides safeguards to protect the child's interest.

### **Section 181 When child's property must be delivered to child**

- Section 181 provides a duty on trustees, including guardians who are trustees of small trusts, to deliver the property and provide an accounting to the child when the child reaches 19 years old, unless a trust instrument, such as a will or an order, says differently.

## **Part 9 – Protection from Family Violence**

Existing restraining orders, which prohibit harassment and contact in specified circumstances, are replaced with one type of order: a “protection order”. A protection order is a safety-related order. Breaches of a protection order will be a criminal offence and may be enforced under section 127 of the Criminal Code.

Use of the Criminal Code to enforce protection orders will promote timely, effective enforcement, which can save lives. It streamlines enforcement and limits it to the criminal justice system, where the police and Crown counsel are familiar with the processes and tools. It sends the message that breaches of protection orders will be taken seriously.

As well, the new protection order scheme:

- broadens the range of family members who are eligible to apply for protection orders;
- clarifies the procedure to ensure protection orders are accessible, clear, and effective; and
- provides guidance on risk factors to promote the use of protection orders in appropriate and safety-related situations.

The new regime responds to recommendations made in numerous reports, including the *Keeping Women Safe* report and the Representative for Children and Youth’s *Honouring Christian Lee* report, which say consistent enforcement of protection orders is critical to increasing victim safety. The previous scheme, which was enforced through civil law, was identified as problematic on a number of levels. Inconsistent enforcement of civil restraining orders was identified as an issue that impacts families’ safety and confidence in the justice system.

### **Section 182 Definitions**

- Section 182 creates definitions necessary to support interpretation of the other sections in this Part.

### **Section 183 Orders respecting protection**

- Section 183 establishes the framework for the new protection order regime.
- It provides that a protection order may be made against a family member where there is a safety concern. The broadened range of eligible family members (as defined in section 1 of the Act) is consistent with domestic violence laws elsewhere in Canada.
- The section allows for an application for a protection order to be made by the at-risk family member or by another person on behalf of the at-risk family member. For example, the mother could also apply for a protection order on behalf of her child. It also allows for the court to make an order on its own initiative, where a risk is identified.
- The section clarifies that protection orders are available on a stand-alone basis; they may be made at any time and need not be connected to other family law proceedings.
- Section 183 limits the terms that may be included in protection orders to ensure they are safety-focused and appropriate for enforcement by police and the criminal justice system. This is intended to promote more consistent, timely and effective enforcement. Under the Family Relations Act, many restraining orders also included provisions that were not safety-related, which undermined the seriousness of the order and resulted in enforcement challenges. The new regime creates a division between orders for risky and non-risky



behaviours to promote more effective enforcement appropriate to the situation. If a person requires an order for non-safety-related issues, there are “conduct orders” available under Part 10 of the Family Law Act that are enforced through family law remedies, whereas the safety-related protection orders are enforced through the criminal law remedies.

- The section provides a default expiry date of one year unless the court specifies a different duration. Under the Family Relations Act, many orders had no end date which caused enforcement problems since police were unable to tell whether the order remained relevant. The default expiry date allows judges to tailor orders while providing greater clarity for the police in their enforcement role as compared to orders that do not provide an end-date. Peace bonds under the Criminal Code also expire after a year.
- Section 183 replaces sections 37, 38 and 126 of the Family Relations Act.

### **Section 184 Whether to make protection order**

- Section 184 provides guidance to courts on when protection orders should be ordered.
- It lists risk factors courts must consider in determining whether family violence is likely to occur and whether it is appropriate to make a protection order. The risk factors are consistent with risk assessment research and tools used in British Columbia and across Canada by police and the justice system.
- The section also provides factors for a court to consider when determining whether the order should be made against only one person in cases where both parties are seeking protection orders against each other. Mutual orders may not be appropriate where one person is the primary aggressor and one is repeatedly a victim.
- Section 184 also provides examples of circumstances that should not preclude the making of a protection order, including whether the victim has previously returned to the home after incidents of family violence or whether criminal charges have been laid.

### **Section 185 If child a family member**

- Section 185 adds additional factors to be considered when making a protection order where children are involved.
- It requires the court to consider whether a child family member specifically requires protection in any circumstance where family violence may occur including to protect them from exposure to family violence.
- This section responds to recommendations, such as those from the Representative for Children and Youth in the *Honouring Christian Lee* report, that challenge the assumption that the safety of a child is secured through the safety of the parent. It recognizes that children may specifically require protection as well.

### **Section 186 Orders without notice**

- Section 186 clarifies that protection orders can be made without notice, and sets out how an order may be set aside, changed or terminated.
- It establishes that in cases where family violence is a risk, orders without notice may be appropriate to promote safety.

- Where an order is made without notice, the court may set aside or change the order if the order is not appropriate on consideration of the evidence of the party against whom the order was made. If the order is set aside, it is like the order never was and there is no prejudice to the party.

### **Section 187 Changing or terminating orders respecting protection**

- Section 187 allows the court to shorten, lengthen, terminate or otherwise change a protection order after it is made to address changing circumstances or evolving risk.

### **Section 188 Enforcing orders respecting protection**

- Restraining orders under the Family Relations Act were enforced through civil law. Enforcement of restraining orders under the Family Relations Act was identified as a critical justice system failure.
- Section 188 replaces section 128 of the Family Relations Act, which provides for civil enforcement through the Offence Act, with a section which states that neither the Offence Act nor the Family Law Act apply to the enforcement of a protection order.
- The Act deliberately remains silent on how protection orders are to be enforced. This is necessary to allow for enforcement through the Criminal Code. Section 127 of the Criminal Code is a default enforcement mechanism that, by its terms, applies only where there is no other remedy available under the statute. Section 127 of the Criminal Code is successfully being used to enforce civil protection orders in Manitoba, and recently Ontario amended its legislation to do the same.
- Police authority to act on a breach of a protection orders is also clearly provided for. This will avoid confusion and promote consistent police enforcement at the time of a breach.
- The protection order itself will be a civil order. When the order is breached, the breach triggers the use of the Criminal Code. If the restrained party never breaches the protection order, they are never brought into the criminal system.
- Using the Criminal Code to enforce protection orders will promote timely, effective enforcement, which can save lives. It streamlines enforcement and limits it to the criminal justice system, where the police and Crown counsel are familiar with the processes and tools, and it sends the message that breaches of protection orders will be taken seriously.

### **Section 189 Conflict between orders**

- Section 189 gives priority to safety-related orders in cases where they conflict with another order relating to a family law dispute. These orders include: protection orders under the Family Law Act, orders under the Child, Family and Community Services Act and the Criminal Code, or safety related orders made under legislation from another province.
- For example, if a parent has parenting time but later bail conditions prohibit contact with the child, the safety-related bail conditions prevail and there is to be no contact with the child until the issue or inconsistency between the orders is resolved.
- This will promote safety, eliminate confusion and provide for a consistent approach.

### **Section 190 Rights not affected by Act**

- Section 190 states that the making of a protection order does not affect any existing right of action of a person affected by family violence.
- It clarifies that a person affected by family violence may continue to pursue civil or criminal proceedings in tandem with obtaining a protection order.

### **Section 191 Extraprovincial orders**

- As part of the new protection order regime, consequential amendments have been made to the Enforcement of Canadian Judgments and Decrees Act which adopt the Uniform Law Conference of Canada's recommendations. These amendments allow civil protection orders made by judges elsewhere in Canada to be enforced like protection orders from British Columbia without the need to register the out-of- province order. Manitoba, Saskatchewan and Nova Scotia have already enacted these amendments.
- This section is intended to promote greater safety and consistency across Canada.

## **Part 10 – Court Processes**

This Part sets out the statutory framework respecting court processes. It defines the scope of the court's jurisdiction, provides for appeals, and provides for standing in Aboriginal matters. As well, this Part provides authority for the court to make orders respecting procedural matters, orders to manage the case or the parties, and orders for enforcement.

Unless indicated, authority throughout the Act is provided to both courts. Unlike the Supreme Court which has an inherent jurisdiction to make certain orders, Provincial Court is provided its authority by legislation alone. Outlining the broad range of powers in this Part provides the Provincial Court with a greater range of tools and powers to effectively manage proceedings, tailor procedures and results and provide appropriate remedies.

### **Division 1 – Jurisdiction of Court Generally**

This Division sets out the scope of Supreme Court and Provincial Court jurisdiction respecting matters under the Family Law Act. It also provides rules for dealing with situations where both courts have jurisdiction over a matter and proceedings may be brought in either court.

#### **Section 192 Supreme Court jurisdiction**

- Section 192 clarifies that the Supreme Court has jurisdiction over marriage, divorce and all matters in the Family Law Act, subject to any restrictions imposed by the federal Divorce Act.
- It carries over section 5 of the Family Relations Act with minor changes.

#### **Section 193 Provincial Court jurisdiction**

- Section 193 replaces section 6 of the Family Relations Act with a provision that more clearly outlines Provincial Court jurisdiction. The provision does not withdraw power that had previously been within the Provincial Court's purview but more clearly expresses the restrictions in several areas to reflect the case law and provide clarity.
- Firstly, it restricts Provincial Court to making declarations of parentage except where the issue of parentage is related to another matter, such as child support. For example, a person cannot apply to Provincial Court seeking a declaration of parentage, but if a dispute about parentage arise in a child support case, and one person says they are not the parent, the Provincial Court may make a determination for the purposes of establishing whether there is a duty to pay child support.
- Secondly, the section prohibits Provincial Court from making any order respecting property, including orders for exclusive occupancy of the family residence.
- Despite the restriction on making property orders, the Provincial Court may make safety-related protection orders which may have the effect of restricting access to a family residence, since the Provincial Court has jurisdiction with regard to public safety.

## Section 194 Overlapping court jurisdiction

- Section 194 carries over sections 7 and 8 of the Family Relations Act with changes to clarify the process for dealing with areas of overlapping court jurisdiction between Provincial and Supreme Court.
- As was the case under the Family Relations Act, proceedings may be commenced in both courts as long as relief has not already been granted in by one court.
- When applications are brought in different courts for the same or similar relief, the section provides the court a number measures to deal with the applications more effectively, including the ability to consolidate proceedings, make orders and decline to hear matters.
- It also outlines the rules for when the Supreme Court may and may not change, suspend or terminate Provincial Court orders. This prevents parties from taking a second kick at the can at the same issue where it has already been effectively resolved. At the same time, this section provides flexibility to adjust an order from Provincial Court where an issue in Supreme Court will impact that order, without requiring the parties to go back to Provincial Court again.

## Section 195 Provincial Court enforcement of Supreme Court orders

- Section 195 provides that Provincial Court can enforce Supreme Court orders respecting parental responsibilities or contact with a child provided that procedural requirements are met.
- It carries over section 12 of the Family Relations Act with minor changes.

## Section 196 Certain actions must not be maintained

- Section 196 carries over section 123 of the Family Relations Act. This section prohibits specific common law actions for matrimonial torts:
  - **Restitution of conjugal rights:** remedy that obligates a spouse to continue to live with the other spouse and carry out spousal duties
  - **Loss of consortium** : action based on the inability of one's spouse to have normal marital relations
  - **Criminal conversation:** action for damages against a person who has coaxed their spouse into adultery
  - **Jactitation of marriage:** A false boast of marriage
  - **Enticement of a spouse:** action against a person who caused a husband to lose the love, services or society of his wife.
  - **Harbouring of a spouse:** action against a person who harbour a man's wife after notice that she has left him without his consent
  - **Breach of promise to marry:** right of action for breaking a commitment to enter into matrimony.
- Section 123(3) and (4) are not carried over because they are no longer required: (3) is irrelevant because the relevant time frame for bringing an action has long passed; (4) is unnecessary because the Divorce Act (Canada) deals with the grounds for dissolution of marriage and is a no-fault system.

## **Division 2 – Procedural Matters**

This Division addresses procedural matters respecting: a lawyer's duties, timing of bringing a family law disputes to the court, the involvement of children, intervener status, applications that may be heard in a party's absence, spousal compellability, privacy and information that should accompany orders.

### **Section 197 Complying with duties respecting family dispute resolution**

- Section 197 requires lawyers to certify that they have complied with their duties in section 8 to discuss dispute resolution options with their client prior to starting a proceeding in court.
- It promotes the informed use of out-of-court processes to resolve family law disputes.
- This section harmonizes the Act with section 9 of the Divorce Act which requires lawyers to certify that they have complied with the duty to advise clients of family dispute resolution options before commencing an action.

### **Section 198 Time limits**

- Section 198 provides clear limitation periods for certain proceedings, applications and agreements.
- The section also suspends the running of limitation periods during dispute resolution. This will discourage the need to start a proceeding in court where it is likely the dispute will be resolved out of court, but does so without prejudicing the parties if settlement is not achieved.
- Limitation periods were unclear in the Family Relations Act as they were embedded in the definitions section. This was confusing and did not provide adequate direction.

### **Section 199 Conduct of proceeding**

- Section 199 encourages a child-focussed and less-adversarial approach to hearings.
- It replaces and expands upon section 120 of the Family Relations Act.

### **Section 200 Applications may be heard in party's absence**

- Section 200 provides authority, in certain circumstances, for the court to hear applications when one party is absent.
- Under the Family Relations Act applications were made in a parties' absence under the Court Rules. Section 200 ensures that both courts have adequate authority to hear these applications and promotes greater consistency.

### **Section 201 Legal capacity of children**

- Section 201 provides for the circumstances under which a child has the legal capacity to conduct or defend a proceeding on their own behalf without a litigation guardian, including once they are 16 years of age or older.

- The section also allows a court to appoint a litigation guardian for a child, even where the child has legal capacity under this section.
- The changes made in this section codify the common law.
- Section 201 replaces section 4(2) of the Family Relations Act which only recognized married children as having the legal capacity to conduct or defend an application. Section 4(1) of the Family Relations Act is not carried forward because marital status is no longer relevant in terms of determining a legal disability.

### **Section 202 Court may decide how child's evidence is received**

- Section 202 provides courts the flexibility to admit children's evidence that may not otherwise be allowed by the rules of evidence. This also recognizes that it may not be appropriate for children to be fully involved in court processes.
- The purpose of the section is to allow children to participate in proceedings that impact them, which often results in better outcomes for children, without forcing them to engage in the proceeding.
- The provision adopts an approach used in the Child, Family and Community Services Act in child protection proceedings.

### **Section 203 Children's lawyer**

- Section 203 allows the court to appoint a lawyer to represent a child in high conflict parenting disputes where it is necessary to protect the child's interest.
- Children's lawyers can be a useful tool in highly conflicted parenting cases. They can refocus attention on the child's best interests and help ensure that decision-makers have appropriate information when parents are unwilling or unable to provide it.
- However, use of children's lawyers is not appropriate in the vast majority of cases, as it tends to draw the child further into the conflict. It may increase the adversarial nature of the proceedings, and therefore may work counter to the child's best interests. Research shows that the best way to manage high conflict families is to get them out of court and into more interventionist approaches where they can resolve underlying issues.
- If an appointment is made, the court may allocate among one or both of the parties all or part of the lawyers' fees and disbursements. This approach used in Alberta's Family Law Act.
- Section 203 replaces section 2 of the Family Relations Act with a section that allows the court to appoint a lawyer to represent a child in high conflict parenting disputes where it is necessary to protect the child's interest. Section 2 of the Family Relations Act referred to a government-funded program of children's lawyers (family advocates) that is not operational.

### **Section 204 Intervention by Attorney General or other person**

- This section allows the Attorney General or any other person to apply for leave to intervene in a proceeding at the discretion of the court.
- The section recognizes that interveners acting in the public's interest can assist the court in making determinations in some cases.
- Section 204 carries over section 18 of the Family Relations Act.

### **Section 205 Spouse Compellable as witness**

- Section 205 establishes that the Act supersedes section 8 of the Evidence Act which states that spouses are not compellable witnesses against each other. This clarification is important otherwise spouses would be unable to testify in proceedings brought under the Act.
- Section 205 carries over section 19 of the Family Relations Act.

### **Section 206 Exclusion of the public or from publication**

- Section 206 allows the court to exclude any person or the public from a hearing and prohibit publication of the identities of parties or children.
- This section provides the express authority for both courts to better manage their proceedings where appropriate.

### **Section 207 Information accompanying orders**

- Section 207 mandates that prescribed information be given to a party when a court makes an order.
- The particulars of what and how information is to be given will be set out in the regulations.
- This section allows for the development of mandatory information materials to assist parties about their obligations and options after an order is made.



## **Division 3 – Standing in Aboriginal Matters**

This Division carries over the provisions from the Family Relations Act respecting standing in proceedings respecting Aboriginal matters. The provisions were scattered throughout the Family Relations Act. This Division consolidates, but does not substantively change these provisions.

### **Section 208 Guardianship of Nisga'a child**

- This section provides that the Nisga'a Lisims Government must be served notice and has standing in all proceedings with respect to a Nisga'a child.
- It ensures that British Columbia fulfils its obligations under the Nisga'a treaty.
- Section 208 carries over section 22.1 of the Family Relations Act.

### **Section 209 Guardianship of treaty first nation child**

- This section requires that in cases where a first nation treaty provides for it, treaty first nations must be served notice and have standing in proceedings respecting treaty first nation children.
- This section ensures that British Columbia fulfils its obligations under first nation treaties.
- Section 209 carries over section 22.2 of the Family Relations Act.

### **Section 210 Property proceeding involving treaty lands**

- This section provides treaty first nations with standing in proceedings where one party is a member of the first nation and a parcel of treaty land is at issue.
- It ensures that British Columbia fulfils its obligations under first nation treaties.
- Section 210 carries over section 66.1 of the Family Relations Act.

## **Division 4 - General Orders the Court May Make**

This Division sets out the general types of orders a court may make during a proceeding. Each Part of the Family Law Act provides specific order making powers relating to their subject matter. This Division outlines additional types of orders that either the entire Act or multiple parts. The purpose of the Division is to consolidate the residual order making powers to make the Act more readable and coherent.

### **Section 211 Orders respecting reports**

- Section 211 allows the courts to order reports on the needs and views of the child or on the ability of parties to satisfy the needs of a child in proceedings related to guardianship, parenting responsibilities and parenting time.
- These reports are:
  - publically funded through Family Justice Services Division (MOJ), or
  - privately funded by private practitioners.
- Section 211 carries over section 15 of the Family Relations Act with minor changes to promote clarity.

### **Section 212 Orders respecting disclosure**

- Section 212 provides the court authority to order disclosure of information by parties at any stage in the proceeding.
- Where the Court Rules provide rules respecting disclosure, the rules will define what disclosure is required.
- This section encourages people to make timely and appropriate disclosure knowing that the court may compel them to do so.

### **Section 213 Enforcing orders respecting disclosure**

- Section 213 provides both courts with a broad spectrum of measures to compel disclosure, including making an order based on an attributed income, ordering payment of security or a fine, or payment to the other party for expenses incurred as a result of the non-compliance.
- Under section 92 of the Family Relations Act, the only way for a court to enforce an order for disclosure was to impose a fine. The section was ineffective and rarely used. Securing adequate disclosure can be an extremely time consuming and costly exercise for a party. The inability of courts, particularly Provincial Court whose powers are limited by the legislation, to effectively compel disclosure was identified as a significant problem that undermined early settlement and fair outcomes.
- The wide range of remedies will ensure both courts may effectively compel adequate disclosure and will deter parties from delaying full disclosure.
- In conjunction, there are other sections of the Family Law Act that promote full and frank disclosure. Section 5 provides a duty to parties to disclose even prior to starting a court proceeding. Where an order or agreement was based on false or partial disclosure, the

order may be changed or the agreement may be set aside and replaced with an appropriate order: see for example, section 93 [Setting aside agreements respecting property], section 164 [Setting aside agreements respecting spousal support], section 167 [Changing, suspending or terminating orders respecting spousal support]. Under section 214 [Orders respecting agreements], where an agreement is set aside based on non-disclosure, the court may also penalize the person if they entered into an agreement knowing they were not disclosing significant property.

### **Section 214 Orders respecting agreements**

- Section 214 clarifies the relationship between orders and agreements.
- The section provides the following clarifications:
  - if a part of an agreement is set aside by a court, it is severed from the agreement;
  - the terms of an agreement may be incorporated into an order;
  - where an agreement is made and, later, an order is made respecting the same issue, the order replaces the agreement. However, it only replaces the agreement respecting that particular issue, the remainder of the agreement remains effective;
- This section also allows a court to penalize a person if the person entered into an agreement knowing they were not disclosing significant property. If a court sets aside an agreement for failure to disclose information, the court may order the non-disclosing party to reimburse the other party for the expenses related to securing the faulty agreement. This will encourage disclosure and protect a party who incurs expenses in securing an agreement in good faith, where the other party's non-disclosure nullifies the agreement.
- Section 214 expands upon section 11 of the Family Relations Act that allowed a court to incorporate the terms of an agreement into an order.

### **Section 215 Changing, suspending or terminating orders generally**

- This section generally allows the court to change, suspend or terminate an order.
- This section is a catch-all and may only be used where the matter is not specifically dealt with in another part of the Act. Other parts of the Act provide for additional limits or considerations for changing specific types of orders: for example section 167 provides specific rules for changing spousal support orders.
- This section may not be used to change order respecting property or pension division. Unlike orders with regard to other matters, property or pension division is final. As a result, these orders may not be changed. Property division orders may only be appealed within the limitation period.
- Section 215 carries over section 20 of the Family Relations Act.

### **Section 216 Court may make interim orders**

- Section 216 allows a court to make interim orders prior to a final determination of an issue.
- The section adds rules about when a court may change an interim order. Under the Family Relations Act, it was unclear whether a court could change an interim order. This resulted in hardship to a party whose circumstances have changed but is otherwise unable to adjust the order.
- Section 216 replaces and expands section 9 of the Family Relations Act.

### **Section 217 Interim orders before changing, suspending or terminating orders**

- Section 217 authorizes the court to make an interim order pending a determination on whether an order will be changed, suspended, or terminated.
- Often a time lag exists between an application and a hearing. This section is used where the parties already have an order and application is made to change the order due to a change in circumstances. Where it may cause hardship for the person to continue to be bound by the original order, the court may make an interim order pending the hearing on whether the original order should be changed.

### **Section 218 Terms and conditions of orders**

- Section 218 allows a court to include in an order any appropriate term or condition. The section provides both courts the flexibility to tailor orders to the circumstances.
- It does not apply to a protection order in which the terms and conditions are limited to safety-related matters. This is important to avoid confusion for police officers; it is important for them to know that all clauses in a protection order deal with safety and breaches are appropriate to be enforced as a criminal issue.

### **Section 219 Persons may consent to order being made**

- This section provides for consent orders.
- It allows parties to come to an agreement before or during a proceeding and subject it to the rules relating to orders rather than agreements.
- This changes section 10 of the Family Relations Act in that it removes the ability of a consent order being obtained without any evidence. Since orders are given greater deference than an agreement and may only be changed under limited circumstances, this section requires the court to be satisfied that there is adequate evidence to support the consent order. Generally, this section reflects existing practice.

### **Section 220 Court may make order on behalf of child**

- This section allows the court to make an order for relief on behalf of a child, if a spouse's or parent's application should have been on behalf of the child.
- Section 220 carries over section 17 of the Family Relations Act.

## Section 221 Misuse of court process

- Section 221 adds a provision that provides the court with the power to prohibit or limit a party from making further applications in cases where the court feels a party is making trivial or vexatious applications or is otherwise misusing the court process.
- It provides a case management tool for courts to deal effectively with high conflict families and vexatious litigants, who often make repeated applications without adequate grounds.
- This section allows a court to restrict a party from making future applications about the same issue or limit them from coming to court until they have complied with the conditions imposed. If the person has refused to comply with an order, the court may refuse to allow the party leave to make an application to court until they have complied with their orders.
- It also provides the court with other remedies. For example, where the party has repeatedly taken their spouse to court without adequate grounds, they may be required to pay the expenses the spouse incurred as a result. Alternatively, the court may order the person to pay a fine for using the justice system inappropriately.

## **Division 5 – Orders Respecting Conduct**

The majority of the provisions in this Division are new.

This Division provides a court with a wide range of tools to help judges manage behaviour, de-escalate tensions, promote compliance, and facilitate the settlement of disputes. It includes a collection of tools and remedies that range from preventive measures, such as sending people to counselling or programs to punitive measures, such as fines or payment of expenses to encourage compliance. Conduct orders will allow a judge to tailor processes to the needs of a particular family.

These new measures are available to both Supreme and Provincial Court. This will ensure more consistency between tools and remedies available between the two levels of court and ensure that Provincial Court, whose authority to act must be provided for in legislation, has the tools they need to effectively manage family law cases.

These tools can be used in any family law case, but will be particularly effective in managing high conflict families. Although high conflict families constitute a minority of separating or divorcing couples, they use a disproportionate amount of court resources. Some reports speculate that 10% of families demonstrating high conflict behaviour use up to 90% of family justice system resources. Further, the research shows that children in high conflict families are more likely to be damaged by their parents' ongoing conflict. These families often require a more interventionist approach to resolve the underlying issues, manage the dispute and contain their extraordinary demands on the resources of the justice system.

### **Section 222 Purposes for which orders respecting conduct may be made**

- Section 222 enable courts to use conduct orders at any time to facilitate settlement, facilitate and manage behaviours that might frustrate a resolution, prevent the misuse of court processes and facilitate arrangements pending final determination.

### **Section 223 Orders respecting case management**

- Section 223 provides the court with the ability to make orders to assist in effective case management.
- For example, a court may dismiss an application, adjourn a proceeding while the parties attempt to resolve a dispute or attend a program, require one judge to hear all further applications, or restrict court applications where a parenting coordinator is involved in the case.

### **Section 224 Orders respecting dispute resolution, counselling and programs**

- Section 224 authorizes the courts to require parties to attend family dispute resolution or attend counselling, or services or programs. These interventions are often more effective and more affordable for families than court.
- Interventions such as dispute resolution, counselling and programs can be used to de-escalate conflict, resolve underlying issues, promote settlement and encourage adherence to orders or agreements. Preventative tools such as these can better address the underlying causes of conflict.

- If there are costs associated, the court may allocate the costs between the parties. The financial costs associated with dispute resolution are almost always significantly lower than the cost of court, particularly where lawyers are involved. As well, the emotional costs associated with court are high.
- There are publically-funded Family Justice Centres and Justice Access Centres located in communities across British Columbia. Family Justice Counsellors offer assistance to families upon separation by providing dispute resolution services and information and referrals to other services. As well, most separating parents are required to attend a “Parenting After Separation” course prior to filing an action in court.

### **Section 225 Orders restricting communications**

- Section 225 allows courts to make restrictions or conditions respecting communications between the parties in order to manage behaviour and limit conflict between parties.
- For example, under this provision, an order could be made that requires the parties to communicate by email, except in emergencies, to avoid heated conversations in front of the children.
- This provision is not to be used where there is a safety risk and a protection order is more appropriate. In those cases protection orders should be sought or ordered instead.
- Under section 228 [Enforcing orders respecting conduct], repeated breaches of a conduct order restricting communications are grounds for a court to consider if it would be appropriate to make a protection order under Part 9 of the Act. Research shows that when restrictions on contact or communication are repeatedly breached, it is often an indicator of escalating risk of harm.
- The Act makes an important distinction between conduct orders and protection orders: conduct orders are tools to manage the misbehaviour of parties and are enforced in family court by the parties. Where there is safety risk due to family violence, a conduct order alone is not to be used to manage the risk. Protection orders also restrict communications (and contact) but are for the purpose of preventing violence. A protection order is enforced by the police and Crown under the Criminal Code. Where there is risk of harm, a protection order should be made since it is intended to prevent family violence and provides an appropriate justice system response.

### **Section 226 Orders respecting residence**

- Section 226 provides that a court may make interim arrangements respecting the residence and related expenses while the parties sort out their final arrangements.
- For example, an order may be made to determine who pays the mortgage or utilities, to prevent a person from terminating utilities for a home, or to require supervision of the removal of personal belongings from the residence.
- The section provides the Provincial Court and Supreme Court with measures to diffuse conflict during a proceeding.

### **Section 227 Other orders respecting conduct**

- The section provides further tools for courts to manage behaviour such as ordering a party to provide security to ensure they comply with an order, report to the court or another person or program to monitor compliance, or anything else the court feels is appropriate.

### **Section 228 Enforcing orders respecting conduct**

- Section 228 provides remedies and consequences for failure to comply with a conduct order made under sections 223 to 227.
- The range of remedies is intended to enable the application of progressively more serious responses, without unduly limiting the court's discretion to make orders appropriate to the circumstances of the case. Both the conduct orders and the remedies allow judges to tailor their response to the circumstances of the particular case.
- This section also provides that where there are repeated breaches of a conduct order respecting communications a court must consider if it would be appropriate to make a protection order under Part 9 of the Act. Research shows that when restrictions on contact or communication are repeatedly breached, it is often an indicator of escalating risk of harm.



## **Division 6 – Enforcement Generally**

This Division provides general rules related to enforcement. It also provides remedies for breaches of orders where the Act does not provide specific remedies and provides for extraordinary remedies that may be used where no other remedy under the Act would reasonably ensure compliance.

### **Section 229 Service need not be proved**

- Section 229 provides that an order is enforceable without proof that it was served on the other party. This section clarifies that orders be effective as soon as they are made.
- Section 229 carries over section 13 of the Family Relations Act.

### **Section 230 Enforcing orders generally**

- Section 230 provides for general enforcement of orders made under the Act.
- These remedies are similar to the Supreme Court contempt of court powers. This section promotes greater consistency between Provincial and Supreme Court remedies in family law cases.
- These orders may be used only if there is no other provision under the Act that applies for the purposes of enforcing an order. For example, the Act provides for remedies specifically tailored to breaches of orders for parenting time and enforcement must be dealt with under that section.
- The Family Relations Act offered few effective responses where the terms of family law orders or agreements are not honoured. This was a problem in both courts, but was particularly problematic in the Provincial Court, which only has authority to act as provided by legislation.

### **Section 231 Extraordinary remedies**

- Section 231 allows for the limited use of two extraordinary remedies: police apprehension of a child and imprisonment. These two remedies may only be used when there is no other less severe remedy under the Act sufficient to secure compliance.
- Police apprehension of a child may only be ordered where a person who has parenting time or contact with a child has wrongfully withheld a child and the court determines that no other remedy (under Part 4 Division 5- Compliance Respecting Parenting Time of Contact with a Child) will be sufficient to force compliance.
- Imprisonment may only be ordered after the person has had an opportunity to be heard.
- This approach balances the need to have more severe remedies available, with the recognition that other remedies are usually more appropriate in family law cases. Although these extraordinary remedies should not be regularly used, because they have such a negative impact on children, there are rare cases where a court may require them. The Act provides a wide range of tools and remedies to ensure compliance that will be sufficient in most cases.

- This section replicates remedies available under sections 36 of the Family Relations Act which allowed for police apprehension of a child and section 128 which made breaches of certain orders an offence punishable by imprisonment under the Offence Act. Section 231 provides a simpler, more streamlined approach than that in the Family Relations Act.

### **Section 232 Offence Act application**

- Section 232 provides that the remedies in the Offence Act no longer apply in most family law matters. . This section creates an opt-out from the Offence Act, which has been criticized as being ineffective and difficult to use in family law cases.
- The Family Law Act provides a complete code for enforcement and almost all available remedies are included within the Act.
- This streamlines and simplifies enforcement and allows for a more flexible and nuanced approach that better responds to families' interests.
- This section replaces section 128 of the Family Relations Act. Section 128 provided that violating specified provisions constituted an offence which drew in the Offence Act.

## **Division 7 - Appeals**

This Division provides rules respecting appeals. It generally carries over the appeal provisions from the Family Relations Act.

### **Section 233 Appeals from Provincial Court orders**

- This section provides for an appeal process from the Provincial Court to the Supreme Court.
- Section 233 carries over section 16(2), (3), (6) and (7) of the Family Relations Act. Section 16(1) is not carried over in this provision because it has been integrated into section 198 of the Act respecting time limits. Sections 16(4) and (5) of the Family Relations Act addressed procedural issues that are already appropriately found in the Court Rules and will not be carried over.

### **Section 234 Order under appeal remains in effect**

- This section provides that, unless otherwise provided in the order, an order remains in full force while an appeal is made.
- Section 234 carries over section 14 of the Family Relations Act.

## **Part 11 – Search Officers**

This Part establishes and deals with the activities of search officers. It combines what were two distinct portions of the Family Relations Act into one Part and modernizes the sections to better reflect the current activities of search officers. It does not expand search officer powers but provides details regarding authority and restrictions to support the current framework of the search officer program.

### **Section 235 Definitions**

- This section defines terms required to support interpretation of this Part.
- Section 235 replaces the definitions sections 87 and 98.1 of the Family Relations Act.

### **Section 236 Search officers**

- Section 236 authorizes the appointment of persons as “search officers”.
- Section 236 carries over section 98 of the Family Relations Act and changed the name of the employees from “enforcement officers” to “search officers”.

### **Section 237 Searchable information**

- Section 237 lists the type of information that a search officer may request and disclose in the course of assisting persons with issues related to guardianship, parenting arrangements, contact and support under this part. It carries over much of subsections 99(3) and (4) of the Family Relations Act, while providing greater clarity with respect to practice.
- Searchable information includes information:
  - that can confirm the identity of a party or potential party;
  - respecting the: location, address, contact information, employer, employment address, location of or particulars about a party’s assets, and particulars about a party’s income; and
  - about a protection order made against the party.
- Searchable information does not include:
  - personal correspondence between a party and his or her parent, child, spouse or sibling.
  - information in the possession or control of the party’s solicitor, a family justice counsellor or person who assists a family justice counsellor and is a prescribed person under the confidentiality of information section in Division 2.
  - information collected under the Statistics Act that cannot be disclosed under section 9(1)(b) of that Act.

## **Section 238 Requesting and disclosing searchable information**

- This section describes the purposes for which searchable information may be requested or disclosed. These include:
  - taking an action or considering whether an action should be taken in relation to a child care or support issue;
  - recalculating child support;
  - enforcing rights or duties respecting a child care or support issue; or
  - fulfilling a duty under an international convention.
- This section also allows searchable information to be requested or disclosed to protect the safety and security of a party, a search officer or a person to whom information is given.
- This section does not expand search officer powers but provides details regarding authority and restrictions to support the current framework of the search officer program.
- Section 238 carries forward and modernizes sections 99(1), (3.1) and 39(1) of the Family Relations Act.

## **Section 239 Requesting searchable information**

- Section 239 provision states that a search officer may request searchable information from anyone. Following the request, the person must provide the information as long as it is not subject to privilege or confidentiality.
- This section provides the authority for search officers to perform their duties.
- Section 239 carries over sections 99(1), 99(5) and 39(1) and 39(3) of the Family Relations Act.

## **Section 240 Disclosing searchable information**

- This section lists to whom a search officer may disclose searchable information.
- Section 240 replaces section 99 (6) of the Family Relations Act. Section 99(6) allowed search officers to disclose information to people performing similar duties in other jurisdictions. The power to provide information to the people actually requesting it was not expressly provided for.

## **Section 241 Information-sharing agreements**

- Section 241 authorizes the Attorney General to enter into information-sharing agreements and create cooperative networks between search officers and ministries, public bodies, or organizations as well as between British Columbia and other provinces to improve the effectiveness of search officers.
- Subsection (2) includes what must be included in an information sharing agreement entered into under subsection (1).

### **Section 242 Orders respecting searchable information**

- Section 242 allows a search officer to apply for a court order to require a person to give searchable information to the search officer.
- Section 242 carries over sections 40 and 100 of the Family Relations Act.

### **Section 243 Restrictions on disclosure of information**

- This section restricts disclosure of searchable information to certain circumstances, specifically only for the purpose for which information was obtained or to protect person or property from harm.
- The section contains exceptions to the rule, allowing for disclosure of personal information that has been in existence for 100 years, other information in existence for 50 years and that which is allowed under the Freedom of Information Act.
- The purpose of section 243 is to protect the integrity of searchable information by it being used improperly.
- Section 243 carries over sections, 100(4) to (6) and 41 of the Family Relations Act.

### **Section 244 Offences**

- Section 244 makes it an offence if a party does not comply with a request or order for searchable information, or the person knowingly provides false or misleading information.
- Section 244 carries over section 128(2) and (4) of the Family Relations Act. It is the only section of the Family Law Act that continues to be enforced under the Offence Act.

## **Part 12 – Regulations**

This Part enables the Lieutenant Governor in Council to establish subordinate legislation to facilitate the operation of the Act.

The regulations in this part carry-over much of the regulation-making power found the Family Relations Act. This Part also introduces new regulation making power in the areas unique or significantly expanded in the Family Law Act, such as family dispute resolution.

### **Section 245 Regulations respecting family dispute resolution**

- Section 245 gives the Lieutenant Governor in Council the authority to create regulations to implement the provisions in Part 2 – Resolution of Family Law Disputes.
- It authorizes regulations to be made regarding:
  - the process and standards of family dispute resolution;
  - the classes of persons and qualifications required for who may be a family dispute resolution professional;
  - the mandatory assessment of family violence by a person who has the required training, experience and other qualifications; and differential regulations for different types of family dispute resolution.
- This section also authorizes regulations to be made about the following with regard to mandatory family dispute resolution processes:
  - the type of processes to be used;
  - limits or conditions on participating in mandatory processes;
  - steps that must be taken before entering mandatory processes;
  - creating exemptions to requiring mandatory processes; and
  - any other matter that may be necessary to engage in mandatory processes.

### **Section 246 Regulations respecting pension division**

- Section 246 section gives the Lieutenant Governor in Council the authority to create regulations to implement the provisions in Part 6 – Pension Division.

### **Section 247 Regulations respecting child support**

- Section 247 carries over section 129(2) and (4) of the Family Relations Act which gives the Lieutenant Governor in Council the authority to create regulations to establish and implement the use of the Child Support Guidelines and the child support service.

### **Section 248 General regulation-making powers**

- Section 248 gives the Lieutenant Governor in Council general regulation making authority to support the provisions of the Family Law Act, including prescribing forms for the purposes of the Act, providing limits and details respecting the children’s property regime under Part 8, and a general authorization to make regulations respecting any other

matter not specifically referenced in this section for which the Act contemplates regulations.

### **Section 249 Other regulation-making powers**

- The section includes standard regulation making powers allowing regulations to be made in accordance with the types of regulations found in section 41 of the Interpretation Act.
- This section also permits regulations to be made designating classes of people, providing discretion to the minister, or allowing adoption of other Acts by reference.
- Section 249 carries over section 129(1) of the Family Relations Act.



## **Part 13 – Transitional Provisions**

This Part creates rules for transitioning from using the Family Relations Act to using the Family Law Act. It deals with the application of the Act with regard to ongoing court proceedings as well as how to deal with orders and agreements made under Family Relations Act.

The Interpretation Act provides a default that the Act will be used upon it becoming effective. Therefore, all new proceedings will be brought under the Family Law Act after it comes into effect, unless otherwise is provided in these transition provisions. Any issue not specifically addressed in this Part will be dealt with under the Act once it comes into effect.

Generally, the transition provisions support the immediate use of the Family Law Act for family law disputes, even where they have been started under the Family Relations Act or where there are existing agreements or orders made under the Family Relations Act. This promotes a speedy transition to the new regime and ensures the tools and benefits of the new law can be realized immediately by all families.

There are a couple of exceptions to this general transition rule:

- With the exception of pensions, property division proceedings that were commenced under the Family Relations Act will be determined by a court under the Family Relations Act unless the parties agree to use the Family Law Act; and
- Restraining orders granted under the Family Relations Act will remain effective as per their terms.

### **Section 250 Definition**

- This section identifies the Family Relations Act as the “former Act”.

### **Section 251 Transition – care of and time with children**

- Section 251 addresses how orders or agreements made for custody, guardianship or access under the Family Relations Act will be dealt with under the Family Law Act.
- This section provides that orders or agreements which refer to custody, guardianship, and access that were made under the Family Relations Act, before the coming into force of the Family Law Act, will be considered and interpreted according to the new language under the Family Law Act as follows:
  - A person who had custody or guardianship under the Family Relations Act will be a guardian with parental responsibilities under the Family Law Act. The time that such a person has with the child under the old order or agreement will be their parenting time.
  - A person who has access but not custody or guardianship under the Family Relations Act will have contact with the child under the Family Law Act. They will not be a guardian.
- Details of a party’s parental responsibilities, parenting time or contact will be determined as best they can be through consideration of how the terms and conditions of custody, guardianship and access orders or agreements are described.

- Proceedings regarding parenting arrangements or contact that have been started, but not determined, before the Family Law Act is in force, do not need special transition sections. Section 4 of the Interpretation Act provides a default rule that the Act will be used upon it becoming effective, so cases started under the Family Relations Act will be determined under the Family Law Act.

### **Section 252 Transition – proceeding respecting property division**

- Section 252 addresses how proceedings for the division of property commenced before the Family Law Act comes into effect are to be dealt with.
- Section 252 provides that the Family Relations Act continues to apply to agreements or orders made before the Family Law Act comes into force. This ensures that property division disputes that have been resolved may not be re-opened by virtue that new property division rules have been introduced.
- This section also provides that where a property division proceeding is started under the Family Relations Act, it will be determined under the Family Relations Act unless the parties agree otherwise.
- This recognizes the high cost of preparing for court in property disputes. The property division schemes under the two acts are entirely different and will require different valuations and will result in different decisions. It would be unfair and financially difficult to require parties who have had valuations completed under the old rules to revisit their calculations to provide evidence under the new scheme.

### **Section 253 Transition – pension benefits**

- This section addresses how pension benefits obtained and divisible prior to the Family Law Act coming into force will be divided.
- It states that unless an order or agreement provides otherwise, undivided pension benefits will be divided according to the rules under this Act.
- This is different than the transition proposed for other property division. The difference is that the changes to the pension regime are minor and will not likely result in very different decisions. The property division scheme is entirely different and will result in different decisions.
- Since the Bill provides greater clarity regarding pensions and is used mostly by administrators who are experts in this area of law, providing for the Bill's immediate application will streamline the process rather than complicate it.

### **Section 254 Transition – changing, suspending or terminating orders**

- Section 254 clarifies that a party may not claim that the coming into force of this Act is a change of circumstance for the purpose of changing, suspending or terminating an order or setting aside an agreement made under the Family Law Act.
- It prevents parties from applying to change their order as a result of there being a new Act. Instead, there must be a change in circumstances with respect to their particular situation, as required by the Family Law Act.

### **Section 255 Transition – restraining orders**

- Section 255 indicates that restraining orders made under the Family Relations Act continue in accordance with their terms and are not affected by the Family Law Act.
- The section ensures that people do not lose the protection of restraining orders without their knowledge, which otherwise could leave them in an unsafe situation.
- Having a restraining order does not prevent a person from seeking a protection order. Where there is a continuing safety-risk, the person may benefit from seeking a new protection order. The Family Law Act protection orders offer significant benefits over a Family Relations Act restraining order, including more effective enforcement. The Family Relations Act restraining orders are enforced through the civil justice system, whereas the Family Law Act protection orders are enforced through criminal justice system. This change simplifies the enforcement process by using tools that police are familiar with to promote more effective and serious enforcement.

### **Section 256 Transition – regulations**

- Section 256 allows the Lieutenant Governor in Council to make regulations for 3 years following the coming into force of the Act to facilitate the transition from the Family Relations Act to the Family Law Act.

## **Part 14 – Repeals, Related Amendment and Consequential Amendments**

This Part repeals the Family Relations Act and provides for the commencement of the Bill.

It also makes amendments to over 80 other British Columbian Acts made necessary by the changes proposed in the Family Law Act. Most of these consequential amendments are minor and housekeeping in nature. The intention of consequential amendments is to maintain the status quo, while updating the language to ensure consistency within British Columbian legislation.

An exception is the changes made to the Commercial Arbitration Act. This act is changed to the Arbitration Act and substantive changes are made to it to provide for a more defined framework for the use of arbitration in family law cases. The substantive changes to this act are explained below.

### **Arbitration Act**

#### **Section 305 (of the Family Law Act)**

- The title of the Commercial Arbitration Act is changed to the Arbitration Act to reflect the expanded use of arbitration in family law disputes.
- The Commercial Arbitration Act was previously used to conduct family law arbitrations, but it was a cumbersome fit. Family law is unique and requires special rules and safeguards to protect vulnerable parties.
- This act is amended to provide for additional provisions, tailored to family law that will allow for family law arbitration. It provides structure, rules and safeguards necessary to make arbitration effective and suitable for family law disputes.

#### **Section 307 (of the Family Law Act)**

- Section 307 makes several changes to section 2 of the Arbitration Act.
- The section clarifies that if a conflict arises in a family law dispute between the Arbitration Act and the Family Law Act, the Family Law Act provisions will trump.
- This section also requires arbitrators to consider section 37 of the Family Law Act if dealing with issues related to care and time with a child. Section 37 of the Family Law Act provides that all decisions respecting parenting arrangements must be made in the best interest of the child. This provision requires arbitrators to similarly make parenting arrangement decisions consistent with the factors set out in the Family Law Act.

#### **Section 308 (of the Family Law Act)**

- Section 308 adds a new section 2.1 in the Arbitration Act to set out specific rules respecting family law arbitrations.
- It provides that parties cannot agree to arbitrate a dispute before the issue arises. For example, a cohabitation agreement made before the parties are married cannot provide that the parties will arbitrate their family law disputes if they separate. This is to protect vulnerable parties and ensure that both parties go into arbitration willingly at the time of the event. This is important due to the binding and non-negotiable nature of arbitration.

- If the parties did make an agreement to arbitrate before the issue arose, the agreement will have no effect and the parties will be able to seek a court order instead.
- There is an exception to this rule.. Where the substantive issues of the dispute have been resolved, they may arbitrate any future disputes that have to do with implementing the decision. This allows, for example, parties to reach agreement about parenting arrangements, but provide in that agreement that future disputes about how to implement those arrangements can be determined by an arbitrator.
- A court may set aside an arbitration decision and make an order to replace it based on procedural fairness considerations, such as where improper advantage was taken of a person's vulnerability. The procedural fairness considerations are consistent with the procedural fairness test that applies to formalized agreements in the Family Law Act. This provides a safeguard to ensure a court may interfere with an arbitration decision in appropriate, but limited, circumstances.

### **Section 309 (of the Family Law Act)**

- Section 309 adds an important safeguard to section 29 of the Arbitration Act.
- An arbitration award that is inconsistent with the Family Law Act is not enforceable. This does not require the parties to specifically use the Family Law Act to govern their arbitration; parties to an arbitration can agree to use any kind of law they wish in an arbitration. But if it results in an award that is inconsistent with the principles underlying the family law, the court can make a different order if the matter is brought before the court.
- This means, for example, that a court will not be required to uphold and enforce an arbitration award that is clearly not in the best interests of the child. Nor would it likely be required to uphold an award that gives 100% of the family property to the husband without compensation, spousal support or other financial benefit to the wife, as this significantly diverges from the principles in the family law.

### **Section 310 (of the Family Law Act)**

- Section 310 modifies section 29 of the Arbitration Act by allowing a family law award to be enforced without the requiring leave of the court. Leave of the court is required for other types of arbitration awards.
- This change ensures arbitration awards are treated, for enforcement purposes, the same as family law orders or agreements.

### **Section 311 (of the Family Law Act)**

- Section 311 adds a subsection in the Arbitration Act allowing a court to change a family law arbitration award on the same basis that a family law order could be changed.
- It ensures arbitration awards are treated the same as family law orders or agreements, with respect to changing the award.
- This is important in family law, particularly with respect to parenting arrangements, because circumstances change over time and the decisions must be adapted to the changing circumstances, for example as a child's needs change as they grow up.

### **Section 312 (of the Family Law Act)**

- Section 312 amends section 31 of the Arbitration Act. It provides a specific rule respecting family law arbitrations that allows an appeal of an award on a question of law or mixed law and fact. Other types of arbitration awards may only be appealed on a question of law.
- The amendment reflects the reality of family law, which is more fact-based than other types of law.
- Section 312 ensures arbitration awards are treated, for appeal purposes, similar to family law orders.

### **Section 313 (of the Family Law Act)**

- Section 313 adds a subsection that prevents parties from agreeing to remove the ability of the court to review an arbitration award in family law disputes.
- This ensures arbitration awards are treated, for review purposes, similar to family law agreements and orders.