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CASES DEFINING FAMILIES

SEFTON HOLDINGS V CAIRNS (ENG CA CIV DIV 1988)

SE

F: Moved in with family when she was 21, was friends with daughter, amalgamated into family. Parents dies and she stays with the daughter. Daughter dies and the landlord says she does not qualify under family as stated in the Rent Act 1977

D: Appeal allowed, she is not a member of this family

- From the family's perspective she is a sister to daughter, court says no de facto adoption because she is too old (21) when she moves in.

- Court refers to *Ross v Collins* that states that two strangers cannot ever establish artificially a familial nexus even if they consider their relationship to be tantamount to that (from 1964).

- Length of residence cannot transform a resident into a family member

- Two issues: (1)Whether the D was member of Ada's family and not her parents—no case law which holds that the Rent Act covers adult adoption

-Differences between living as a member of the family and being a member of that family

-THINK ABOUT: does the court use Vanier or Census? Could argue that society is changing need more broad definition. Financial issues- we broaden here what are the repercussions in other areas (estate/property etc.). Could be well reasoned—follows case law. BUT can't people have their own say of what their family is? Weak distinction between part of Ada's and not parent's family, there is intention but not formalization (people are just living life), age distinction

JANE DOE V ALBERTA (ALTA CA 2007)

F: JD lived with partner, decides to have child by herself but maintain relationship with CL partner. Want to enter agreement that is legally enforceable that CL partner will not be considered father and has no obligations

D: Appeal dismissed, agreement cannot stand

- Took the familial approach in defining family (there is a certain way that families operate—father will care for crying child). COURT SAYS: it is an express intention but actuality of the situation is different

-Definition seems very narrow what about step parents etc. they do not always take on a parenting role—dysfunctional families. GOOD EXAMPLE: MAKE DECISIONS BASED ON HOW WE THINK FAMILIES OUGHT TO FUNCTION BUT SHOULDN'T PEOPLE BE ALLOWED TO CHOOSE

-Public law issue—if you act as a parent and have no biological connection you have child support obligations, state has large interest in people supporting their own family members

-Court bolsters decision by leaving the door open to relationships that are in the best interests of the child

FREEDOM OF CONTRACT: Court says you can contract for whatever you want but court has discretion of enforcement…isn't this actually taking away freedom of contract??

- John Does is a person standing in the place of a parent such that he falls under Part 3 of the FLA. In *Chartier v Chartier* the court looked at intention based on expressed, actions (participation in child's life, financial support, discipline, representation to society) in considering whether a person stood in the place of a parent. A PERSON'S INTENTION IS RELEVANT BUT NOT DETERMINATIVE.

Relationship of interdependence with the mother with create vis-à-vis a relationship of interdependence with the child

- Court sees no charter issue—economic issue (excluded under 7) and father chose freely to be in relationship with the mother

JH v FA (Ont CA 2009)

F: Mother comes from St. Lucia to Canada with child, claiming abuse from former partner. In Canada has relationship and has a child (who is a Canadian citizen). Immigration issue and there is deportation order. She gets court to issue a non-removal order trying to circumvent immigration by claiming custody. But there is no custody because father is not litigating custody issue.

D: Appeal allowed, mother deported

- Court says it is inappropriate, you cannot use one court to circumvent the other when there is no valid claim in family court

- There are ways in which decisions in non-family law areas do have significant impact on families (historically immigration issues)

Vanier Institute – Definition of Family

- Vanier Institute Definition (P.12): any combination of 2 or more persons who are bound together over time by ties of mutual consent, through birth and or adoption of placement who, together assume responsibilities for variant combinations of the following
  - → Physical maintenance and care of group members
  - → Addition of new members through procreation or adoption
  - → Social control of members
  - →Affective nurturance- love
  - →Socialization of children

→ Production, consumption, distribution of goods and services

JURISDICTION OF MARRIAGE

The law still distinguishes between the **essential validity of marriage** and the **formal validity of marriage**

1. Essential Validity → Inherent Capacity

- Requirement defined by Common Law
- Federal jurisdiction pursuant to s 91(26)
  → Although fed can override the Common Law, the federal government has done little to exercise its jurisdiction

2. Formal

- Provincial Jurisdiction

S 92(12) "Solemnization of marriage in the province"

- *Marriage Act*
  - s. 4: Licence
  - s. 5-6: Age
  - s. 7: Mental capacity
  - s. 17: Banns
  - s. 20-24: Solemnization
  - s. 25: Witnesses
  - s. 31: Curative Provision → **even if a few things wrong w/ validity of marriage but couple lives together for long time as if married → considered to have valid marriage**
- *Ref re Marriage Legislation in Canada* 1912
  - PC interpreted 92(12) broadly
  - marriage void if doesn't meet "**pre-ceremonial"** requirements set out in provincial statute, e.g.: ceremonial matters such as witnesses, licenses, authority of person performing the marriage
  - Age → formality (prov restrict issuance of license based on age, parental consent)

S 92(13) "Property and civil Rights"

NB That a valid marriage must meet both 1) capacity requirements and 2) conform to the formalities of the province

LAW OF ANNULMENT – THE MARRIAGE NEVER WAS

The requirements below are extremely important as they dictate whether a person can apply for Annulment or a Divorce

ANNULMENT

- Can only be granted if the marriage is **Invalid** → One of the fundamental/requisite elements of marriage has not been met.

Tendency= the greater the availability of divorce, the narrower the use of nullity (and vice versa)

Within nullity there are two types of cases:

1) Void → nothing can make it valid

- bigamy

2) Voidable → there were deficiencies with the marriage but these can be ratified later down the road

- Ex. marriage of persons underage

NB Duress: difference in opinion if it makes it void or voidable

- Most authority says voidable
- depend if the duress continues

JURISDICTION FOR ANNULMENT

Annulment of Marriage Act (Ontario 1930):

(3) **The Supreme Court of Ontario** has jurisdiction for all purposes of this Act

- Federal legislation citing that Ontario has jurisdiction to deal with annulment and law of Ontario is as it existed in the UK traditionally
    - Used to be handled by Ecclesial Courts – but no Ecclesial Courts here

WHY ANNULMENT

1) Religious purposes: require the individual to have "never been married" in order to marry again
2) Attempt to avoid financial consequences of partnership – if not married, no corollary relief after Divorce

FLA s. 1(1):

- Definition of spouse includes: either of two persons who (b) have together entered into the marriage that is voidable or void, in good faith, on the part of a person relying on this clause to assert any right

→ *Significance of this legislative definition?*

If you entered into in good faith you still can seek support (possible remedy in other courts in terms of detrimental reliance)

- see section on bigamy

INHERENT CAPACITY REQUIREMENT AS AMENDED BY FED PARL

1. Two Persons

- *Civil Marriage Act 2005*, s 2 → changed from *Hyde v Hyde*
- CL → previously "one man and one woman" *Hyde v Hyde* 1866

2. Consent → Parties must have the capacity to consent to marriage

i. Mental capacity
ii. No duress
iii. Marriage for a limited purpose does not render it invalid (immigration)

3. Capacity of Consummate
4.Consuagnity and Affinity
5. No Prior Marriage
6. Age

1. TWO PERSONS → FEDERAL PARL *CIVIL MARRIAGE ACT*

Current definition / requirement → *Civil Marriage Act* 2005 s2: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others"

HYDE V HYDE 1866 (UK) -- PREVIOUS CL DEFINITION

"voluntary union for life of one man and one woman to the exclusion of all others"

- valid in Canada until 2004 -*Same Sex Marriage Reference* 2004
- This principle was the basis for same-sex marriage challenges in Canada.

CRITICISM OF HYDE V HYDE

Hyde v Hyde was touted as the 'law'-->

- the court deliberated and came up with the definition in a case that challenged the issue
- the definition captured the *reality* of marriage (objective truth)

BUT
1. ***Hyde v Hyde* was a case about polygamy → not about "man" and "woman"**

- Monogamy → main normative push
- Opposite sex requirement relied on in retrospect

2. The *Hyde* definition at the time as a restatement of normative ideals, not the reality

- **Definition in *Hyde* says that "for life"**
- already divorce act at the time → law had recognized that marriage might not always be a union for life

CONSTITUTIONAL CHALLENGES

Leyland 1993: UNSUCESSFUL?

Court held Hyde definition did NOT violate the *Charter*

→ **STRONG dissent from GREER catalyst for future challenges**

- Functional approach
- Families take many forms and that the definition of family should evolve to meet those contexts

- Example of how although the definition itself was not changed → resulted in a number of collateral legal contexts
- SPOUSAL SUPPORT STATUTES WAS RECOGNIZED IN NUMBER OF LEGAL CONTEXTS—PENSION, HOUSING AND ADOPTION

Halpern v Canada ONCA 2002—SUCCESS!

→ One of 3 equality challenges lanched in ON, BC and Que

1. Existing CL definition of marriage contravened s 15 of the *Charter* and canot be saved by s 1.

2. Different ideas of what the remedy should be → courts held should be decided in the political arena

Facts

A same sex couple wanted a court order that

- 1)City of Toronto clerk must grant licenses to same sex couples and;
- 2) The General Register of Ontario must register same-sex marriages solemnized by the church

DIV Crt. Different Proposed Remedies:

The question is how should the change happen:

1. should the court impose and change the common law definition itself? (Laforme)
2. Or should it be democratic? (Blair, CA)

DIV Crt. issued a suspended declaration of invalidity for 24 months-- > let the legislature deal with it

HOLDING ONCA

Immediate declaration would not contravene the ROL

- "An **immediate declaration** will simply ensure that opposite-sex couples and same-sex couples immediately receive equal treatment in law in accordance with s15(1) of the *Charter*."

Two Different Definitions of Marriage : Halpern

The definition of marriage was lynchpin → if AG succeeded in essentialist argument, then Same-sex couples could not be "excluded"

Respondent (AG Canada)'s argument:

Relied on *Hyde* "'definitional boundaries" of marriage:

- marriage is unique in its essence
- opposite-sex [by nature]
- embodies the complementarity of the two human sexes

Heterosexual procreation: "the ultimate defining characteristic of marriage"

PROBLEM – This didn't even make sense in the context of hetereosexual couple

→people who can't or chose not to have kids would not be married

Court of appeal →
Marriage more fully characterized by its pivotal child-**rearing role** and long-term conjugal relationship → obligations of care, support, companionship, shared social activity, physical, social, economic interdependence, and LOVE!
Marriage in the:

- one of the most significant forms of personal relationships
- a basic **element of social organization** in societies around the world
- **public expression** AND **Recognition of the expression** of love and commitment to each other
  → respect and legitimacy as a couple

Since Marriage is defined this way by the court of appeal,

- Same-sex couples are denied access to this fundamental **social** institution simply on the basis of their sexual orientation.

This case and others in BC and QC with similar decisions were not appealed by the Federal government, who instead turned to Parliamentary action. By the time the SSMR went to the SCC, five common law provinces, one territory, and QC all permitted SSM.

RE SAME SEX MARRIAGE REFERENCE 2004 SCC

Gov't asked SCC:
1) Was the issue (which definition) one of capacity and therefore under the legislative authority of the federal government

- **Court held that the provision spoke to capacity and fell within jurisdiction s 92(26)**

2) whether extending capacity to marry to people of the same gender was consistent with the Charter and

- **Clearly it is**
- **In the circumstances of this case, the drafting of the Bill actually flowed through a Charter challenge**

3) whether the provision would violate the s 2(a) rights religion of religious officials from by compelled to perform same-sex marriages

- **2(*a*) of the Charter is sufficiently broad to protect religious officials from state compulsion to perform same-sex marriages against their religious beliefs**

BUT, this DOES NOT extend to PUBLIC OFFICIALS

- they are acting in capacity as agent of government.
- If you use your own conscience, you are making policy decision
  →undercut principle that gov services must be provided on impartial and non discriminatory basis

Civil Marriage Act - Gov Response to SSMR -

LEGISLATION:
Civil Marriage Act

Section 2: Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others
Section 3: It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

SAME-SEX MARRIAGE AND DIVORCE → CONFLICT OF LAW WRT AMENDMENTS TO CMA

PROBLEM:
1) Same sex marriage not valid in other jurisdictions

→ **same –sex couples could not get a divorce there!**

2) Couple returned to Canada, the can't divorce because of the 1yr **residency** requirement under *The Divorce Act*

Result→ Charter Challenge
Lawyer in the divorce proceedings launched Charter s15 challenge to residency requirement (for both Hetro and SS)
→ In the end**, P agreed to stay** of proceedings so govt could enact legislation permitting SS divorce.

GOV RESPONSE –
Govt introduced Bill C32 – *An Act to Amend the Civil Marriage*

- **Amended *CMA* s5 allows court to grant divorce to SS couple married in Canada.**
- **BUT**: Parties are left to return to their "home jurisdiction" to sort out corollary relief – cannot access sharing of property, spousal, child support regime from *Divorce Act*.
- **Remember:** this is only a problem for ppl not resident in Canada for 1 year.

Is this consistent with a finding of validity for limited purpose marraiges?

- Current law – yes, we want marriage to function as social unit, and if people live in Canada need access to corollary relief
- McLeod – no – but it is the way that limitied purpose should be treated b/c limited purpose is not a social unit that the state should deal with

Compare Divorce requirements CMA v Divorce Act

	***CMA* → for non-residents**	***Divorce Act* –** available to heterosex and SS couples **resident** in Canada for **min. 1 year.**
Availability:	Can be dissolved if couple **has each** been living for **1 year in state** that does not recognize validity of their marriage.	Married person must be resident in Cdn province for at least 1 year prior to initiating divorce
Grounds:	Marriage can be dissolved in Canada if couple separated for 1 year. → No adultery and cruelty	Separation for 1 year, but also adultery and cruelty.

	MUST apply jointly for divorce (some exceptions)	**MAY** apply **jointly or individually**
Corollary Relief	Divorce proceedings relate only to dissolution of marriage → **no provisions for corollary relief** (left to home jurisdiction)	**Access to divorce and all provisions re corollary relief** under *Divorce Act* (property, support, custody, access to children)

Critique

- Some couples were actually critical of the *Civil Marriage Act*
    - much of the SSM litigation originated through **ppl trying to gain access** to sharing of **benefits**, survivorship
    - Why leave it to home jurisdiction (if marriage not recognized, how can divorce + entailing obligation be recognized)

- Others critiqued on basis of parl further privatizing fiscal responsibility to citizens → can't have your cake and eat it too though

Hincks v Gallardo 2013 ONSC

F: Same-sex couple were **civil partners** under UK law,

- sought divorce in Canada

Issue: can they access the *Divorce Act* AND corollary releif under the *FLA* even though not "married" in UK?

Held: Denying acess to DA would be contrary to Charter.

- A civil partnership in England constitutes a "marriage" in Canada, and it can be dissolved pursuant to the *Divorce Act*.
- Same-sex parties are also "spouses" for the purposes of the *FLA*.

Reason:

- UK has a separate but equal" system → Civil Partnership the legal equivalent to marriage in all but name
- Civil partnership" provides for rights/responsibilities on dissolution **AND** Financial and property relief equal to that of married couples in the UK

- **Note:** UK has since enacted same-sex marriage legislation, case may be less relevant.

DETAILED REASONS

1. Rejects floodgate argument that recognizing the civil union as marriage will dissolve distinction between the two:

- Only civil unions, where there is **not a option** to marriage and the civil union **is equal** to marriage.

2.Imposing the rights of marriage onto the civil partnership would not violate the parties' autonomy(*Nova Scotia v Walsh 2002*)

- there was no marriage available – no CHOICE
- civil had the same legal status as marriage – not choosing between different obligation regimes

3. The subjective intent of the **effect** of entering the agreement doesn't matter: if there is consent and capacity, then the statute oulines the legal effect

2. CONSENT

MENTAL CAPACITY → WHAT LEVEL OF COMPREHENSION IS REQUIRED? (COMMON LAW TEST)

The threshold for consent is low

"The concept of marriage is a very simple one, and does not require a high degree of intelligence to comprehend" (*Durham v Durham* 1885 UK)

*** NB there is almost a presumption of validity

1. You only have to *understand/ appreciate* the duties and responsibilities of marriage→ <u>you do not have to have the ability to discharge them</u> *Webb v Webb*

- Evidence that people with disabilities have very functional marriage and that the majority of times kids stay in the family

<u>Webb v Webb</u>

- H 22 chornic schizophrenic, W a minor
- Met it psychiatric hospital, married by a judge, had a kid
-application for nullity

2. You do not have to have testamentary capacity in order to marry (*Banton*)

- The courts do not think that property should override all other aspects of the marriage

<u>Banton</u>

-H was deaf, blind and sick in retirement home → **financially incompetent** under *Mental Health Act*
-secretly marries waitress at retirement home → creates 2 new wills to benefit her
-"last fling"

Held:
-wills were invalid, but **marriage was valid**
-GB had capacity to manage personal care/ general ability to converse etc
→ dies intestate and property split btw W and C under *Succession Law Reform Act*

<u>Re Sung Estate (2005)</u>

Facts
-Family doctor provided evidence that H did not have capacity for personal care – illogical or clearly
-Fraudulent behaviour: Told H one thing about retaining lawyer – but did not execute prenup agreement with the lawyer
-took money out of his bank account over several days

3. Intoxication may, but not always, negate consent

Marriage Act (s 7)

"No person shall issue a licence to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason"
• Broad language but narrow application • Is the province overstepping here? S 7 treats capacity as a formality

CMD v RRS

Facts: o H + W met in Las Vegas, married with in hours o **Process→** showed up chapel w/o a marriage certificate → W went through a series of steps to get it, came back o When W got home, applied to have marriage annulled
HOLDING: The marriage is valid → The steps she took were rationally connected to entering marriage contract, aka knew exactly what she was doing → evidence fell short of proving that she lack capacity

DURESS AND UNDUE INFLUENCE:

Test for duress is very HIGH → mental capacity which is LOW

S(A) v S(A) 1988 Subjective test

The issue is the applicant's state of mind: • "As long as the oppression affects the mind of the application in faction stated, **physical force is not required…[neither] is the threat of such force**."
Burden: The onus is on the party seeking an annulment to prove → not easily discharge
The question is: The applicant's mind was so overcome by oppression that there was an absence of free choice • The relevant circumstances include: i. Applicant's age ii. Emotional state and vulnerability iii. Lapse of time between duress and the marriage iv. If the marriage was consummated v. If parties lived together as husband and wife vi. Timing and commencement of the annulment proceedings ⇒ Problem: the factors that make a person vulnerable to duress don't

disappear after marriage

Previous case law on Duress

Thomson v Thomson 1971 (SAKS)

F: i. Older woman (+19) ii. She was depressed b/c of previous rejection—entered marriage because H insisted – went through with it b/c of family (mother's) pressure iv. Consumates marriage
H: The W did not establish that this was a case in which the principles would apply

Pascuzzi v Pascuzzi (1955)

F: W was unapposed i. W 15 at the time of marriage, H 19 ii. Caught having sex, they charged her with juvenile delinquience, H with sex asslt. → she was told by lawyer, mother and police that charge dropped if married → her only home was with the H's parents v. Lived together from Feb- Dec
Enough pressure to vitiate consent → ANNULED It would have been practically impossible for someone her age to continue to refuse

ARRANGED VERSUS FORCED MARRIAGES

Families will arrange partnerships between individuals for the purpose of marriage
→ but there is a range of willingness to enter into such partnerships

- Simply because it is arranged doesn't negate consent
- The question is whether people have a choice

NB Although consent is a subject test, the court draws on object elements in its reasoning

Hirani v Hirani (UK)

-19 year old Girl is married Hindu man by Hindu parents -She had expressly denied consent → wanted to marry a muslim guy
Holding: She was totally dependant on family and had no other option → nullity granted

Compare to?

Singh v Singh / Singh v Kaur (Canada)

- court held that family pressure, economic, social or cultural pressure not enough to constitute duress for annulment
→ son married to avoid disgracing his family and to be able to participate in the family business

Marriage of S (Australia)

Duress for annulment should be broad enough to encompass non-violent parental coercion

LIMITED PURPOSE OR IMMIGRATION MARRIAGES

Courts are not going into the purpose behind a marriage
→ but NB some motives for marriage are invalid for immigration purposes

Iantis

The mere fact that parties go through a form of marriage for limited purposes will not render the marriage invalid.
→ Motive supports a finding of validity

Singla

R: A marriage will be valid where there was no mistake as to the nature of the ceremony or identity of the parties.
→ validity rules should be applied ot ensure that marriage arises when people have capacity to enter into marriage and there is at least a chance of functioning as a social unit

PROBLEM: marriage will be valid for family law purposes but invalid for Immigration law purposes

Raju v Kumar (2006 BCSC)

Court awarded tort damages when Fijian husband about intentions of marriage to wife. After entering Canada he commenced divorce proceedings. Wife received damages for wedding expenses and sponsorship applications and $10,00 for hurt feelings, postponement, humiliation etc.

MACLEOD: Should Courts be reluctant to grant nullities in these circumstances?

- CAPACITY ONLY REQUIRES THAT you understand the nature of the relationship ie. Rights and obligations
  - You don't have to be able to discharge the (Webb)
- Courts will not grab nullity if there is a different purpose → DOES NOT negate your ability to understand what the rights and obligations were?

PROBLEM?

→ when we think about why we are upholding marriage:

- we want to make strong social units
- In his case, strong units are obviously not the purpose
- So to take this judicial approach is not appropriate.

So parties will have to get divorced and might have support obligations etc.

3. CAPACITY TO CONSUMATE

- UK, but Technically valid in Canadian law

  → "ordinary and complete" intercourse between spouses after the marriage ceremony

Two Key Notes

1. Difficulties: intruded on the private lives of the individuals. What does consummation mean now? Policy

2. This is only a requirement that there is ***capacity* to consummate.** Consummation itself is not a requirement of a valid marriage.

- **Test for capacity to consummate (*Gajamugan* 1979 Ont):**
    1. Impotence must exist at time of marriage
    2. The incapacity pleaded must be such as to render intercourse impractical
    3. The incapacity may stem from "a physical or mental or moral disability"; and
    4. The impotence must be incurable
- Test often requires expert evidence → results in "dueling doctors
- Kierstead thinks it is fairly irrelevant

4. Consanguinity and Affinity

How to close is too close? The law reform commission says maybe we should recognize some of these relationships

Traditional Prohibitions

Persons related too closely by **consanguinity (relationships of blood)** and **affinity (relationships by marriage)** are prohibited from marrying.

- Prohibited degrees were set out in Archbishop Parker's Table of 1563.

Parliamentary Reform

- *Marriage (Prohibited Degrees) Act* or *M(PD)A* 1991 → NEW ACT
- **s2(1)** Subject to subsection (2), persons related by consanguinity, affinity or adoption are not prohibited from marrying each other by reason only of their relationship.

→**s2(2)** No person shall marry another person if they are related **lineally** [direct biological line], or as **brother or sister** or **half-brother or half-sister**, including by adoption.

→ Nothing in this legislation prevents ppl from marrying a cousin or similar.

NB *FLA* → s 1 "Spouse" (b)

- have together entered into a marriage that is **voidable or void**, in **good faith** on the part of **a person relying on this clause** to assert any right.

5. No Prior Subsisting Marriage

To marry a second time, must a) divorce or get a degree of nullity, or b) the spouse is dead

NB → *Marriage Act s(9)* allows you to get married again if your spouse disappears, but this does not end the first marriage

FLA (1) "SPOUSE" (b)

(1) "Spouse" (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right

- This provision protects spouses of a void or voidable marriage b/c of pre-existing marriage **as long as the marriage is entered in GOOD FAITH**

- **ONLY HELPS** if you are the person that entered the marriage in good faith

Knight v Knight

Facts:

- H's 1st divorce in Mexico was not valid in Ontario. Gets married again
  - 2nd marriage is not valid
- 2nd wife claims support and property division

R: Court held that 2nd W entitled to remedy even though the marriage is void. She was entitled to remedy under the FLA 1 because she entered into the marriage in good.

BIGAMY AND POLYGAMY

Criminal Code s 293

Criminal Code s293 → offence to marry second person while you are still married to first person

- Codifies bigamy as an offence in Canada
- Can get complicated in context of conflict of laws situations

Charter Challenge → Reference re CC of Canada (BC) 2011

1) S293 infringes freedom of religion under Charter, but is save by s (1)- demonstrably justified in free and democratic society
2) Children under age of 18 at time of entering polygamous union are excluded from application of s293
3) S293 does not require that the union involve a minor or occur in a context of dependence or exploitation, undue influence, power imbalance, etc.

RATIONAL → S. 293 is meant to protect…

- Harm it does to monogamous relationships (idea that this is what family should look like)
- Exploitation of young girls, women and also boys
- Complication of support issues

FLIPSIDE…this is their religion, so is criminal law appropriate?

Perhaps our view is wrong, unpackage what the problem really is…more effective ways of enforcement?

FLA (2) POLYGAMY

(2) In the definition of "spouse", a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.

6. AGE

COMMON LAW AGE REQUIREMENTS

• **At common law:** Marriage involving a person under 7 is void Marriage involving a boy between 7 and 14 is voidable at his instance Marriage involving a girl between 7 and 12 is voidable at her instance
Legebokoff v Legebokoff **F:** The wife was 15 at the time of the marriage and she did not meet the provincial age requirement. 16 years later and 3 children later she wanted to void marriage

D: Court said no, the amount of time etc. has superseded your age at this time

- Example of a "voidable marriage"
- See s 31 of *Marriage Act* → curative

ONTARIO STATUTORY AGE REQUIREMENTS

→ NB a "capacity" requirement but treated as "formality" because the feds have done nothing

AGE AND PROVINCIAL STATUTES

***Marriage Act*, RSO 1990, c**

5. (1) Any person who is of the age of majority may obtain a licence or be married under the authority of the publication of banns, provided no lawful cause exists to hinder the solemnization. R.S.O. 1990, c. M.3, s. 5 (1).

(2) No person shall issue a licence to a minor, or solemnize the marriage of a minor under the authority of the publication of banns**, except where:**
A) the minor is of the age of sixteen years or more and;
B) has the consent:
i) in writing
ii) of BOTH parents
iii) in the form prescribed by the regulations

MECHANISMS FOR DIVORCE

GROUNDS FOR DIVORCE: S. 8 BREAKDOWN OF MARRIAGE

S 8(2)(B) : FAULT

S 8(2)(b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,

(i) committed adultery, or
(ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

S 8(2)(S) NO FAULT: SEPARATE AND APART

Breakdown of marriage

(2) Breakdown of a marriage is established only if

(a) The spouses:
- have lived separate and apart for **at least one year immediately *preceding*** the d**etermination** of the divorce proceeding and;
- were living separate and apart **at the commencement of the proceeding**; or

CALCULATION DURATION OF SEPARATION:

8(3) For the purposes of paragraph (2)(a):

(a) spouses shall be deemed to have lived separate and apart for **any period** during which they **lived apart** and ***either*** of them had ***the intention*** to live separate and apart from the other; and

➔ must be both physical separation and intention to destroy the matrimonial consortium (*Rushton*; *Cooper*) in order to be living separate and apart

Supporting Reconciliation

Separate and Apart not Interrupt by Attempts at Reconcilliation

S 8(3)(b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated

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(ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totaling, not more than ninety days with **reconciliation as its primary purpose**.

Duty of Lawyers

9. (1) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding

(a) to draw to the attention of the spouse **the provisions of this Act that have as their object the reconciliation of spouses**, and
➔ **NB the object is reconciliation**

(b) to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counselling or guidance facilities known to him or her that might be able to assist the spouses to achieve a reconciliation,

→ unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

COURT: in Reconciliation

s. 10. (1) In a divorce proceeding, it is the duty of the court, before considering the evidence, to satisfy itself that there is no possibility of the reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

DEFINING "SEPARATE AND APART": REQUIRMENTS FOR DIVORCE UNDER S 8(2)(A)

FACTORS TO BE CONSIDERED: COOPER *AND* LASTMEN *AS CITED IN* → *DUPERE V DUPERE 1974*

The factors that a court will consider regarding "separate and apart" are as follows:

→ **Physical Sept and INTENTION are key**

1) Consider evidence with great care, each case determined on its own circumstances
2) **There can be a physical separation within a single dwelling unit**
3) Case not taken out of s8(3) just b/c couple remains in same house due to **economic necessity**
4) **To meet the statute there must be**
a) physical separation and
b) a withdrawal by one or both spouses from the matrimonial obligation with intent of

destroying the matrimonial consortium (*Rushton* 1968 BSCC test, added to Ont in *Cooper*) **5)** Cessation of sexual intercourse not conclusive, but may be considered **6)** A distinction may be drawn between an unhappy household and a separated one.

RUSHTON V RUSHTON → "SEPARATE AND APART" WITHIN SAME DWELLING UNIT

*** NB under the old Divorce act that required 3 year separation period

Facts	• parties are married in 1936 start having difficulties in relationship in 1960 • Stop having sex in 1965 →live in separate rooms, • W did not perform domestic services; both bought own groceries. • Husband pays wife monthly fee. • They live together because they are joint care takers of the apartment they live in and to keep this position they have to act as husband and wife. • They became responsible for a new apartment building and now they do not have to live in the same suite
Held	They had been living separate and apart→ divorce granted
Ratio	• You need physical and intent to destroy marriage consortorium • You can be separate and apart in the same unit→ should not be excluded from the legislation because of poverty
NB	The W specifically did not have the financial ability to leave

DUPERE V DUPERE 1974 – NOT SUFFICIENT INTENTION OR PHYSICAL SEP

	• Parties separated → W moved out and was living with kids on $30 per month • Moves back in with H → resume relations for a month • THEN they start living "separate and apart: • W had a relationship with other man with "tacit consent" of petitioner
Decision	The parties were not living separate and apart
Reasoning	**They continued to live as one household: difference between unhappy and separated one → You can't get divorce on Demand** • Parties communicated and cred for children → x-mas gifts together • H provided financial support • H was ambivalent about the arrangement continuing → no intention • Because W continued to live as a "maid" for the "sake of the children" → not enough

→ NB probably would not be decided the same way not

- Gendered → significant weight placed on domestic duties of the wife

CALVERT V CALVERT → INTENTION AND CAPACITY S 8(3)(B)(I)

(b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated (i) by reason only that either spouse has become incapable of forming or having an intention to continue to

live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable, or

Facts	• The wife who is at the point of court litigation. • She has alzeimers and represented by litigation guardian—not capable of bringing matter forward on her own. • Looking for support. • Husband says she did not have mental capacity to separate so she cannot claim equalization. <u>Prior to litigation</u> • When wife separated exhibited early signs of disease and told lawyer of wish to separate, • **at that time the lawyer said she had the required capacity** to separate.
Ratio	• Capacity to form intent to live separate and apart as required under s8(3) → shall be determined based on a party's capacity to form **<u>intent at the time the party initially sought the divorce.</u>** • Does not matter if you lose capacity during the year of separation

<u>ADULTERY : S 8(2)(B)(I)</u>

***Divorce Act* s. 8(2)(b)(i)**

- Only 'innocent" spouse can apply for divorce on fault grounds
- Traditional Definition of adultery: heterosexual intercourse

➔ all traditional norms defined

<u>APPLIES EQUALLY TO HETERO/ SAME-SEX RELATIONSHIPS</u>

***Thebeau* 2006 NBQB:**

- Definition of adultery must be consistent with equality under Charter. Applies as ground for divorce regardless of whether sexual misconduct is homo or hetero.
- "untrammeled by prospect of fault based divorce"

***P(SE) v P(DD)* 2005 BCSC:**

- **ADULTERY IS ABOUT THE VIOLATION OF THE MARRIAGE BOND**
- The violation, and not the specific nature of the act itself is what constitutes adultery
- sexual intimacy with another person, regardless of that other person's sex, undermines the integrity of the marriage.

→ Interpreting legislation as the law evolves → s 15 and society

<u>PROOF OF ADULTERY – BURBAGE V BURBAGE 1985</u>

1.<u>Establish Presumption</u>
A) **Evidence of opportunity**
B) **Evidence of inclination**,
➔ this **raises a PRESUMPTION that adultery has taken place**

2. Rebutle
➔ **ONUS shifts to the adulterer to rebut the presumption**.

APPLICATION TO *BURBAGE*
--> W found to be adulterer

1. Presumption Formed
a) Opportunity : **She stayed the night**
b) Evidence of inclination

2. Failed to rebut

- She claimed no intercourse b/c guy had back surgery and was impotent
- Surgeon had died – no medical reports

CRUELTY: S 8(2)(B)(II)
Can be mental or physical—must be grave and weight nature—
HIGH THRESHOLD: conduct is intolerable to that other person→ not just annoying

KNOLL V. KNOLL *(1970 ONT CA)*

- Courts have refrained from **attempting to generate a general definition for cruelty**
  ➔Generally "disposition to inflict to delight in or exhibit indifference to the pain or misery of others.

- If one spouse by his conduct causes wanton, malicious or unnecessary infliction of pain or suffering upon the body, the feelings or emotions of the other
  ➔ conduct ***may*** constitute cruelty and entitle a petition to dissolution of the marriage IF **the in the court's opinion** it amounts to physical or mental cruelty of such kind as to render the intolerable the continued cohabitation of the spouses
  → **courts tend to use a subjective test now**

B(Y) V. B(J) *(1989 ALTA QB)*

Facts	• W claims divorce on cruelty b/c H had an affair with another man
Ratio	• Being a homosexual doesn't make you cruel • Need something more than orientation to "as constituting the grave conduct necessary to ground a divorce judgment" (on cruelty grounds).

BARS TO DIVORCE

TRADITIONAL BARS TO DIVORCE

Even if marriage breakdown is proven one of the **3 traditional bars** to divorce may stop divorce:

- **s11(1)(a) - collusion** → an absolute bar. If parties have manufactured evidence re marriage breakdown they will not get

divorce.
    - Very unusual to see this in modern divorce context → in past related to adultery

- **s11(1)(c) - condonation** → situation where **person has committed adultery but was forgiven by other spouse AND continues to live in marriage relationship**.
    - Fact that person condoned action means they cannot bring divorce application based on adultery.
    - Would have to start an application for "1 year or more" → but can't backdate V-Day to the time of the adultery (*Flemming*)
- **s11(1)(c) - connivance** → someone permits someone else to have sexual relations with their own spouse (if even passively) → can't apply for divorce on adultery grounds.

REASONABLE ARRANGEMENTS FOR CHILDREN: S11(1)(B)

Section 11(1)(b) of the DA 1985 **requires** a court to satisfy itself that there have **been reasonable arrangements for the support** of children of the marriage and, if necessary, to **stay the granting of the divorce until such arrangements have been made.**

PROPERTY DIVISION

PURPOSE OF PROPERTY DIVISION :

Purpose
(7) The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6)

S 4(1) "net family property" means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

(a) the spouse's debts and other liabilities, and

(b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, other than debts or liabilities related directly to the acquisition or significant improvement of a matrimonial home, calculated as of the date of the marriage;

STEP ONE: DETERMIN VALUATION DATE

ONTARIO"S V-DATE IS INFLEXIBLE SOMETIMES THIS CREATES PROBLEMS

DEFINING V-DAY

"valuation date" means the earliest of the following dates:
1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation.
2. The date a divorce is granted.
3. The date the marriage is declared a nullity.
4. The date one of the spouses commences an application based on subsection 5 (3) (improvident depletion) that is subsequently granted.
5. The date before the date on which one of the spouses dies leaving the other spouse surviving.

CARATUN V CARATUN

1. **NO NEED FOR MUTUAL INTENTION** You only need one spouse to have "intention" to separate w/o reasonable prospect of resuming cohabitiation

Facts	• W wants a later V-Date so that she claim some of the income H gets from dentistry degree • **Claims that she still thought that there was a prospect of resuming cohabitation** • **She thought H would return to the home→ reconcilliation**
Held	**NO NEED FOR MUTUAL INTENTION**

FLEMMING

F: Husband says I actually separated as of Today BUT **had I known that she was fooling around earlier I would have separated earlier**.
→ So wants to use the date he would have separated **had he known of infidelity**
D: Court says NO—you did not separate

STEP 2: WHAT PROPERTY WAS OWNED BY EACH SPOUSE ON V-DAY PURSUANT TO S 4(1)

"PROPERTY" DEFINED S4(1) *FLA*

"property" means any interest, **present or future**, **vested or contingent, in real or personal property and includes**,

(c) in the case of a spouse's rights under a pension plan, the imputed value, for family law purposes, of the spouse's interest in the plan, as determined in accordance with section 10.1, for the period beginning with the date of the marriage and ending on the valuation date; ("bien")

A. IDENTIFY ALL PROPERTY – PRESENT, FUTURE, VESTED, CONTINGENT

S 4(1) "property" means any interest,

Present or Future	A future income streams **<u>including</u>** interests on trusts	***Brinkos* –** Dad made trust + gifts after marriage, W added to it after marriage → Spouse entitled to ½ of income of trust (minus pre-marriage value + gifts)
Vested or Contingent	The value of a contingent interest is "property"	***DaCosta*** – W gets value of contingent portion of H's GranD's estate, currently vested a natural grandkid, G died intestate -court –ve small sum in case H dies before cousin

OUGHT this to be the law? S 9 presumption of "equal contribution, financial or otherwise" and entitlement to property

B. IDENTIFY EQUITABLE CLAIMS→ "ANY" INTEREST S 4

STEP 1: UNJUST ERICHMENT

1. An enrichment (to title holder)
2. A corresponding deprivation (to non title holder)
3. An absence of any juristic reason for the enrichment (ie. it must be "unjust" for title holder to maintain entire benefit).

In the constructive trust, Spouse 1 would have a % of the equitable interest and Spouse 2 would have a 50% equitable interest.

<u>RESULT: NO EQUALIZATION PAYMENT, INSTEAD HOLDS ½ INTEREST IN TITLE.</u>

Problems:

1. Difficulty <u>to actualize the value</u> of your entitlement until the property is sold.
2. If the value of land goes down? → value of equitable interest would decrease
   * What if spouse applies for the other spouse to have an equitable share in debt

<u>Rawlick- Majority</u>

F	• H holds sole legal title to land • H and W ran farm and farm machinery business on while married. • After V-Day, land rezoned for development→ property value increased A LOT.
Claim	→W claims that Constructive Trust must be impost before calculating NFP so that NFP include the equitable interest → there would be no equalization because W owned ½ equitable interest
Ratio	• Property as defined in s4 is broad enough to include equitable interests • There was an unjust enrichment → CT appropriate remedy for that unjust enrichment • The CT furthers the objectives of the FLA by putting them in equal positions

McLachlin's Dissent

	The real problem is that we have an inflexible valuation date in Ontario -→ nothing in legislation that would allow court to say in these circumstances we ought to take trial date as the date we will assign values.
Dissent	1. You need to look at other remedies available first that can compensate for the UE → 2. **There was no UE in this case :** The wife was not deprived although husband was enriched. - The wife did not contribute anything after separation that entitle her to this increase - beneficial interest in property it is almost like saying we have joint title (they are jointly entitled to what the property is worth) **If court finds unfair result, should alter equalization under s5(6)**
Reform/ Policy	Ontario *FLA* should have provision that provides judicial discretion to examine the result of the NFP calculations and then move V day accordingly to ensure fairness → eg PEI *FLA* s6(6) → COMPARE TO when someone contributes early on and the fruits are realized later (Murdoch)

PROFESSIONAL DEGREE→ NOT PROPERTY *CARATUN*

Reasons Why not ***Caratun***	1. **The nature of characterization of property** a. It is **inherently non-transferable** → degree belongs to the person who earned it. b. Requires the **personal efforts** of license holder to be of any value in the future. c. **Floodgates**: **All qualifications (e.g. trades, etc.) would have to be included in NFP if a license to practice dentistry was.** 2. **Difficulty of valuing the license →** Even if we held this was property we can't value it. a. It is possible to vary support payments based on earnings in the future, but an equalization payment is fixed regardless of changes in the circumstances. b. Difficult to predict future earnings from different degrees/license c. Future labour does not constitute anything earned or existing at the valuation date.

Critiques	1. For reasons under (2) → we predict future earnings when we calculate losses in tort ? 2. **McCallum** - Mrs. C was a "partner" like under the *Partnership Act* -If a person pays a premium to enter a partnership and the partnership dissolves → you get that premium back

	-Could you recoup half the cost of tuition (if paid) through 5(6)? **What if you framed the issue as being one of <u>personal sacrifice/lost opportunity cost</u>** → claim compensatory SS (***Keast v Keast* 1986 → before Caratun)** • In that case got **<u>quasi-restitutionary</u>** support @ 1000 per month for 10 years • AND $600 for life

Caratun – facts

F	Man married woman to immigrate to Canada, left her 2 days after receiving dental license. → Has a high income potential but NO ASSETS
Claim	Professional degree property → entitlement CT
Holding	Held that that license to practice dentistry was not property, and thus there was nothing to which the constructive trust could attach
Remedy	Gave her a one time compensatory **spousal support** lump sum payment of 30,000 **-Could you recoup half the cost of tuition (if paid) through 5(6)?**

PENSIONS

Pensions have always been included as property

- BUT S4(1)(c) states that it is now just the pension accumulated during marraige
- BUT there has been an amendment (**10.1)** as to how the value pensions should be calculated for the purpose of property division.

Pensions are problematic:

- You don't know when you'll get it
- You don't know how long you'll get it
- You don't know how much you'll get b/c of fluctuating investment rates

S4(1)(c) in the case of a spouse's rights under a pension plan, the imputed value, for family law purposes, of the spouse's interest in the plan, as determined in accordance with section 10.1, for the period beginning with the date of the marriage and ending on the valuation date; ("bien")

Imputed value for family law purposes
10.1 (1) The imputed value, for family law purposes, of a spouse's interest in a pension plan to which the *Pension Benefits Act* applies is determined in accordance with section 67.2 of that Act.

Same
10.1(2) The imputed value, for family law purposes, of a spouse's interest in any other pension plan is determined, where reasonably possible, in accordance with section 67.2 of the *Pension Benefits Act* with necessary modifications.

DEFINED CONTRIBUTION PLANS

Both the employer and the employee contribute money on a fixed or set rate

- The contribution and the return on investment are used to purchase an annuity

CALCULATING VALUE AT V DAY:

([Contribution of Spouse] + [contribution of employer] x [Return on Investment])

X [Duration of Marriage] = Value

DEFINED BENEFIT PLANS S 10.1(1) OR S 10.1(2)

Defined benefit Plans are when the pension is calculated using a formula created by the employer

- Usually include variables like years of service and salary

Problem: The contribution during marriage to P does not reflect the actual value
NOW: A pension plan administrator calculates the imputed value under the *Pension Benefits Act* pursuant to s 10.1(1) or s 10.1(2)

HOW TO EQUALIZE

If the pension is the only real asset a couple has, one spouse may be disadvantaged because the values is locked up in the RRSP.
→ The amendments in **s 10.1** provide flexibility and allow for more creative approach to divvying up equalization

Order for immediate transfer of a lump sum
10.1(3) An order made under section 9 or 10 may provide for the immediate transfer of a lump sum out of a pension plan but, except as permitted under subsection (5), not for any other division of a spouse's interest in the plan.

Same
10.1(4) In determining whether to order the immediate transfer of a lump sum out of a pension plan and in determining the amount to be transferred, the court may consider the following matters and such other matters as the court considers appropriate:

1. The nature of the assets available to each spouse at the time of the hearing.
2. The proportion of a spouse's net family property that consists of the imputed value, for family law purposes, of his or her interest in the pension plan.
3. The liquidity of the lump sum in the hands of the spouse to whom it would be transferred.
4. Any contingent tax liabilities in respect of the lump sum that would be transferred.
5. The resources available to each spouse to meet his or her needs in retirement and the desirability of maintaining those resources..

PENSION INCLUSIONS AND EXCLUSIONS

Inclusions

Disability Pension	Included	*McTaggart* *Maphangoh* -Able to take normal pension early b/c of disability -Not a separate income stream, a regular pension
Sick Leave	Included	*Bremer*
Severance	Excluded if received after VD -even though work period was during marriage	*Leckie* – severance is supposed to help you move forward
Personal Injury - compensation for **wages**	**INCLUDED**	*Trendle* – The compensation related to wages earned in cohabitation
Personal Injury -**DAMAGES** or right to damages, or settlement	**EXLCUDED**	*Lowe 2006* -Got benefits from WSIB plan -construed as a supplement to income rather than something accumulated during marriage
CPP	Excluded	

DOUBLE DIPPING

Double Dipping is when:
1. S1 is entitled to a portion of S2's pension through equalization
2. S2 retires
3. S1 brings a spousal support claim

➔S1 gets part of the pension through equalization, and then is asking S2 to pay support out of that same pension.

Boston v Boston (2001 SCC):

Only part of pension earned after separation should be considered in determining support obligations (though depending on circumstances, paying spouse may face more significant obligation)➔ **this has not been divided yet**

- Courts can exercise discretion to say obligation of paying spouse is larger

STEP 3: DOES ANY PROPERTY CONSTITUTE EXCLUDED PROPERTY S 4(2)

First determine all property entitlements (incl equitable property), then determine if anything is excluded (*McNamee*; *Rawluk*).

➔ Excluded property is EXCLUDED; not DEDUCTED. IE NEVER IN THE PROPERTY CALC AT ALL

STATUTORY EXCLUSIONS S 4(2)

S 4(2) The value of the following property that a spouse owns on the valuation date does not form part of the spouse's NFP:

GIFTS

1. **PROPERTY, other than a matrimonial home**, that was acquired by gift or inheritance from a person **after the date of the marriage.**

2. **INCOME** from property in para 1 [is excluded] if the donor or testator has expressly indicated that it is to be excluded from the spouse's NFP

TRACING

5. **Property, other than a matrimonial home**, into which property referred to in paragraph 1-4 can be traced

DOMESTIC CONTRACT

6. Property that spouses have agreed through domestic K is not to be included in the spouse's NFP

DAMAGES/ LIFE INSURANCE/ CPP

3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages

4. Proceeds or a right to proceeds of a policy of life insurance, as defined under the *Insurance Act*, that are payable on the death of the life insured.

7. Unadjusted pensionable earnings under the *Canada Pension Plan*.

GIFTS

BURDEN OF PROOF FOR DEDUCTIONS AND EXCLUSIONS S 4(3)

If you are making a claim that property constitutes excluded property under s 4(2)
→ That person has the onus of proving that the property meets the statutory requirements (*Silverberg*)

Flatter v Brown→ Evidentiary Burden

1.There must be evidence to discharge the burden.

2. The standard of proof is on a balance of probabilities it must more like than not to be a gift

NB → subsequent cases (*Harrington)* this has ended up being "it must be unambiguous"

Silverberg

1. You can't re- characterize property after the marriage breakdown (*Silverberg*)

2. If the evidence ambiguous (ie you can't prove FOR SURE the WHOLE thing a gift) it goes all into the NFP

W given jewellery in affair → tells husband during marriage it was a work bonus

- At court, claims it's a gift

H: Court held that some jewellery could be gift, some bonus → ALL goes into NFP

Harrington, Ho

3. You can't claim property as a gift if you have expressed ownership over it in a legal way (*Harrington, Ho)*

- *Harrington* – H managed Trust for D – income given to H
  - the H had admitted on income tax that he owned it in a legal was
    → did not meet burden for establish gift

McNamee – gifts and unjust enrichment

4. A Spouse may be entitled to CT over the gift if excluding the property would constitute Unjust Enrichment. (*McNamee*)

- **You must consider possibility of BENEFITIAL OWNERSHIP of ALL property (including gifts) before exclusion**
- If there was a CT imposed on gift BEFORE separation → you cannot treat property as a gift for NFP (ie no gift)

H works for D → D "gifts" shares to H as part of estate freeze
D excluded the shares from H's NFP in declaration of gift
-H signs declaration of gift, but doesn't know it's excluded from NFP until separation
→ IE. Wife thought it was part of of NFP

NB. Initial Judge said NO GIFT b/c part of estate freeze

CA says: All element of a gift there: Intention, delivery, acceptance
BUT that there is a possibility of CT → Trial judge didn't consider this
NEW TRIAL ORDERED

TRACING

Spouse can exclude property that can be traced back to a gift or inheritance acquired during the marriage SO LONG AS it is NOT the **matrimonial home**,

→ If you use a gift to fund the purchase of the matrimonial home – that value is included in the value of the home on V-Day

Tracing success → Ho v Ho(1993)

- H's parents given both W and H $$$ gifts
- H claimed that all the gifts were for him → but formally given to W for tax purposes
  →W "loaned" money to H to buy a care and Savings Bonds

HOLDING # 1: The property belongs to the person who declared it for tax purposes. Gift is expressed in a legal way
HOLDING #2: The gift can be traced back from the investments made with the gifts

- The items that could be traced back to the W's gift are excluded from her NFP
- Admitted that some of the money had co-mingled with family fund and could not be excluded [146,000 out of 200,000]

Tracing to Joint Properties → Cartier v Cartier

1. If you have used a gift to purchase property held jointly with spouse → You can trace gift and exclude half the value of the property NFP

- H inherited land
- H sold land and bought investment properties
- Put in joint title with w

1. H able EXCLUDE HALF the value of the investment properties
2. W had to INCLUDE HALF the value of the investment properties
→It was as if H gifted half the value of property to the W

Half EXCLUDED from H's NFP -→ Half INCLUDED in wife's NFP

Traced to Matrimonial Home? SOL→ Lefevre v Lefevre

Husband uses funds inherited [s4(2)(1)] and personal injury [s 4(2)(3)] money to purchase matrimonial home.
→ Could not excluded from NFP because it was the matrimonial home.

WHAT IS THE MATRIMONIAL HOME?

S 4(1) "**matrimonial home"** means a matrimonial home under section 18 and includes property that is a matrimonial home under that section at the valuation date;
When we think about matrimonial home for the division purposes, we are talking about a matrimonial home as of the valuation date

TEST MH: 18(1) Every property in which:

- a person has an interest and;
- that **is** or, if the spouses have separated, **was** at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home

NB Multiple properties can be the family home (*De Costa*)
→ cottage, chalet, house, condo etc.

1. You can have more than one Matrimonial Home (Da Costa)
2. You must use the property "ordinarily" ie in line with your lifestyle (DaCosta)

"Ordinarily Occupied" → De Costa v Da Costa 1990

- H argues that recreation farm not a MH
- Wife claimed she cooked there a couple times and had furniture delivered

H: not a matrimonial home→ excluded from NFP
→ no evidence that they spent night there together, that she cooked, never stayed after furniture delivered

STEP 4: VALUING PROPERTY AT V DAY

1. Valuation is FINANCIAL – does not look to sentimental or emotional value **2.Generally courts will look at Fair Market Value of property at V-Day** → can become the warring of the experts

MONTEGUE→ MARKET VALUE FOR INFORMED AND PRUDENT BUYER

1. Objective test to market value: The court did value the property at its highest market value to the informed and prudent buyer.

2. Courts did not assign negative value to asset.

Facts	• H had a property that was completey polluted • The cost of cleaning it up would be more than the land
Ratio	→ Valued at Zero for the calc of NFP • **highest market value to the informed and prudent buyer.**

OSWELL V OSWELL --> ALTERNATIVE TO MFV

1. Courts will sometimes make its own valuation so that the amount is fair to both the parties rather than fair market value

Facts	• Wife had fur and jewellery • W tried to give fair market value → H had valuation for insurance • Judge dissatisfied by both
Ratio	→ Makes assessment that is fair to the parties • Approximate declining value, gold prices and wear and tear

STEP 5: DEDUCTIONS

NFP means the value of all the property, except excluded property (4(2)) that a spouse own on V-Day, **after deducting** a) the spouse's **debts and other liabilities** b) the value of the property **other than a matrimonial home,** that the spouse owned **on the date of the marriage**, after deducting spouses debts and liabilities (other than debts and liabilities related directly to the acquisition or significant improvement of the family home) → **the property the spouse owned on the date of marriage is calculated AS OF THE DATE OF MARRIAGE**
Step 5.1:

4(1)(a) Debts During Marriage
= [V-Day "lump"] –[debts and liabilities] = Y

4(1)(b) Date of Marriage

(i) [value of property as of date of marriage] + [- value of debts and liabilities as of date of marriage] = Z[can be positive or negative]

4(a) TOTAL NFP = Y- Z

2. Value of property owned at the date/before of marriage
→EXCEPT the property, values that are attributed to something that is currently (at the date of separation) the matrimonial home or its improvement

NFP WILL NOT BE LESS THAN ZERO –S 4(5)

S 4(5) If a spouses property is calculated to be less than zero, it will be deemed to be equal to zero.

DISPOSITION COST FOR EQUALIZATION MAY BE DEDUCTED

S 4(1.1) "Net Family Liabilities"

- Debts and liabilities refered to in s 4(1) definition of NFP **include any applicable contingent tax liabilities in respect to property**

STARKMAN V STARKMAN;

Confirmed that
Disposition costs are not deductable in the absence of evidence for PLAN of disposition

SENGMULLER → DISPOSITION COST CAN BE INCLUDED IF NOT SPECULATIVE

1. Disposition cost should be included if the evidence convinces the judge that on a balance of probabilities, the disposition will take place at a particular time in the future.

- Example, will disposition be necessary for equalization

2. From the evidence, Judge will deduce:
a) the likely time of disposition
b) likely disposition costs
c) present value of the disposition cost at the V-D

There are three rules:

1. Apply prciniple of fairness → the costs of disposition and the benefits should be shared qually

2. Deal with each case on its own facts, considering
    a. The nature of the asset
    b. Evidence of the probable timing of the disposition
    c. Probable tax and costs at that time

3. Deduct disposition costs before arriving at the equalization payment

→ except in sutionat where it is not clear "if or ever" there will be realization of property

STEIN V STEIN BCCA

DEDUCTIONS AND MATRIMONIAL HOME – FOLGRA; NAHATCHEWITZ

The value of the Matrimonial Home cannot be deducted from NFP pursuant to s 4(1)(b) because of the relation ship of s(4)(1) definition and s 18
→ Matrimonial Home is defined by s 18 [include property under that section]

- Confirmed by *Folgra*

FOLGRA *1986*→ STATUS OF MH IS NOT IMMUTABLE

1. MH status is not immutable
2. Owner *may* regain right to deduct under s 4(1)(b)

Facts	• H had a home at the date of marriage → 100K • After marriage, sold the house • Bought another house that was 300K →MH at separation
Ratio	• The 100K value of house at date of the marriage can be **deducted as premarriage property** • The home was not the matrimonial at the date of the marriage→ therefore does not meet legislative requirements of s 18 • Since not MH under s 18 **CAN deduct 100K (value at date of marriage)**
Counter argument	What about tracing? What if you could estbalish that this house was used to purchase next house?

NAHATECHWITZ 1990 ONCA

Facts	• H had a home → married → became MH • W had to spend time out of country for citizenships • H sold house while she was away • Separated

Ratio	Confirms Folgra → H permitted to deduct home $ at date of marriage
Ought this be the law?	The requirement that the home "be ordinarily occupied" envisions a certain set of family relationships and interactions. → People who don't fit are deprived of protection – immigrants

OLRC REPORT REGARDING SPECIAL TREATMENT OF THE MH:

OLRC recommended that the MH exception be removed both from excluded property under s4(2), and also in relation to the deductions under s4(1).

- The result was a recommendation that spouses should only continue to share in capital gains or losses of the house during marriage.
- **Why**? These section are traps for the unwary. **Recommendation was not accepted.**
  → **I agree:** yes the purpose is to put the spouses in equal positions from the marriage, but BIC should also come into property division because you want the child to have a similar standard of living

STEP 6: CALCULATING EQUALIZATION CLAIM

PURPOSE

s5(7): The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6)

ENTITLEMENT

1. **S 5(1) Sates that:** The spouse with the **lesser** of the two NFP will be etitled to one half the difference
2. **Equalization under s 5(1) is only available if**
   a. A order for divorce or decree of nullity is granted
   b. The spouses have separated and there is no reasonable prospect that they will resume cohabitation

NFP WILL NOT BE LESS THAN ZERO –S 4(5)

S 4(5) If a spouses property is calculated to be less than zero, it will be deemed to be equal to zero.

APPLICATION VIA S 7(1)

S 7(1) The court may, on the application of a spouse, former spouse or deceased spouse's personal representative, determine any matter respecting the spouses' entitlement under **s 5**

ORDERING HOW S 5 ENTITLEMENT SHALL BE PAID → S 9 POWERS OF COURT

S 9(1) In an application under section 7, the court may order:

(a) that one spouse pay to the other spouse the amount to which the court finds that spouse to be entitled under this Part;

(c) that, if necessary to avoid hardship, an amount referred to in clause (a) be paid in installments during a period not exceeding ten years or that payment of all or part of the amount be delayed for a period not exceeding ten years; and

(d) that, if appropriate to satisfy an obligation imposed by the order, [including s 9(1)(a)

(i) property be transferred to or in trust for or vested in a spouse, whether absolutely, for life or for a term of years, or

(ii) any property be partitioned or sold.

(b) that security, including a charge on property, be given for the performance of an obligation imposed by the order;

STEP 7: UNEQUAL SHARES S5(6)

S5(7) Purpose of Equalization:

The purpose of this section is to recognize that child care, household management and financial provision are **the joint responsibilities of** the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6)

S 5(6) Application for unequal Shares

The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,

(a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
(b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
(c) the part of a spouse's net family property that consists of gifts made by the other spouse;
(d) a spouse's intentional or reckless depletion of his or her net family property;
(e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;
(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
(g) a written agreement between the spouses that is not a domestic contract; or
(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property

TEST FOR UNEQUAL SHARES

1. DO YOU FALL INTO AN EXISTING CATEGORY IN S 5(6)?

2. IF SO, have you convinced the court that it would <u>be unconscionable</u> in the circumstances to order equalization?

UNCONSCIONABILITY

HIGH THRESHOLD:
→"unconscionable" is a higher threshold that "inequitable" (*Braaksma v Braaksma)*

- patently and grossly unfair (Sullivan); unreasonable, and repugnant to anyone's sense of justice to the level of unconscionability

→ **Example *Waters*:** just because unequal contribution did not make it unconsionable

Stresses policy of certainly and finality *

- *Waters* – s 5(7) deems contributions equal, not that they are or that they should be.

– will grant a lump sum spousal support award (*Hein , Caratun*)

EXAMPLE NOT UNCONSCIONABLE: WATERS V WATERS *1986*

Facts	○ H and W had factory jobs and no children ○ W did all housework and financial affairs → H alcholic ○ W claimed unequal shares
Holding	Rejected – no basis for revising equalization calim Commentary – s 5(7) deems contributions equal, not that they are or should be equal – public policy reasons → unequal contributions does not automatically make equalization unconscionable

EXAMPLE UNCONSCIONABLE: SULLIVAN V SULLIVAN *1986*

1. Will award unequal shares if spouse has something like a professional degree that can't be included in property, or one spouse's livelihood disproportionately harmed.

Facts	○ W performed all household work, child care and financial support ○ Husband contributed virtually nothing ○ W had a small business included in NFP ○ H had a professional degree as psychologist→ not property
Key	**→ stark and significant difference in contribution by W on ALL fronts**
Ratio	The court preserved her small business to allow her to financially provide for herself and kids in the future ○ Would have been <u>patently and grossly unfair</u> to allow H a share in the business equity when he had contributed nothing

Judges offsetting unfairness of s 5(6) with SS -- Hines v Hines 1988

Facts	• Parties married when they were seniors • The W brought home into the marriage • Separated shortly after
HELD	• The court order equalization • BUT also ordered a lump sum of spousal support to offset the division of the home → W was also given 10 years to pay off equalization
Policy	Judge is substituting own idea of fairness → does this case reflect the limitation of the statute? It envisions a particular form/coming together without considering that people marry later in life/ successive marriages with multiple obligations

S 5(6)(e) Amount received disproportionate to length of cohab <5 years

MacNeil v Pope *1999* → S 5(6)(e) "Cohabitation" include cohab BEFORE marriage

Facts	• Parties had cohabited for many years before marriage • Lived together in marriage for less than 5 years
Ratio	• "Cohabitation" include pre-marriage cohabitation → contrary to previous holding in *Stewart*.
Holding	• The party's situation is not one that would fall under s 5(6)(e) → **therefore equalization pay IS ordered**
Think Walsh	Can this be reconciled with the claim that people choose to cohabit to avoid property obligations → should courts be able to impose this retrospectively? → Can they deny property rights to cohab simply because they haven't married yet – especially when you consider that one party may be preventing marriage from happening

Reason for Short Cohab under s 5(6)(e) Not considered → Futia v Futia *1990*

Facts	• Parties married less than two years • W alleged physical and mental cruelty → app for divorce • Major asset was MH and was own by H • H claimed unequal division pursuant to s 5(6)(e) • W countered that the only reason that the marriage was so short was because of the abuse
Held	Unequal share pursuant to s 5(6)(e) in favour of the H
Reasoning	• Court held that behaviour and reason for short period of cohabitation will not be taken into account when ordering unequal shares pursuant to s 5(6)(e)
Critique	• "contemplated norm of 5 years" • how can you assess the importance of the period of cohabitiation with out

	also looking at the reason for leaving (*McLeod*)

PRE *SERRA* → OLRC → S 5(6) TO ADDRESS DECREASE IN PROPERTY VALUE POST V-DAY

- OLRC report 1996 recommended that amendment be made so 5(6) to allow courts to take into account post V-Day variations in property value
  → what McLachlin said in *Rawluck* **,** ie why use crazy trust principles
- Would require additional factors added to s 5(6)
  → not *Rawluck* trust argument but statory ability to award unequal shares
- BUT nothing happened, so spouses only had *Rawluck* for a long time

SERRA V SERRA

1. An assessment of unconscionability is whether the RESULT of an equal equalization payment would be unconscionable in the circumstance → Does not require fault based conduct

1. DO YOU FALL INTO AN EXISTING CATEGORY IN S 5(6)?
Post V-Day decline in value of assets CAN be considered under s 5(6)(h)
To justify Date of Trial assessment of value, identify:

- **Magnitude of decline**
- **Nature of Decline**
- **Calculate valuation with clarity**

2. IF SO, have you convinced the court that it would be unconscionable to order equalization?

Have the post V-Day market driven changes in asset value make the result of equalization unconsionable in the circumstance?

Facts	• H had a textile business that tanked after V-Day with the recession • Had been around 10 million → not it was valued at 2 million → Meant that W entitled to 5 million through equalization when Net Worth was only 2 million • The decrease happened despite intense efforts to save business • Decrease attrutable to: i. Recession ii. W obtained preservation order under s 12 *FLA* that prevented H from having flexibility to move assets
Procedural history	• **Trial judge**: unconscionabilty flows from fault based –conduct → NOT market forces

Reasoning	**1. DO YOU FALL INTO AN EXISTING CATEGORY IN S 5(6)?** **Post V-Day decline in value of assets CAN be considered under s 5(6)(h)** **To justify Date of Trial assessment of value, identify:** • **Magnitude of decline** → The magnitude was extreme, and occurred despite efforts to save it • **Nature of Decline** → Occurred 2008/2009: little chance that H would ever recoup value; no control over the decline → evidence that it would not even be possible to sell asset to make equalization payment • **Calculate valuation with clarity** **2. IF SO, have you convinced the court that it would be unconscionable to order equalization?** • It would be unconscionable to force someone to pay more than twice net worth for equalization • In addition , W had means of her own

KEAN V CLAUSI 2010

1. Using s5(6)(h) to address market driven decline in value is not reestricted to the very wealthy(ie. Doesn't have to be a giant asset).

2. The decline does not have to result in an equalization payment that would be greater than Spouse's net worth – ie. Doesn't have to be as extreme as in *Serra*

Facts	• H took equity of the MH and put in a investment account for the purpose of services the mortgage of the MH • **Put account in W name only** • Was worth 228,000 → Market tanked in 2008 → 157,000 DoT
Holding	Ordered equalization in unequal shares
Reasoning	• Unconsionable to force the W to bear burden of the **entire asset decline** • Especially since it was created at the instigation of the H → NB still very stark and dramatic contrast • Court put a lot of emphasis on i. the nature of the account – from MH and ii. How it was managed – H alone iii. The account was intended to benefit **entire family**
Question	What if this had not been an asset that was so clearly linked to the marriage partnership? What if it had been her asset, and she had → here, it was the nature of the asset and how it was created, rather than the decline itself that sparked equalization **Serra and Serra not clearly a precendent – since that was an extrordinary value and *Clausi* is clearly linked to matrimonial home.** • **On the other hand, Serra never treat it as a stand alone factor for unconscionability – so the test remains quite high and still looks for**

	fault based conduct (ex W preservation order) • **Therefore, a statutory provision would make it more uniform -**

*** DO we even want this? What if there is a chance that asset could regain its value → spouse gets to skimp on unequal equalization and get the benefit of increased asset

s5(6) of PEI *FLA* gives court discretion wrt an eq payment where there is a post V-day change in value. Similar provisions not adopted in Ont, despite OLRC recommendations.

THE MATRIMONIAL HOME

S 19(1)	Right to possession
S 19(2)	Rights as long as spouses
S 24(1) (b)	Order for exclusive possession
S 24(3)	Criteria considered for grant
S 24(4)	BIC → a) disruption b) preference

Leckey argues that *Walssh* only talked about asset division. However, the home is largely regulated and excluded to the property division afforded to married couples. Can the home be treated as a form of support, such that cohab couples have a right to exclusive possession?

Also suggested by s 40 of the *FLA* -for restraining orders on the depletion of propery – under Part III

STATUTORY RIGHT TO POSSESSION UNTIL DIVORCE/DECREE NULLITY → S 19

S19(1) BOTH souses have equal right to possession of the matrimonial home

S 19(2) When only one spouse has a interest in the MH, the other spouse's right to possession **a) is personal against the first spouse** **b) ends when they cease to be spouses, unless a separation agreement or court order says otherwise**

ORDER FOR POSSESSION → EXCLUSIVE POSSESSION UNDER S 24(1)

24(1) Regardless of the ownership of a matrimonial home and its contents, and dispite (the spouses right to possession under) s 19, the court may on application, by order **b) direct that one spouse be given exclusive possession of the matrimonial home or part of it for the period that the court directs and release other property that is a matrimonial home from the application of this Part.**

CRITERIA FOR EXCLUSIVE POSSESSION → S 24(3)

S 24(3) In determining whether to make an order for exclusive possession the court **shall** consider:

a) The Best Interests of the children affected
b) Any existing orders under Part I (family property) and any existing support orders
c) The financial position of both spouses
d) Any written agreement between the parties
e) The availability of other suitable **and affordable** accommodation AND
f) Any violence committed by a spouse against the other spouse or the children

BEST INTEREST OF THE CHILD FOR THE PURPOSE OF ORDERING EXCLUSIVE POSSESSION OF THE MATRIMONIAL HOME → S 24(4)

S 24(4) In determining BIC the court **shall** consider

a) The possible disruptive effects on the child of a move to other accommodation
b) The child's views and preferences, if they can be reasonably ascertained

Rosenthal v Rosenthal *1986* →Application denied for economic reason

1. The expectation to maintain pre –marital breakdown standard of living must be viewed in light of the money available

Facts	• **S 24(3)(a)/24(4)** W living in the MH with three sons→ grown up and adjusted • **S 24(3)(b)** 1 son in college→ H paying support • 2 Receiving income→ EI, Workers Comp→ not paying enough to even cover the cost of their groceries → Total expected monthly expenses for MH was 1500 • **s 24(3)(c)** prior to marriage living both parties living beyond their means • **s 24(3)(e)** H had moved out and was living in an apartment for 600 • **s 24(3)(f)** W did not claim violence but cite distress/phschological deterioration
Holding	Denied→ In fact court ordered that the home be sold
Reasoning	• It was unrealistic for W to expect H to mainting pre-break down standard of living • Children are older

Pifer v Pifer *1986* → Application granted because of BIC s24(3)(a)

1. BIC for the purpose of ordering exclusive possession under s 24(1) is not restricted to the criteria in s 24(4).
2. BIC can include the psychological stressors on children because of fighting.

Facts	• Joint app for custody and exclusive possession • H accountant, W a nurse • H entered in motor home business that tanked – they move to KW so that W can be a nurse • H tries to set up accounting business • Becomes alcoholic and leaving cigarretts in front of propane heater • Baby sitter files affidavit of the fights, smoking and drinking
Holding	Granted W exclusive posession AND custody
Reason	• A house clearly fraught with friction that would put stress on the children • Relies heavily on the baby sitter's affidavit to tip balnce of probability in W's favour • **NB initially, they were going to grant exclusive possession and custody to H because he would have more time to be with Kids→ affidavit "proved" his habits for the judge to award it the other way**

SPOUSAL ABUSE - 24(3)(F)
Hill v Hill→ Application Granted because of Spousal Psychological Abuse

1. Violence in s 23(3)(f) I=include psychological violence (ie non physical forms like, verbal and emotional)

Fact	• Wealthy H and W split → H has been verbally and psych harrassing wife → hand written notes to her and friends • H had dragged out litigation, given false doc, not complied with order to stop harassing • **S24(3)(c)**Both H and W had lots of money to move out • **S34(3)(d)** Money no object and sons had extra room for H • S 24(3)(f) Evidence that H was still harassing wife
holding	Exclusive possession granted to W
Reasoning	• Violence include psych violence • Would be impractical for them to continue sharing the home • H can move ou • H had more reasources AND **makes a big deal about emotional attachment to home/hardship to H**

Wilson v Wilson *1989 granted*

1. Granted because of abuse and extremely limited resources

Fact	• H had a past convictions from abusing wife and was alcoholic • **They were currently maintaining TWO separate household INT THE SAME HOUSE** • W unemployed, received minimal assistance and could babysit • Wife agreed to accommodate needs beyond what H could afford
Decision	• Grant Exclusive possession to wife b/c it would not have just to force her to live with a H who abused her • Also in the best interest of child not to be uprooted and to be with mom • There was no financial alternative for the W

Behrendt v Behrendt

Facts	• H had been on disability from job for 6 years with depression and undiagnosed psychotic behaviours • Had started locking himself in room → no communication with W • Had abused one of the daughters • Wife applied for exclusive possession of matrimonial home under s 24 (3)(a) BIC and 24(3)(e) Suitable and affordabel accomadation • W submitted affidavit in claim and response to H • Son file affidavit to support H →said W harassed him out of house • H receiving disability benefits → had taken car and not returned with it etc. • **H claimed that he had <u>no money</u>** → filed not financial info and denied abuse
Decision	Dismissed → judge pointed to the contradictory evidence of the son and the age of daughter → H killed W with a chainsaw 3 months later
Critique	- Judge made decision on the "nature of the allegations" → not enough despite extensive psychiatric reports -How must a role did the children's affidavit - or lack thereof determine the issue

MATRIMONIAL HOME AND ABORIGINAL COMMUNITIES

- SCC has held that provincial family law statutes are not applicable to aboriginal persons on reserves.
  →Why? Constitutionally that aboriginal people are governed by federal legislation
- Order for exclusive possession were not available to aboriginal persons living on reserves
- Proposed: Bill S-2 allows aboriginal communities to develop own set of rules with respect to matrimonial interests and property
  →possessory rights on the reserves - process that they have to consult with community

and then file that legislation.

- If they do not do that there is a default structure set out in the act that aims to provide similar possessory (claims for exclusive possession) the kinds of relief we have looked at.

But see Family Homes on Reserves and Matrimonial Interests or Rights Act

UNJUST ENRICHMENT

Unjust enrichment is the only remedy available to cohabiting spouses.

The non-title holding spouse must show that:

1. There was an enrichment/benfit transferred to the title-holding spouse

2. There was a corresponding deprivation to the non-title holding spouse.

- NB in *Rawluck*, McLachlin did not want to give the CT because W not deprived when the value of the fam went up with the market

3. There was no juristic reason for the enrichment and it would be inequitable for the title-holding spouse to keep it (*Gardland*, Adopted in *Kerr*)

I. **INITIAL ONUS ON CLAIMANT:**
The Claimant must demonstrate there are no existing categories that would provide a juristic reason for the retention of the benefit.

➔ **The claimant *prima facie* meets the test that no juristic reason exists if they can demonstrate there is no juristic reason within existing categories** → contract, gift.

II. **REBUTTLE**
The Defendant may rebut *prima facie* conclusion by demonstrating that there are circumstances outside the established categories that would give rise to a juristic reason to retain the benefit.

- Proof of mutual benefit conferred
- Parties expectation → will not likely be successful b/c must prove intention was that title would not be different after separation →

REMEDIES:

FIRST: Ask would monetary remedy be sufficient in the circumstances (*Peter v Beblow*)

i. **on a value received or quantum meruit**

STEP TWO: If there is **no JFV** OR there is something about the property that cannot be replaced by money **(*Beblow; Kerr*)**

ASK: Is there a sufficient nexus between a) the acquisition or b) the preservation, maintenance or improvement of the property and contribution? (*Beblow; Pettkus; Sorochan*)
→ **if yes, CT**
→ The % of the proprietary interest will be proportionate to the contribution (*Sorochan*)

OR

STEP THREE: On a <u>value survived</u> basis (*Kerr*; *Vanasse)*

ASK: Is there a sufficient link between the accumulation of wealth and the contribution?
→ If yes, was there a JFV?

JOINT FAMILY VENTURE – SIGNS

1. **Evidence of mutual effort**

- collaboratively towards common goals,
- decision to have and raise children together,
- contributions to common financial pool

2. **Economic Integration**

- joint bank accounts, → ie level of integration
- business or farm operated as family unit

3. **Actual intent, Conduct → ex** how you present yourself as to the public
4. **Priority of the family**

    - conduct or proceeding on the basis or understanding of shared future
    - Leaving work to raise kids
    - Relocating to the maritime
    - Forgoing education or career advancement

→In all of these the length of relationship ties in as well

<u>REMEDIES</u>

Articulated by McLachlin* in *Peter v Beblow

<u>Value Received</u>: The value that the title hold spouse actually received

- Monetary remedies → Quantum Meruit
- Problem: over time hard to know what the value of your services are, you may not be able to realistically collect that value, your services might be worth far less than the asset that you helped obtain

<u>Value Survived:</u> the value of the asset at the time UE was claimed
→ important because the value survived may exceed the current value of the asset obtained by through the contribution

1. **Proprietary/CT remedies** are evaluated on a value survived basis (*Peter v Beblow*)

- Over a particular property → but NB in *Peter v Beblow*, court treated all family assets as a pool and place CT over the home because it was <u>the approximate portion of her contribution</u> to the assets as a whole NOT that she did 100% of the work for 100% of the home.

2. **Monetary remedies** for accumulated wealth through JFV (*Vanness/ Baranow*)

JFV *KERR V* BARANOW*; VANASSE V SEGUIN*: MONETARY REMEDIES ON VALUE SURVIVED BASIS W/ JFV

Available when the claimant can demonstrate a link between the contribution and the accumulation of wealth AND a Joint Family Venture
→ Idea that the assets that were accumulated are held in the JFV and if you contributed you should get an equitable share of the **total gains in assets at the time of the application**.
(Waters)

JFV FACTORS

5. **Evidence of mutual effort**

- collaboratively towards common goals,
- decision to have and raise children together,
- contributions to common financial pool

6. **Economic Integration**

- joint bank accounts, → ie level of integration
- business or farm operated as family unit

7. **Actual intent, Conduct → ex** how you present yourself as to the public
8. **Priority of the family**

    - conduct or proceeding on the basis or understanding of shared future
    - Leaving work to raise kids
    - Relocating to the maritime
    - Forgoing education or career advancement

→In all of these the length of relationship ties in as well

DOMESTIC CONTRACTS WITH APPLICATION UNDER *DA*

MIGLIN V MIGLIN – TEST FOR SETTING ASIDE A SEPARATION CONTRACT

1. Court affirms that the Objective of the new divorce act do not support importation the "Causal Connection test" from *Pelech* as it stands (emphasis on self –suff and autonomy)
→ Our normative attitudes re SS have changed

2. But affirms that autonomy and finality are still importance objective

- Cites s (9) →clause Lawyers duty to inform of other settlement options
- Indicative that parliament put a "high premium on private settlement"

3. Rejects holding of CA that treats application to set aside settlement similar to variation:
1) Has there been a material change in circumstances 2) Would the amount of support in the agreement justifiable under s 15 the *Act*

SHORT MIGLIN TEST

APPLICATION re Miglin

- **Step 1**- both parties were well-represented in the negotiation process
- Step 2 - there were some changes that have happened, but we don't think they were outside what the parties contemplated.

STEP ONE: CIRCUMSTANCES AT EXECUTION

1A: CIRCUMSTANCE OF THE EXECUTION

i. The State of the Parties

- Were there circumstance of pressure, vulnerability or opression
- Courts will look to the factors in s 15(4) a) Length of cohab b) function
  → Will be assessed "in all the circumstance"

ii. Condition of negotiation

- Length of negotiation
- Circumstances under which negotiations were held

iii. Independent Legal Advice

UNCONSIONABILITY

Unconscionability is a **lower standard** than in the world of commercial contract

- Party just need to present persuasive evidence that someone took advantage

→Courts should not presume a power imbalance; or if a power imbalance is present, should not presume that exploitation occurred

- **ILA may overcome power imbalance between the parties themselves**

1B: SUBSTANCE OF THE AGREEMENT

i. Only a "significant departure from the general objectives of the Act will warrant the Court's intervention"

ii. "Substantial compliance" means **a significant departure from the ENTIRE ACT** → not just the objectives of s 15.2

- Finality, certainty, autonomy: There is a lot of value to certainty (rely on the fact that what they negotiated is what they will live by), therefore accepting of some departure

from the objectives of the act
- And the objective in s 15.2

➔**NB** If the court determines that the agreement substantially fails to comply with the objectives of the ACT, parts of the agreement may be salvaged

- **Ie.** The whole agreement will not necessarily be set aside

***The finding of this stage will be the "backdrop" for the court says the "intention of the parties" is at the second stage

STEP 2: NEW CIRCUMSTANCE AND APPLICATION FOR SUPPORT

1. Courts should assess:

i. The extent to which the agreement reflects the original intent of the parties

- Ie has life unfolded in a way that was foreseeable by the parties at the formation of the agreement

ii. If the agreement is still in substantial compliance with the objectives of the *Act*

HIGH THRESHOLD FOR INTERVENTION:

i) There is an unforeseeable circumstance that would make the application of the settlement run counter to the original intent of the parties and

General response→ there were some changes that have happened, but we don't think they were outside what the parties contemplated.

ii) it broadly complies with the objectives of the *Act*

→ COURT UNLIKELY TO INTERVENE if first section is met

- **fact that agreement may not mirror what court would have ordered in the circumstances does not undermine its validity**

LIST OF CIRCUMSTANCES DEEMED FORESEEABLE:

→ the court says that they have abandoned the *Pelech* test of "radical" circumstances, but this seems pretty similar

- job mkt change;
- parenting responsibilities more onerous;
- transition into workforce might be challenging;
- each person's health cannot be guaranteed a constant;
- vale of assets in property division may not remain constant;
- business value may rise or fall

→ The only thing not on here is the sickness of the child

MIGLIN FACTS AND APPLICATION OF THE TEST

Facts	• Couple married in 1978-1993
	• Had 4 kids – fairly young
	• Owned a lodge business
	• **Negotiations lasted around a year, had ILA and other professional help to develop separation agreement**
	• The end result of negotation
	  ○ W trade ½ interest in lodge for H's ½ interest in MH
	  ○ H took on the mortgage though
	  ○ Child support of 60,000 → clear indication that this was to help W out too
	  ○ **Had a consulting agreement for 15,000/yr for 5 years and could be renewed with consent of both parties**

Issue	○ There was technically no spousal support in the agreement → so the W is making an application under s 15.2(1) ○ The court must consider s 15.2(4)(c) – the presence of agreement and the terms of the agreement
Application	H convinces the court that the agreement was entered into autonomously by the parties and that 1. Step One: i) Circumstances of execution -- there was no exploitation of a power imbalance that would warrant the agreement being set aside AND there was plenty legal advice ii)Substance of Agreement -- that it complied substantially with the objective of the act as a whole, and more specifically, the objective of s 15.2 2. Stage two At the time of W application, the agreement still i)Time of application -- reflected the original intention of the parties. ○ that the "consulting agreement" might not be renewed → she did no work in last 2 years, it is reasonable that he did not extend contract—how could no payment for services not being performed be a change in circumstances not foreseeable ○ Change in child care arrangements foreseeable ii) it still complied with the act

DISSENT MIGLIN – LE BEL

TEST: appropriate threshold for overriding the agreement is whether the agreement is objectively fair <u>at the time of the application</u>.

- separation agreements are unique
- Gender-based interdependencies & inequities may still be present in separation agreements →The parties' financial arrangements manifestly failed to address the fact that Ms. Miglin disproportionately suffered economic disadvantages flowing both from <u>both the roles</u> that the parties adopted during their 14 year marriage (and post- separation custody) and from the breakdown of the marriage."

- Don't sanctify family law K, can be much imbalance in bargaining power.
- Suggests return to Bracklow → apply more holistic approach to mrg breakdown, even in context of separation agreement.
- …[T

PRE-NUPS → HARTSHORNE V HARTSHORNE → ALIGNS WITH *MIGLIN*

NB In this case, the Majority aligns itself with the same policy arguments in *Miglin*

Two Time Frames

1. Time of Execution:

   i. **What was the parties intention at the time of the execution?**
   → A K will reflect the Parties' idea of fairness

   ii. Was the process of entering of the agreement fair?
   - ILA, Duress, Coersions, Undue Influence [s 56(4)]

2. Have things unfolded as parties had expected (ie Financial and domestic arrangements)

   i. Ie "foreseeable" or consistent with the K

   → The complainant must establish that the unfairness outweighs the general principle of deference to the parties' intention at the time of K → **BUT THIS IS A VERY HIGH BURDEN**

NB Fairness- the contract reflects what the parties think is fair at the time – the court cannot just set it aside because the contract is different than the version of fairness laid out in the statute.

Dissent Deschamps

The test should be: is the contract **SUBSTANTIVELY FAIR** at the time of application

- The K can guide the court as to what the parties think it fair

Facts	• 2 marriage • H wanted a marriage K that severley limited entitlement to property BUT **W maintained right to SS** • At time of marriage had already cohabited for 2 years and have a kid • W had previously worked as an associate at H's law firm but then left • W had had legal advice → told not to sign it • W did sign it but inserted clause that it was not voluntary • Agreement was that they had separate ownership of debts and liabilities and property – she was entitled to 2% per year of marraige

Reasoning Majority	1) **Intention:** They agreed to maintain separate property ownership at time K was made; 2) **Did not revise K:** Throughout marriage **they maintained** separate finances, bank accounts, etc, just as intended. Wife had kids, stayed at home, and raised children, as intended. 3) **Things unfolded as planned in the K** • **ILA obtained → there was no unfairness** • **"If the respondent truly believed the agreement was unacceptable, she should not have signed it" → deciding not to follow good ILA worked against her.**
Holding	Any economic disadvantage could be supported through **spousal support** order, **thus the marriage K should be enforced**. → Ie through compensatory suppor

DISSENT Deschamps	• Parties' intention should just be one factor among many when determining what is fair
	• **ILA does NOT render the agreement fair**
	• Majority ignored the POWER imbalance already at play
	  ○ Not mention that she already had a kid at the time
	  ○ No mention that she had been out of the workforce for years already
	  ○ No **mention that there was a clause in the agreement that she contested the K**
	• **<u>You are not exempted from the *ACT*</u> - you are still regulated by the regime. The H made a choice to marry along with the possibility of judicial review.**
	• Underlying suggestion at para [91] that part of the majority's fair to see unfairness is because they do not consider the **benefit** that the H got from the marriage
	
	NB Notes that the majority view DOES not encourage people to make fair K's.
	• The type of law only continues to benefit H's with property who want to know contracts will be enforced when they move onto the next family.
	• We should not be enforcing unfair Ks.
	Fairness **DOES NOT equate w/** Liberal idea of freedom of contract.
	→ the majority considers it "unfair" if people aren't able to rely on contract

Key Difference	1) Bastarache treats family K as any other K, doesn't take into account difference in bargaining power; 2) Minority → family law K context is different

POLICY Chat	**Likely that Basterache was wrong**: • BC makes new legislation • Sets out a test similar to ON • **BUT, there is a provision that even if none of those factors are met, judge can set it aside [s93(5)]** → Mimicked in *LeVan*, but NB → in ON the "fairness" test can only be considered one it has be proven that one of the grounds in s 56(4) have been breached

<u>SETTING ASIDE DOMESTIC CONTRACT ABSENT APPLICATION</u>

<u>Majury's Gender Based Approach to Unconscionability</u>→

There is systemic inequality of bargaining power what we ought to do if someone establishes from outset then presumption of unfairness should kick in—absent the other party rebutting this presumption courts should be more willing to set aside

TYPES OF DOMESTIC CONTRACTS – FLA

s51 – Definitions - "domestic contract" means a marriage contract, separation agreement, cohabitation agreement, paternity agreement or family arbitration agreement

s52 – Marriage K

s53 – Cohabitation Agreement

- **S 53(2) -- Cohab will become Marriage K if parties agree to marry**

s54 – Separation agreement

s55 – Formalities for enforceable contracts → unenforceable unless made in writing, signed by the parties and witnessed

CONTRACT PREVAILS OVER ACT S 2(10)

s2(10) – (outside part IV) but **very** important: a domestic K dealing with a matter also dealt with in this Act prevails unless this Act provides otherwise.

➔ **all valid K very broad scope and enforceability, unless the Act provides otherwise.**

PROVISIONS THAT WON'T HOLD

- **s56(1) – Judicial review –court may disregard provision of K where in BIC**
  - re education, moral training, custody or access of a child (all K)
- **s56(1.1) – CS must be reasonable in regard to CS guideline + provisions relating to support of child** (only **in s 54**)
- **s56(5)** – **barriers to remarriage (**similar to DA s21.2)
  → Removing barrier to remarriage is **not valid consideration**—if consideration J will set aside all or part K

SETTING ASIDE A SUPPORT AGREEMENT

- **s33(4)** – setting aside support agreements for unconscionability or if spouse becomes entitled to welfare after rejecting, or accepting only reduced, spousal support

TWO-STEP TEST S56(4) : *LEVAN* ONCA 2008) → CITES *DOCHUK*;

STEP 1: DECIDE WHETHER CONTRAVENTION OF S 56(4)(A), (B), OR (C)

S 56(4)(a) Failure to Disclose

i. **Parties MUST REQUEST DISCLOSURE of financial information** (*Butty v Butty* ONCA) **and;**
ii. **The non-disclosure must be SIGNIFICANT in order to invoke this protection** (*Butty v Butty* ONCA)
iii. **There is a duty in family law to disclose ALL assets and VALUE of those assets (*Rick*)**

S 56(4)(b) Understanding Nature and Consequences of the K

i. No requirement for independent legal advice in Ontario

ii. **BUT** if a party **deliberately declines** to seek legal advice → **court will not set aside contract**. (*Rosen* 1995 ONCA)

S 56(4)(c) Contract Law: DURESS and UNCONSIONABILITY

ONUS: The onus lies on the claimant to demonstrate that there were circumstances surrounding the **negotiation** of the contract require the contract to be set aside → ie vulnerability and exploitation

i. Vulnerability alone will not suffice (*Barton v Sauvé*; *Miglin*)
Miglin→ even when power imbalance is present there is **no presumption** that exploitation actually occurred.
ii. **Supposedly Lower threshold than private K-** The claimant is nor required to demonstrate a level of unconscionability as in private contract (*Miglin* re app for spousal support→ but see *Rick*

STEP 2: APPLY DOCHUK AND EVALUATE FAIRNESS

1) Should the court exercise its discretion to set aside the K:

a) Consider:

i. Whether there was concealment of the asset or material misrepresentation
ii. whether there had been duress or unconscionable circumstances
iii. whether the petitioning party neglected to pursue full legal disclosures
iv. whether he/she moved expeditiously to have agreement set aside
v. whether he/she received substantial benefits under the agreement
vi. whether the other party had fulfilled his/her obligations under the agreement

b) Fairness (LeVan):

The judge is entitled to consider the fairness of the application *alongside* the other factors from *Dochuk*
→ J may be more inclined to set aside clearly unfair K than one that treated parties fairly

***NB – Tosh said "equally" but the whole point of this test is the fact that equal/=/ fairness and that we are looking at what is **substantively fair.**

S56(4) CASE LAW

S56(4)(A) FAILURE TO DISCLOSE ASSETS
Levan v Levan 2008 ONCA

Facts	• H had significant shares in family business→ fam drafted K that **excluded** all of H's assets **and severely restricted SS** • W's 1st layer said not to sign it • H sent W to another lawyer 2 days before the wedding • 2nd lawyer connected to H's lawyer • **H's lawyer worked for firm that handled company AND evidence to suggest that H's lawyer worked to prevent disclosure** • W signed **NB – W applied to set entire K aside --> not just SS**
Held	• $5.3 million and significant Child and Spousal support
Reasons	• There was no disclosure s 56(4)(a) • The H misrepresented the terms of the K • AND the lack of disclosure prevented her from understanding the scope of the the K under s 56(4)(b) → rejected proposal that she would have signed no matter what the numbers were, since she didn't even know what the numbers would relate to (*Dochuk*)
Ratio	**See above – fairness in ON legislation**
	• **Perhaps "unfair"** because of the restriction of spousal support→ see Hartshorne

Dochuk v Dochuk 1999 Ont Gen Div → Demchuk test not met

Facts:	Evidence that husband had willfully failed to disclose relevant information,
Holding	Court declined to set K b/c the held that **wife would have signed the contract anyways.**

Rick v Brandesema [2009]→Originally a BC case

Facts	• Husband and wife enter K-→ property division was quite different than her entitlement if they were compliant with legislative regime. • **Wife had significant mental health issues**. • Husband deliberately diverted funds with help of brother in law. Husband knew of wife's "disordered thinking" and "impetuous behaviours." CA • Her vulnerability was compensated by ILA
Decision	
Reasoning	• Articulated Issue as a implication of *Miglin*

	• Applied the *Miglin* test and found that the circumstances of negotiation were governed by exploitation • **Abella:** The husband's exploitative conduct both in failing to make full and honest disclosure and in taking advantage of what he knew to be his wife's mental instability resulted in the finding of unconscionability **→Professional Help did not cure this finding**

Ward v Ward → Nature of non-disclosure might have impact

- W engaged in collaborative law
- Later claimed that H failed to disclose
- **Rep by counsel and had knowledge of H's financial situation AND that the nature of his work meant that not income statement would be available.**

K upheld→ Likely because a) the nature of non disclosure b) counsel
BUT argue this should not apply – collaborative law means no litigation → you often threaten with litigation to get disclosure

S 56(4)(B) UNDERSTANDING NATURE AND CONSEQUENCE OF K → ILA
Rosen v Rosen 1995

- Court held that wife had acted **voluntarily** when she declined to seek Legal Advice
  → **K upheld**

Clayton v Clayton

- Court held that she was "quite capable" of seeking legal advice and had refused to do so
- **K Upheld**

S56(4)(C) CLAIMS ABOUT DURESS AND UNCONSCIONABILITY → HIGH THRESHOLD
Saul v Himel 1995 Ont Gen Div → Misrepresentation→ K upheld

Facts	• Parties signed K that H would support kids • H claims later that he did not know that he was not the biological father of one of the kids • Claimed W misrepresented
Holding	• H did know that he wasn't the bio father • W had no duty to disclose those facts → **K upheld**

Barton v Sauvé (2010) ONSC → vulnerability alone doesn't justify intervention

Facts	• W had gotten 2 million in inheritence • Signed cohab agreement that a) she would buy a house and make him joint owner and b) he would get 70,000 on separation • M had depression and rehabilitating physical injury • M had ILA and lawyer testified that M knew and understood the contract • Claimed W had taken advantage of physical and mental vulnerability
Ratio	**Vulnerability alone will not justify setting aside the K**→the claimant must provide evidence that the exploitation actually occurred during the negotiation process in order to discharge the onus
Holding	No evidence that she took advantage in the way envisioned by the law of contract → **K upheld**
reasoning	• No overwhelming power imbalance – and no evidence that she took advantage • He had ILA • He understood the nature of the contract and consequences • He signed it voluntarily

s33(4) → Setting Aside a Provision for Support in Domestic Contract

33 (4) The court may **set aside** a provision for **support OR a waiver of the right to support** in a domestic contract and may determine and order support in an application under subsection (1) although the contract contains an express provision excluding the application of this section,

(a) **Unconsionable:** if the provision for support or the waiver of the right to support results in unconscionable circumstances (THIS IS HIGH THRESHOLD);

(b) **Public purse:** if the provision for waiver of limited support is a for dependant who qualifies for social assistance

(c) **Deadbeat Spouse:** if there **is default** in the payment of support under the contract at the time the application is made

Salonen v Salonen 1986 – s 33(4) → would the interpretation be different now?

Facts	• H and W signed separation agreement → W went to live with another guy • W had ILA • H took on all marriage debts BUT this meant that he couldn't pay support • W separates with other guy • Applies to have agreement set aside so that H has to pay support • Otherwise she and kids are on social assistance

Decision	• **K UPHELD** • W had ILA and two months negotiation time → aple time to consider long and short term effects • NB court said holdin it up would be pulic policy
Policy Chat	• Probably not going to be held up now after *Bracklow* → shift support of family members based on need to the private sphere.

s56(5) – BARRIERS TO REMARRIAGE (MIRROR PROVISION OF DA 21.2)

- Applies where someone in religious circumstances who is obliged to give a divorce can have their arrangements interfered with by the court if they use that religious obligation for bargaining power (e.g. deliverance of "get" from H to W under Jewish law)

WARD V WARD ONCA → COLLABORATIVE LAW AGREEMENT PRESUMPTIVELY VALID

Parties negotiated CL agreement, woman tried to litigate, thought it was unfair. Trial Ct upheld but ONCA allowed appeal → **CL agreement presumptively valid, won't be set aside lightly**

INDEPENDENT LEGAL ADVICE IN LEVAN AND HARTSHORNE

Court appears to draw distinction re ILA basd on how knowledgeable parties are regarding the law. In *Hartshorne*, probably thought "this woman is a lawyer – she should know she'd be bound if she signed it"; *LeVan*, more deferential to woman

SPOUSAL SUPPORT

Legislation

Spousal support is another area of shared jurisdiction

- Federal [s. 91(26) – Marriage and Divorce]
  - *Divorce Act*
  - Support seen as ancillary to divorce matters
- Provincial [s. 92(13) Property and Civil Rights within the Province]
  - *Family Law Act, Part III*
- Note paramount of *Divorce Act*

Most often if not married you will look for your support under the *FLA*, but if already divorced you look at *Divorce Act*. However could have been married but not divorced so you could still seek under *FLA.*
FLA considers faulty behaviour a bit more or provides more scope for it. But generally not looking for divorce process and just want support.

SS FOR COHABITING COUPLES

WHO IS A "SPOUSE" UNDER PART III OF THE FLA

S. 29 In this Part, "spouse" means a spouse as defined in subsection 1 (1) [essentially people that are married], and in addition includes **either of two persons who are not married** to each other and have cohabited,

(a) continuously for a period of not less than three years, or
(b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

S 1(1) "Cohabit" : means to live together in a **conjugal relationship**, whether within or outside marriage

DEFINING "COHABIT IN A CONJUGAL RELATIONSHIP " MOLDOWICH V PENTTINEN

Do not need to meet all of these indices but becomes analysis of whether it is **more reasonable than not in light** of these indicators to conclude they were cohabitating continuously

Key factors to consider re whether spouses cohabit within FLA s29 definition:

1) **Shelter**
2) **Sexual and Personal Behaviour**
3) **Services (that parties provided to each other – e.g. household/domestic)**
4) **Social (participate together or separately in community? hold themselves out as couple to family and friends?)**
5) **Societal (how did society act toward them; couple for tax purposes?)**
6) **Support (economic – shared or separate financial arrangements?)**
7) **Children**

- Shelter, sleeping arrangements, sexual and personal behaviour, services, who prepared meals, mended clothing, shopping, maintenance, social situation presentation, conduct of community towards them and economic situation (acquisition and ownership of property), financial arrangement between them, and attitude and conduct of parties concerning children.

Impact of Children?

- If there are children you move toward s.29(b)→ Courts become more flexible with term "permanence" when there are kids involved
- Mix of objective and subjective factors
- Kierstead says predictability is an issue, but relationships are different so we want to have some scope to weigh factors

DEFINFIN "CONTINUOUSLY" → SULLIVAN V LETNIK (CAPTAIN J)

Test: **Whether the parties are separated is a question of intent, not geography. At least one of the parties must intend to permanently sever the relationship.**

While physical separation of parties may amount to separation of cohabitation, test should be flexible enough to recognize that brief cooling off period does not bring relationship to an end.

Note how hard court is working to include people under s29 → result in more ppl being included as spouses, thus more ppl subject to SS obligation → removes burden from state

Facts	• Parties developed sexual relationship while woman worked for him as bookkeeper. • Had boat in Toronto and Cleveland, other properties too. • Sometimes lived together and sometimes not→ on boat, at her house • Man argued they didn't cohabit continuously, and they never married, so no SS obligation • NB both got anullment of previous marriage
Issue	Was this a continous relationship for the purpose of s 29 FLA?
Decision	They did "live continuously" together -→ intention, not geography
Reasoning	• W had lots of pictures, notes that sais "to my wife" • H had introduced her to W in public/ at work events • Newpaper clipping of them as H and W • Anillment with the purpose of getting remarried

DEFINE "SOME PERMANENCE" S 29(B) → HAZELWOOD V KENT

COHABITATION DOES NOT TURN EXCLUSIVELY ON THE AMOUNT OF TIME PARTIES SPEND TOGETHER UNDER THE SAME ROOF
When children are involved there is a lower threshold for cohabitation that can include:

- An element of financial support by one party to the other
- An altering of the roles in the relationship as a result of the birth of the children and
- Sometime spent together on a regular basis this relationship

F: Exclusive relationship but not living together, 2 kids. Guy names woman as spouse for health benefits
D: Court order H to pony up

DEFINE "NOT LESS THAN THREE YEARS"

3 year absolute requirement if no kids – Braybrick v Nicksick

Facts	• a woman cohabitates with guy for 18 months • , buy a home together, share some expenses. • Kids in relationship but not from this relationship. → Guy killed in collision and woman wants to bring and action to sue the driver of the vehicle.
Holding	3 year period and absolute requirement

SCTRICT REQUIREMENT BECAUSE CLEARLY DEFINED IN LEG

1 MARRIED SPOUSE → MAHONEY V KING

Facts	• M and W have an intimate relationship for 5 years • M is married to another lady and W had her own place
Decision	Court does not order support but does not preclude possibility that this could be a spouse

NB McLeod does like this says "any dating" party could be a "Spouse" → Id say not about where you are living but financial dependency → ususally interdependency happens when you live together

FLA – SPOUSAL SUPPORT

OBLIGATION S30

S. 30 Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with **need**, to the extent that he or she is capable of doing so.

- S. 33(2) An application for an order for the support of a dependant may be made by the dependant or the dependant's parent.

THE ORDER S 33(1)

33. (1) A court may, on application, order a person to provide support for his or her dependants and determine the amount of support

PURPOSE OF SPOUSAL SUPPORT UNDER THE FLA S 33(8)

Purposes of order for support of spouse

S 33 (8) An order for the support of a spouse should,

(a) recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;

(b) share the economic burden of child support equitably;

(c) make fair provision to assist the spouse to become able to contribute to his or her own support; and

(d) relieve financial hardship, if this has not been done by orders under Parts I

DETERMINNG AMOUNT S 33(9)

Determination of amount for support of spouses, parents

S 33(9) In determining the amount and duration, if any, of support for a spouse or parent in relation to need, the court shall consider all the circumstances of the parties, including,

(a) the dependant's and respondent's current assets and means;

(b) the assets and means that the dependant and respondent are likely to have in the future;

(c) the dependant's capacity to contribute to his or her own support;

(d) the respondent's capacity to provide support;

(e) the dependant's and respondent's age and physical and mental health;

(f) the dependant's needs, in determining which the court shall have regard to the accustomed standard of living while the parties resided together;

(g) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;

(h) any legal obligation of the respondent or dependant to provide support for another person;

(i) the desirability of the dependant or respondent remaining at home to care for a child;

(j) a contribution by the dependant to the realization of the respondent's career potential;

(l) If the dependant is a spouse,

(i) the length of time the dependant and respondent cohabited,

(ii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,

(iii) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(iv) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(v) **any housekeeping, child care or other domestic service** performed by the spouse for the family, **as if the spouse were devoting the time spent in performing that service in remunerative employmen**t and were contributing the earnings to the family's support,

(vi) the **effect on the spouse's earnings and career development** of the responsibility of caring for a child; and

(m) any other legal right of the dependant to support, other than out of public money

S 33(10) FLA – MISCONDUCT INFLUENCES AMOUNT BUT NOT ENTITLEMENT

S 33(10) The obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship
→ won't disentitle you, but you won't get much

Morey v Morey *1979* – "Obvious and gross repudiation of the relationship"

It is necessary to demonstrate :

a) the conduct must be exceptionally bad
b) the conduct must be such as could reasonably be expected to destroy the marriage
c) the conduct must have persisted in the face of innocences and virtual blamelessness on the part of the other spouse
d) a matrimonial offence is not sufficient
c) The person raising the test must have a bonefide relief that it can be met → costs if the court finds its frivolous

Limits:
1. Judge discretion – what is "bad"
2. Who is virtually blameless?

Bruni v Bruni *2004*

1. s 33(10) of the FLA CAN apply to post separation conduct

	W conscientious efforts to destroy relationship between H and daugher → "parental alienation syndrome" → the conduct was appaling and needed to be condemned **USED s 33(10) to punish her for misconduct after Divorce and separation agreement**
Decision	• Wife awarded $1 per month in spousal support NB Tosh says that judge probably did not terminate support completely, because if W reapplied to vary they would have to determine *Entitlement* all over again – s 33(10) can't apply and is a waste of resources.

SS MARRIED COUPLES

DIVORCE ACT

15.2 (1)SPOUSAL SUPPORT ORDER A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or pe- riodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
15.2(2) INTERIM Where an application is made under subsection (1), the court may, on application by ei- ther or both spouses, make an interim order re- quiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the appli- cation under subsection (1).
15.2(3) TERMS AND CONDITIONS The court may make an order under sub-section (1) or an interim order under subsection (2) for **a definite or indefinite period** or **until a specified event occurs**, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
15.2(4) FACTORS CONSIDERED In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
(a) the length of time the spouses cohabited
(b) the functions performed by each spouse during cohabitation; and
(c) any order, agreement or arrangement relating to support of either spouse.

15.2(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

15.2(6) OBJECTIVES An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
(a) recognize any **economic advantages or disadvantages** to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any **financial consequences arising from the care of any child** of the marriage over and **above** any obligation for the support of any child of the marriage;

(c) relieve any **economic hardship** of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, **promote the economic self-sufficiency** of each spouse within a **reasonable** period of time.

MODELS OF MARRIAGE – *BRACKLOW*

Basic Social Obligation → Primary SS responsibility falls on the former spouse, rather than the state	**Independent Model** → complemented by "Clean Break" theory OR **Compensation**
a) Founded on the preconception that marriage creates an interdependency that cannot be unravelled b) Recognizes the difference between actual and theoretical independence and self sufficiency c) Payment is the "income replacement model" that should, as much as possible elevate the other spouse to a pre-breakdown standard of living	a) Marriage is an enterprise that can be terminated unilaterally at anytime b)parties are formally committed, but remain substantively autonomous and independent agents c) Support is to help transition into self-sufficiency

MODELS OF SUPPORT- ROGERSON

1. Means and Needs - Views SS as income security (*Bracklow*)

2. Economic Advantages and Disadvantages of the marriage and its breakdown → Viewing SS as compensation for needs created as a result of the marriage (usually in the form of compensation for lost opportunity to obtain higher income)

3. Self-Sufficiency and Spousal Independence "Clean Break" → Spouses need to recognize that marriage has ended. This model facilitates economic disentanglement and assumption by spouses for their own support.

OBJECTIVES

S. 15.2 (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should:
15.2(*a*) COMPENSATORY recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(*b*) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage

- This provision demonstrates compensatory support

(*c*) NON COMPENSATORY : relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

- Might be need – the disproportionate hardship of the spouse who performed mostly domestic functions at the expense of employment
- But also the opportunity cost of being a home maker

(*d*) SELF SUFin **so far as practicable**, promote the economic self-sufficiency of each spouse within a reasonable period of time.

- note post trilogy rigorous application of self sufficiency
- statute now makes it one objective, but still one of five to be decided
  → *Moge* made the interpretative point that i) self sufficiency is relative and ii) that it is one of four factors to be considered.

MESSIER V DELAGE- HISTORY OF SS UNDER THE *1965 DIVORCE ACT* – NEED V SELF SUFF

Facts	• W and H separated • W had three kids • W got Masters degree → H made an application 5 years later on the basis that she had plenty of time to become self sufficient
Issue	Does the Spouse have "Means and Needs" that would warrant support?
Holding Majority	• The majority used discretion to award more support on needs basis
Dissent	• Took a very **strong "clean break"** approach • Looked at the growing equality of women in the workplace and changing societal views → If you are "employable" but not employed, your needs are because of society, not the marriage. **The state should be responsible for providing you with welfare.**

PELECH -"CLEAN BREAK" TEST - ERA OF SELF SUFFICIENCY AND FINALITY

1. Courts will not interfere with an existing agreement between the parties that attempts to fully and finally settle matters of spousal support, unless the applicant can establish:

a) He or she has suffered a **radical change**
b) Flowing from an economic pattern of dependency [factors s 15(4)] –engendered by marriage

2. SS should not go on forever – if there is need that does not arise from the marriage, the welfare of that individual should be shared by the state and not the former spouse

Facts	• Decided after new Act came into effect, but was governed by the old act • **The situation was a couple who had a previous separation agreement with ILA** • The H had paid a lump sum • 13 years later W makes application for support→ on welfare
Issue	Should the court set aside a separation agreement
Decision	• Court will not set aside agreement • The change of health **was not in any way a consequence of the marriage** • She was like any other person who was unemplyed

Policy Implications of Pelech --Baily

1. The clean break approach resulted in higher levels of poverty in post-separation individuals – particularly women;

- Self Suff – held to be about 20,000 per year

2. And created lack of consensus re when to order SS, how much, for how long, etc. **There was a lot of uncertainty and judicial discretion.**
3. **NB although this case was about private agreement, the principle of self-sufficiency was latched onto by courts when determining entitlement, quantum and duration of support.**
   → lawyers would give more weight to self sufficiency than it deserved
   → uncertainty eroded the legitimacy of SS

4. BIGGEST issue: usually granted to older women from more "traditional" marriages than younger women who were deemed more "employable"
5. The decision reflected a lack of consensus as to what marriage and divorce meant and what the consequences should be a break down

1. COMPENSATION – *MOGE V MOGE* FEMINIZATION OF POVERTY

1. Makes statutory interpretation of s 17(7)/15.2(6) clear:

i. Self Sufficiency is ¼ factors to be considered
ii. "Self sufficiency **in so far as practical"** → Compensatory support desireable given the social and practical women face in the labour market
iii. Parliament has appeared to adopt compensatory model

→ "recoginize economic advantage/ disadvamtage of marriage or marriage breakdown."

2. Takes judicial notice of the feminization of poverty

- Excellent analysis of how custodial parent will face barriers in labour

3. Cautions about assumption between "new" and "traditional" marriages for the purpose of assessing "self-sufficiency"

MAJORITY - LHD

Facts	• The parties married in 1950's • Immigrate from Poland, W has grade 7 education • Separated in 1973 – W got minimal SS + CS support • W worked as a cleaner at night • H brings application to terminate SS and CS **H uses *Pelech*:** The W should now be self –sufficiency
Holding	NO WAY! Says L'HD

Application	**Application of the four factors leads to finding Mrs M is entitled to compensatory SS:** **1)** She has sustained an economic disadvantage from the marriage brkdwn **2)** Her long-term responsibility for the children after separation impacted her ability to earn$ **3)** She continues to suffer economic hardship as result of the mrg brkdwn Has failed to become economically self-sufficient, notwithstand her considerable efforts.
Procedural notes.	**1. This is an example of where the W has applied for a VARIATION of support under s 17(1)** • s 17(7) directs that a variation for support should meet objectives that are identical to the objectives for an initial order • the difference is that pursuant to s 17(4.1) to vary, court must be satisfied that there is a change in the "condition, means, needs and circumstances of the spouse" **2. LHD is not overturning *Pelech,* Just distinguishing it → see *Miglin***

MOGE POLICY Q'S

1. McLachlin reaches same conclusion on statutory interpretation alone

Is LHD's judicial notice really a positive thing? Should courts be making policy comments?

Sheppard
- Does not address larger social context that results in Fem Pov – ex. Government policy re immigration and childcare
- Does not address how intersectionality increase vulnerability

Rogerson
- Did LHD entrench privatization policies by placing the burden of the feminization of poverty onto individual
- NB compensatory now available but awarded when in poverty
- On the other hand, would fem of pov ever come onto the political radar in a CONSTRUCTIVE way unless the people who benefit from the current structure were feeling the pinch?

HOUGH V HOUGH – UNSUCCESSFUL CLAIM – VIELED ARGUMENT ABOUT "NEED"

	• H a retired newscaster – had a pension of about 80,000 • W a working stock broker – 500,000 /year • H tried to argue that it would be an economic hardship to have to live on his current budget when he was used to a different standard of living → you ought to take standard of living into account
Decision	You can take standard of living into consideration when you think about compensation → but that is not going to apply here

Reasoning	• H had no economic disadvantages arising out of the marriage → no compensatory support required • Not really any need – he had assets, only barrier is wanting lifestyle • The only justification for providing H with support would be to promote he self sufficiency – in so far as practical → Normally applied in that it is not practical to expect self sufficiency →here it is that what he thinks is "sufficient" is impractical
	• Lifestyle is considered when determining the "condition, means, needs and circumstances" of each spouse • Considered how previous standard of living matched with this → not reasonable or practical for H to make W responsible for the choices he makes to retain standard of living in the marriage -- > Ie not sell condo
Order	• $5000 for two years and 2,500 for one year
Consistent with Moge? Yes → Moge was about the lost opportunity cost for potential earning when you enter a marriage • Neither party experienced this • This case was really a mean v needs case under the guise of compensation	

Keast v Keast *1986*

- s33(9)(j) – court ordered compensatory support under the FLA, including a "quasi-restitutionary or compensatory support sum" for contributions to career potential.

2. NON – COMPENSATORY SUPPORT – NEED – *BRACKLOW V BRACKLOW* 1999

1. The obligation of mutual support created by the marriage means that a spouse has a duty to support, beyond contract and compensation, a former spouse who remains clearly economically vulnerable after the marriage?

Facts	• Parties lived together for 4 years and then married • Mrs. B had 2 children from previous relationship • Initially Mrs. B contributed more to expenses; after 1987 expenses shared equally; eventually Mr. B assumed burden after Mrs. B became unable to work (she was hospitalized in 1991) • Parties separated December 1992 • Previously H had offered to extend duration of support • SCC accepted that Mrs. B was unlikely ever to work again → **Highlights - Mr. B was aware from beginning of relationship that Mrs. B had health problems**
Ratio	**Rationales for entitlement to spousal support:** **1. As in *Moge* and the *Act*: Marriage is an economic partnership that is built upon a premise of mutual support :** i. Therefore, the obligation for support can **arise of the marriage relationship itself**, not just contract ii. There may be circumstance which entitle a spouse to mutual support in the absence of contractual or compensatory factots → NEEDS → **NB** not "I do" but the presumed interdependence that is created . The premise is rebuttable **2. The language of the *Act* indicated parliament wanted support to be awarded for non-compensatory reasons** • S 15.2(6)(a) "Economic Hardship …arising from breakdown of marriage" → can encompass the fact a spouse that used to have a safety net now finds themselves without out one → goes beyond the jurisprudence that relied on this provision for compensation
Application	• Length of cohabitation – 7 years • Hardship of Breakdown imposed – interdependency born from marriage • Need; Ability to pay→ lend support that she is entitled • Matter remitted to lower court for assessment – husband ordered to pay $400 per month for 5 years
Decision	• Finds entitlement BUT remitted to lower court for determination of quantum and support

NOCK V NOCK 1998 - NEED VEILED AS COMPENSATION

NB This is NOT a non-compensatory claim – it's an example of someone who claimed on a compensatory basis but the reasoning really mirrors non-compensatory justification.

Facts	• H loses job after marriage • Gets part time but won't get full time b/c need retraining • He can't retrain because he has learning disability
Decision	→ gives rise to entitlement to support for a support for a time limited duration
Reasoning	• The courts says that H is disadvantaged by marriage breakdown because he cannot rely on W's income stream for support while he get retrainted • but this is not the reasoning in *Moge* → in *Moge*, there was some function or pattern of dependence within the marriage that made the Spouse disadvantaged after breakdown → If H said, I didn't retrain during marriage because of X for the good of family, then he would get compensation • Here, the reasoning is like *Bracklow* → H is experiencing hardship due to the loss of support he received during marriage
Policy	Suggests that compensation is really something that only comes up for women → in Hough , there was no lost opportunity → men may be in need, but there is no basis for compensation

3. BALANCING SELF-SUFFICIENCY WITH NEED

1. Court will take a different approach to awarding spousal support when the marriage is traditional and the wife is older (has a shorter window to earn money and get skills) [Shields; Rioux]

Shields v Shields *ALB CA*

Facts	• Wife is young • 15 year marriage • She had few skills prior to marriage→ stayed at home to work with kids • Had previously received lump sum award; in 2002 motions judge awards $1000 per month indefinitely • By 2006 she was working full time in a low income job
Decision	Given the factors in this case: • a spousal support order of $1000/month for an eight year duration meets objectives a) recognizing the respondent's economic disadvantage arising from the marriage breakdown, B) encouraging he respondent to complete her transition to self-sufficiency by positioning her to earn an adequate income and **adapt her lifestyle accordingl**

Reasons	• The wife had few skills before marriage and re- entered back into the work place essentially the same place she left → no compensatory support • She was earning an income that corresponded to her skills → was about her needing to take care of kids anymore
	Para 32: 15 year marriage and 8 year separation and taking into account the relevant factors— income/ earning capacity for skills, working during marriage, age → provide for **realistic time frame to return to work force** and attain self-sufficiency.

Rioux v Rioux *ONCA*

Facts	• 21 year marriage • At trial, wife is still relatively young • wife earned $26,000 annually during marriage; husband earned $103,000 • Husband in contempt of several orders • At trial, lump sum awarded
Decision	Ont CA awarded $1500 monthly from 2007 to 2012, with review available to either party
Ration	• Additional support is require to attain Self Sufficiency but it is not indefinite

CONDUCT AND SPOUSAL SUPPORT

***Divorce Act,* S. 15.2 (5):** In making an order under subsection (1)or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse **in relation** to the marriage.

LESKUN V LESKUN *2006 SCC*

Facts	• Original support order and then reconsideration • H says bankrupt – but likely diverting assets • W says " I can't get work because I am unstable. I am unstable because of what you did."
BCCA	The ACT does not prevent consideration that the failure to get self sufficiency as being the result, at least in part, of the emotional devastation caused by the other spouse misconduct.
SCC	
Ratio	• You cannot do indirectly what parliament prohibited you from doing directly • The consequences of misconduct and NOT the misconduct itself are relevant – and are assessed as part of the "victims" spouse condition, means, needs and circumstances [ie if depression became a health condition that prevented you from working]

Holding	• Spousal support awarded b/c there were other factors such as economic disadvantage – ex. She cashed RRSP for
Reasoning	• The breakdown, the emotional response and the consequence of the response can be taken into account → but you can only consider those **as means, needs and circumstances [ie the fact that she can't return to work]** when assessing objectives (self sufficiency) →not attributing fault It is impossible and irrelevant to attach a financial assessment to misconduct
	• Semantic? • Avoidance of minute analysis of what cirucmstances

UNGERER V UNGERER

1. You can take post marriage conduct into account.

2. Post divorce conduct must be of "such a morally repugnant nature as would cause a right minded person to say that a spouse is no longer entitled to i)support and ii) assistance from court to enforce/compel support

Facts	• 23 Year marriage • H applies to terminate support • **Argument:** court should consider misconduct *After the marriage* → wife made no effort to be self sufficient – contempt of access orders and had alientated daughter
Ratio	• You can take post marriage misconduct into account • Spousal support can only be terminated for post marriage conduct if it is morally repugnant

CUSTODY AND ACCESS

Custody is concerned about the division of care and responsibility of child care should be divided between different household

APPLICATION FOR CUSTODY

DIVORCE ACT – FEDERAL

16 (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage (what if you are not biological parent→ if you look at DA s. 2(2)→ includes any child they stand in the place of the parents OR one is parent and other stands in place of parent) So what does standing in place of parent? And when are you in definition of child of the marriage

Application by other person

- (3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

  NOTE: other than spouses might make application**? Grandparents**, there has been a lobby and concern by grandparents groups because grandparents are often really negatively impacted by parties divorces. They have been really involved in children's lives.

Joint custody or access

- (4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

Access

- (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

Terms and conditions

- **16 (6)** The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

Factors

- **16(8)** In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

  NOTE BEST INTEREST OF THE CHILD: In making an order courts should take only the best interest of child mean, needs and other circumstances. Even when courts are making orders under ***Divorce Act*** **they tend to refer to more detailed elements of CLRA s24(3)**

Past conduct

- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person **unless the conduct is relevant to the ability of that person to act as a parent of a child**.

Maximum contact

- (10) In making an order under this section, the **court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child** and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

CLRA – PROVINCIAL LEGISLATION FOR CUSTODY
APPLICATION AND MERIT

Merits of application for custody or access
24 (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child, in accordance with subsections (2), (3) and (4).
Best Interests of the Child
24 (2) The court shall consider all the child's needs and circumstances, including,

(a) the love, affection and emotional ties between the child and,
  (i) each person entitled to or claiming custody of or access to the child,
  (ii) other members of the child's family who reside with the child, and
  (iii) persons involved in the child's care and upbringing;
(b) the child's views and preferences, if they can reasonably be ascertained;
(c) the length of time the child has lived in a stable home environment;
(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;
(e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
(f) the permanence and stability of the family unit with which it is proposed that the child will live;
(g) the ability of each person applying for custody of or access to the child to act as a parent; and
(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

S 24(3) Past Conduct Not Considered unless violent [s 24(4)]

Past conduct
24 (3) A person's past conduct shall be considered only,

(a) in accordance with subsection (4); or
(b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent.

→ Parallels the divorce act

Violence and abuse (post Renaud)
24 (4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,

(a) his or her spouse;
(b) a parent of the child to whom the application relates;
(c) a member of the person's household; or
(d) any child. **NOTE: New provision in the *CLA* specifically talks about violence and abuse—**

Same
25 (5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse.

S 20 Father and Mother equally entitled

20 (1) Except as otherwise provided in this Part, the father and the mother of a child are equally entitled to custody of the child.

→ Both have equal rights to children and responsibility to take care of the child when they are with them

Rights and responsibilities

- (2) A person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child and must exercise those rights and responsibilities in the best interests of the child.

Authority to act

- (3) Where more than one person is entitled to custody of a child, any one of them may exercise the rights and accept the responsibilities of a parent on behalf of them in respect of the child.

S 20(4) Custody Rights when Parents Separate

Where parents separate

(4) Where the parents of a child live separate and apart and the child lives with one of them with the consent, implied consent or acquiescence of the other of them, the right of the other to exercise the entitlement of custody and the incidents of custody, but not the entitlement to access, is suspended until a separation agreement or order otherwise provides.

NOTE: Initial piece in the act is that parents have decided to live separate and apart and consent to one parent having child live with them. Other leaves—until any other order is made s. 24(4) the person with who the child lives is going to exercise custodial decision making

Access Definition s 20(5)

Access

- (5) The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

S 21(1) and (2) How to Apply for Custody and Who can apply

Application for custody or access

21 (1) A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.

Affidavit

(2) An application under subsection (1) for custody of or access to a child shall be accompanied by an affidavit, in the form prescribed for the purpose by the rules of court, of the person applying for custody or access, containing,

(a) the person's proposed plan for the child's care and upbringing;
(b) information respecting the person's current or previous involvement in any family proceedings, including proceedings under Part III of the *Child and Family Services Act* (child protection), or in any criminal proceedings; and
(c) any other information known to the person that is relevant to the factors to be considered by the court under subsections 24 (2), (3) and (4) in determining the best interests of the child.

OFFICE OF THE CHILDREN'S LAWYER : *COURTS OF JUSTICE ACT*: SECTION 89(3.1)

Hearing Child's Wishes

There are (4) Main Approaches:

1. Through assessor or other mental health professional
2. Through parties and their witnesses who provide hearsay evidence of child's statements
3. By judge's interview with child outside courtroom
4. By child providing direct evidence in court (rare)

Office of the Children's Lawyer
Statutory authority: *Courts of Justice Act*:
Section 89(3.1):
At the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding

- Court can request that OCL become involved, they can appoint a lawyer to represent the child's interest, social worker that is akin to assessment report (but not completely the same) or both. With younger kids you see social worker and older kids you see lawyer
- Wording says "may", the OCL can determine if they can take the case on and have impact

Section 112(1):
In a proceeding under the *Divorce Act* (Canada) or the *Children's Law Reform Act* in which a question concerning custody of or access to a child is before the court, the Children's Lawyer may cause an investigation to be made and may report and make recommendations to the court on all matters concerning custody of or access to the child and the child's support and education

COURT CANNOT ORDER THE OCL TO GET INVOLVED

***Bhajan v Bhajan*→**

- Used parens patriae to require children's lawyer to become involved.
- No, you cannot do this
- The Ont CA noticed the issues facing the trial court in this issue particularly because these merely provide authority for courts to request (no mandatory wording)

How, if at all, did the trial judge's use of *parens patriae* jurisdiction differ from that of the judge in *AA v BB*?

- **There has to be a gap in the law, there does not seem to be a gap here.** There may **be a gap in service** because OCL resources do no allow them to deal with all of the cases but that is different from gap in legislation.
- Court must respect the legislative scheme in place and not create a parallel scheme (*para 24)*

HARM NARRATIVE?

Emerging research suggests that it isn't the sepearation of parents that is harmful but exposure to
1. conflict in the course of divorce
2. Diminished parenting capacity
3. Diminished economic support

UK Case Study

UK has abolished "custody and acess in statutes"
Reason? The terms of custody and access arise out of a particular conception of both family structure and childhood

- New language reflects acceptance of blended families and **post-dissolution families** → the unit keeps going even if not structure the same way
- Old legislation draws inference that the family structure is abnormal, rather than just

one way of structuring relationships

TYPES OF CUSTODY

PHYSICAL VERSUS LEGAL CUSTODY

- "Legal" Custody = the right to make decisions about matters that affect a child, such as his or her religion, school, and medical treatment.
- "Physical" Custody – focus on where the child lives.

SOLE LEGAL CUSTODY

- One parent is given the responsibility and authority to make decisions for the child about health, education and welfare (usually including choice of religion)
- Both parents may see the child and both parents can have input into the decisions about the child but the final legal responsibility is with the custodial parent.

Generally….

- The court has to have some sense that the parents are able to cooperate
- The parties may be unwilling to have joint custody but if you look at history of what they have done they have been able to reach agreements on important thing in child's life—have to order it and make it happen (in between)

JOINT CUSTODY

Both parents participate in decision making about the child's care.

- Not appropriate when their has been domestic violence

→ generally if joint custody is safe, and if parties can sort of cooperate , joint custody will be considered

History of Joint Custody

Post-Divorce Parenting—emergence of joint custody

- 1970s: courts reluctant to "order" joint custody on unwilling spouses
- But in the 1980's, Boyd suggests that "joint custody seemed to lend itself to social engineering by judges." (Text at 826)
- Focus of orders was on joint "legal" custody
- Generally accepted that joint legal custody was not appropriate in high conflict matters (page 827)→ more parallel parenting

Debate about when joint custody should be ordered continued in the 1990s

***Biamonte* (1998 Ont Gen Div)**

- Ct declined to order joint custody
- …obvious this couple would not survive" joint custody order b/c the ex couple could not manage.
- H's claim to custody based on his "obsession at trying to control ex-wife" re **boyfriend**
  → logic echoed in *Carson v Watts]*

***Mudie v. Post* (1998 Ont Gen Div) → Joint custody is about access**

- Ct ordered joint custody
- Important for child to have "unimpeded access" to each parent

Parents are required to cooperate; sole custody to mother would obstruct father's relationship with children. Important for child to have access we will go with joint custody

Kaplanis v Kaplanis → counsellor given responsibility to make decision for children

Facts	• Father sought parallel parenting order; mother said parties could not communicate without screaming] History • Trial judge said mother's desire for sole custody undermined her willingness to cooperate. • Trial judge ordered joint custody and ongoing counselling for parents; counsellor was authorized to make decisions for parents when they could not agree
Decision	• CA says error to award joint custody in this case and hope OCL is involved
Problem	• **Not in the legislation authorized** AND even if it did we know that the parents are not going to cooperate it does not make sense • **Para 11: Must be some evidence that despite differences parents can communicate effectively with one another (guiding principle)**

Ladiso v Ladisa

- Joint custody order upheld because ages of kids (expressed desire for joint custody) and assessment report that was supportive of this

CRITIQUE OF 50/50 – JANE GORDON

Is equal access an equality right?

1. **Reflects formal, but not substantive equality between spouses.** Does not distinguish between time "with" and "time on" children
→ one parent's 50 is all grunt work while the other (usually dad) get to just spend time with
2. Assumes that Children have no preferences → despite environment before split, it is 50/50 after
3. Child support guidelines have motivated fathers to be more aggressive in custody disputes

- Equality arguments give F's position more bite
- BUT on the other had, F's demand also reflects growing change in f's role in caregiving – influenced by divorce legislation and norms

PARALLEL PARENTING

- Often, decision-making is split between the two parents based on the topic.
- Ex one spouse edu
- May be ordered if parents are having difficulty getting along/ agreeing on decisions

→**BUT** <u>both</u> parents **should continue to have an <u>active</u> role** in the child's life.

The goal is to keep family in tact BUT…

<u>CARTON V WATTS</u>

Facts	• D making an application for sole custody of son [*CLRA* 21(1)] [*Div*16(1)] • D says that W is an alcholic and has done magic mushrooms • W had a son from before → Frankie in foster care <u>Dad's Argument</u> • D says that M's alcoholism makes her unfit to parent → points to Frankie as evidence • BIC in [*Div* 16(8); spouse conduct 16(9) → only considered relevant to ability to parent • CLRA "merits" of app 24(1) and BIC 24(2) and past conduct if relevant 24(3) • **Frankie's social worker in court testifies that Frankie's behaviour is in no way related to W's ability to parent** <u>W's Argument</u> • D is controlling → his attempt to get the son is just another way for him to exert controll over her via access
Decision	Sole custody ordered form W under s16(1) or CLRA 28(1)
Reasoning	1. The court found that the evidence of the social worker was enough to dispell concerns about past conduct under s 16(9) and s 24(3) 2. The judge did not find the H's oral evidence to be credible → supported W claim that he was controlling 3. Relied on BIC →,**Says that mum is more likely to facillitate access AND that it would not be in the child's best interest to have a controlling parent** • S 16(8) "Factor" of BIC AND s 16(10) "maximum contract • S24(2) BIC →

<u>HAIDER V MALACH</u> (Page 759) –

• The judge's assessment of credibility is **extremely important** **→ Appellate courts WILL NOT intervene <u>unless</u> there has been an <u>error in principle or CLEAR FACTUAL ERROR</u> in a matter of significance** • Once the judge thinks you are not credible, the facts are set for the rest of court proceedings

Appellate deference to trial judge
case that talks about deference

GEREMIA V HARB – USING BIC TO CONTROL FUTURE PARENTAL (MIS) BEHAVIOUR?

Best Interest? Or Least Harm? Difficult to distinguish between BIC and how the judge thinks that parent behaviour will impact the kid

Facts	• The claim was for revised acces for D • Parties had been litigating for 7 years and had 24-25 court orders made → Judge made an order that the parents cannot engage in another legal proceeding without leave of court
	Keirstead still thinks that courts would look hard for a BIC factor if the parents every applied to court again

PARENTAL CONDUCT -- > FACTORING INTO JUDGE'S DISCRETION OF BIC

FISHBACK V FISHBACK 1985

--> **judge's analysis is confirmed entirely to the BIC – BUT the judge only focuses on the factor of the mum**

Facts	• W bored with husband → finds another man she finds more exciting • They were married --- so application for custody under 16(1) • D has also found a new partner who is married, but doesn't stay overnight
Decision	Grants to dad
Reasoning	• Judge finds that H's parenting proposal is better • BUT reasons focus on moralistic reasons for denying to Ms. F • **Related Ms. Fishback's past conduct by inferring that her choice of partner was indicative of how much importance she credit's to BIC when following her own course of conduct** → unreliable partner and deprive children of stability • **The court was impressed by H's new partner – helped out with kids on weekend and the fact that she didn't stay overnight**
Critique	• Evidence of familialism – what we expect of family structures and morality

LI SANTI 1990 / HOWARD 1999 → COMPARING EVIDENCE OF ABUSE

LI Santi	• W took kids to a transition house • -did not provide formal affidavit evidence • -judge held that there was not enough evidence to support W taking kids from home **H:** Felt that BIC would be safe giving the Dad interiem sole custody AND exclusive possession of home

Howard	• Court held that she shouldn't have pursued a self held strategy • however, concern about the children is part of BIC and should be taken into account **H:** Gave W interiem custody and exclusive possession of home
critique	Is this a question about what evidence is required to prove a spouse's abusive misconduct? → we can't know what was before the judge -Or is it a sign of the time **NB *Lavalee* 1990 – came out at same time as *Li Santi* – might have taken a while to catch on** **➔ Now there is a general recognition that if there is an allegation it needs to be taken serious pursuant to s 24(3)(5)**

IMPORTANCE OF RACE – BIC

Background *Racine v Woods:*
1. As bonding increases, race and culture become less important.

VAN DER PERRE V EDWARDS

1. Race should always be considered, BUT it is only one factor in the BIC analysis.

Facts	• M had affair with D, professional BBall player • She make application for sole custody at 4 months old • D is married wth 2 daughters • The race issue was not emphasized by the parties themselves
Procedural History	**TJ:** Gave custody to M and access to D **BCCA:** • Said that **TJ** gave no consideration to the race issue • Awarded Join Custody to D • **Invited D's Wife to be a party in the proceeding!** → M appeals the the SCC
Intervener	Race is a crucial factor in BIC and should never be ignored even if it is not raised by the parties **→ parents must be able to help bi-racial children develop to tools to deal with racism and develop a positive racial**
Ratio	1. Race is important, as is the parent's ability to foster healthy racialized socialization. - **2. But race is only one factor among many** → must be considered within the over arching need for a stable environment **3. Significance of race will be determined on a case by case basis.** **4. The CA adopted the WRONG standard of review and should have defered to the TJ on findings of Race**

RACE IN LOWER COURT DECISIONS

Ffrench v Ffrench (NSSC 1994)

- Custody to Caucasian mother where she was aware of children's need for continued contact with their African Canadian heritage so that is sufficient to say that they are going to be properly exposed

Kassel v Louie (BCSC 2000)

- Custody awarded to Chinese Canadian father rather than Caucasian mother
  - → Court concluded child resembled his father.
  - → Child was a son and more important to father's extended family

Camba v Sparks

- African Canadian mother given custody of child because she was more attentive to French Canadian Culture of the father than he was to her cultural background.

RELIGION, CULTURE

LIBBUS V LIBBUS

Facts	• F raise Catholic; M jewish • Agreed to raise children in Jewish faith → D participated in rituals etc. • Prior to separation Parties moved to Uxbridge → M felt islotated • After separation W wanted to move to Thornhill → foster children's jewish identity
Expert evidence	• Judiasim is not just a religion but a way of life → identification instilled in school, family • Children will no flourish if they feel excluded from "preferred group" – outlier • Cannot be offset by the family
Decision	Joint custody and mum can move kids to Thornhill
Ratio	• Dad had a good plan, but mom had the best plan for BIC, including maintaining culture → in this case, D's argument that a stable environment at present school did not fly • Court was not satisfied that D would maintain jewish identity : Gandmother conservative catholic, dad had not converted

PERON V PERON ONCA

1. As children grown older, the arguments for culture get weaker

Facts	• D wanted to send kids to French speaking school instead of immersion • Said this would assist in fostering cultural identity
Ratio	• CA agreed that French would have been best • **BUT too much time had passed and it would be too difficult for kids to move to a French environment now**

YOUNG V YOUNG

1. BIC regarding culture and access can become a "harm" test in favour of unrestricted access

Fact	• M had custody • D was a Jehova's Witness and wanted to take the kids with him while spreading the faith • M sought to bar him from doing this
Ratio McLachlin	• It wasn't going to be harmful to the children to be exposed to Dad's faith → presumptive benefit of unrestricted access unless demonstrated otherwise
Held	→ The access to go with Dad allowed
Critique	• LDH disagrees with introducing "harm" to the BIC test • "it is not the right to be free if demonstrable harm, it is the positive right to the best possible arrangement and circumstances of the parties involved" → should defer to custodial parent Baily says : The presumoptive benefit of access is bad because BIC is replaced by harm test and courts can't consider the negatives of access Deferal to custodial bad because it does not remedy "dead beat" dads and leave the access parent with no way of challenging custodial AND override BIC

ACCESS

CRAIG V ANTONE – NO STATUTORY PRESUMPTION OF ACCESS FOR PARENTS

CLRA s 20(4)

Where the parents of a child live separate and apart and

- the child lives with one of them **with the consent, implied consent or acquiescence** of the other of them,

  the **right** of the other to exercise the entitlement of custody […] **but not the entitlement to access**, is suspended until a separation agreement or order otherwise provides.

Facts	• M and D have a casual relationship • D has been in jail, has drug and alcohol abuse • Had previously threatened to kidnap child to control mother • Mum bring application to revoke custody
Issue	**Does s 20(4) give parents a STATUTORY PRESUMPTION of the right to acccess**
Ration	**1. The test for access is BIC** **2. There is no presumption of access→ denial of access is NOT confined to apprehension of harm to the child [its BIC]** **3. "Entitlement" is still no a presumption**
Decision	• In no way would access benefit the child at all • Denied

ACCESS FOR GRANDPARENTS AND OTHER PERSONS

CLRA - PROVINCIAL LEGISLATION – APPLICATION REQUIREMENTS

1. Parents and **NON-PARENTS** MUST submit **an affidavit [s 21(2)]**:

a) the person's proposed plan for care and upbringing

b) Information about **current** and **previous** involvement in any family proceeding → include Child Protection proceedings

c) any other information known to the person that is relevant to **BIC [24(2)], The person's past conduct relevant for violence or ability to parent [24(3)], violence and abuse [24(4)]**

2. NON PARENT must also submit with application:

- **Police records check [s 21.1(1)]**
- **A CAS records search to determine** [**S21.2(2)]**

a) ***If*** there are CAS records on that person, and;
b) When each file was opened and/or closen

PROBLEM??? Clients without means to pay for legal representation, custody assessment or expert evidence may not be able to bring application
→ could detract people who would fulfil BIC because of resource limitations
→ Not really taking BIC into account.

DIVORCE ACT S 16(3) – NON PARENT

(3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

Appears that BIC is allowed to be defined by parents→ case law suggests that only if grandparent joins a parent in a divorce proceeding are they more likely to be successful

Arnik v Arnik 1999

1. Suggests application can be dismissed if frivolous or vexation
2. But that the ONUS of demonstrating that the application is frivolous and vexation lays on the party that is opposing the application

Facts	• Application made by W's parents in a divorce proceding • Evidence that grandparents had been the primary caregivers of the kids • H opposed
Decision	• Granted leave to apply to custody and access → joined with W (their daughter

Chapman v Chapman 2001—Grandparents rights within INTACT families

1. In the absence of evidence that parents are NOT acting in BIC, the parent's choices should be respected.

Facts	• Family was intact • Grandparents brought application for access
Decision	Denied

RELOCATION

TWO STAGE TEST *GORDON V GOERTZ*

1. Applicant must establish a material change in the circumstances.
    - The applicant is usually the parent OPPOSING the move → or was in *Gordon*

2**. Fresh** Inquiry by court into **BIC**

- **BOTH** parents have the evidentiary burden
- The is **no presumption** in favour of the custodial parent
  → CP views are "given **great respect**"
- Maximum contact principle is **not absolute** and will not **drive the analysis [16(10)/ 17(9)]**

SEVEN FACTORS FOR BIC

- Existing custody relationship
- Existing access relationship
- Desirability of maximizing contact between child & both parents **[16(10)/ 17(9)]**
- Child's views
- Custodial parent's reasons for moving ***only*** in the exceptional case where move is relevant to that parent's ability to meet child's needs
    - example if there is a specialized school that meets needs
- Disruption to child of change in custody
- Disruption to child – re: removal from home, school and community

GORDON V GOERTZ FACTS

	1. Material change: **Move to Australia** 2. "Fresh Inquiry re: best interests" • The move would deprive the child of meaningful relation of the • BUT TJ was correct to give Mum custody despite inadequate attention → Dad have a fair amount of contact AND Mum was in a position to help with access costs • **Change -** access could be exercised in Canada
Decision	Custody to Mum – move allowed- dad has access in Canada

DISSENT L'HD

- Court gives too much weight to the idea that access is in the best interest
- Says that restrictions on custodial parent should be the exception and not the rule
- If there is a restriction it needs to be specific and it needs to be in the original order
- Protesting parent should have to show that 1) the move would not be in best interests and 2) the relationship would be detrimentally affected
  → Why? People are moving a lot

LICKFORD V ROBICHAUD

Facts	• M and W from NB → moved to ON • After breakup W wants to move with son to NB→ H rejects • OCL interview kid, → clear move would be devasting
Decision	**Denied --** the distance would make parenting impossible and Kid love H • Court says, if you move, sole custody will go to D → created a detailed **paralell parenting plan**
Policy chat	Huge example of judicial discretion

WOODHOUSE 1996—SCOTLAND

Facts	• W remarried Scottish guy – they wanted to move back • She proposed 5 yearly visits •
Decision	**NO –** The court could not see how moving would be in the BIC since reasource would be the same in each country but access to D restricted ➔ Also did not believe W re access because she stayed in Scotland one time longer than supposed to

LUCKHURST V LUCKHURST

Facts	• W and H had joint custody of two kids • W moved in with new partner and had a kid • W's new partner could only get work in Cobourg → **W had plan to drive kids to a half way point**
Decision	• **W allowed to move** • H able to see Kids regularly → move was an inconvenience only • W was making reasonable effort to preserve relationship with the H

POLICY CHATS RE GORDON V GOERTZ

Susan Boyd

- enhanced judicial discretion → indeterminacy of best interests test

Rollie Thompson:

- problems with how "reasonable" and "responsible" custodial parent will be interpreted
- playing out in uncertain ways in the caselaw

Bala and Wheeler: → Study of relocation cases between 2001 and 2011

- Number of decisions **increased each year**
- "Success rate" = 50% → but it depended on the status of the relationship in the different cases
- sole custody →64
- joint – 50
- joint physicial – 30
- substantiated allegation of violence – 81
    - Authors propose **relocation guidelines**

Presumptions
in favour of relocation if parent has defacto or legal sole custody
allegations substiated of violence
kids wants to move
Presumption against
unfounded allegation of violence
kids do not want to move
the parent has unilaterally removed the kids
Listen one missing
BC has required that parent prove that the reasons for the move are in good faith

PARENTAGE

Remember: "parenthood is forever" → less scope for autonomy than in cohabitation or marriage

- Supported by increased use of parens patriae jurisdiction

3 contexts in which we will examine the legal formation of families and parent-child relationships:

1) **Biological** (including half-siblings; blended families)
2) **Adoption**
    a. Bio parents no longer have legal rights and responsibilities of parents. Instead adoptive parents have all legal rights and responsibilities of a parent.
3) **Assisted Reproduction**
    a. Who is the "parent" of a child in context where there are a sperm donor, an egg donor, a "surrogate" mother, and a K stipulating two "final" parents?

MOTHER –CHILD BOND AS DEFINING RELATIONSHIP -- FINEMAN

- Mother-child bonds should be the foundation for family definition.
- Have potential to be more enduring bond and supported statistically

- why wouldn't we rethink the world where we see that mother child bond at the crux of family relationship.
- SO THIS IS WHAT WE SHOULD USE AS OUR FUNDAMENTAL IDEA AROUND FAMILY BONDS. The **way we define family can depend on the legal context** and what we are trying to do (establish support obligations etc
  → definitions that actually match up with reality

PARENS PATRIAE JURISDICTION

"**Courts have the power to step into the shoes of a parent and make orders in the best interests of the child"** (*E (Mrs) v Eve)* 1986 SCC

- Key: **Inherent jurisdiction of superior courts**, derived from court of equity, that permits Ct to **override the liberty of parents** and make a decision in the best interests of the children where a parental choice may otherwise result in harm to the child.

Parens Patriae **jurisdiction can be invoked in 3 circumstances (*AA v BB and CC* ONCA):**

i) **To rescue a child in danger (e.g. to prevent harm to a child)**
ii) **Where there is a "gap" in law → where no common law or statutory authority is available (this is what was relied upon in *AA v BB and CC* and *Gallant*)**
iii) **Still emerging: "**the exercise of *parens patriae* doesn't depend on a legislative gap
→ exercise of that jurisdiction is to **meet the paramount objective of the legislation"** (in obiter *AA v BB and CC* ONCA cites *CR v Children's Aid Society of Hamilton* 2004 OJ re this emerging form of *parens patriae*, *AA* doesn't use it though)

PARENTAGE UNDER THE CLRA →

→ Must be in a Superior Court under s 3(b)

EQUAL STATUS OF CHILDREN – NO DISTINCTION BETWEEN "NATURAL" AND ADOPTED

Rule of parentage
1. (1) Subject to subsection (2), for all purposes of the law of Ontario a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage.

Exception for adopted children
1(2) an adoption order has been made, section 158 or 159 of the *Child and Family Services Act* applies and the child is the child of the adopting parents as if they were the natural parents.

1(3) The parent and child relationships as determined under subsections (1) and (2) shall be followed in the determination of other kindred relationships flowing therefrom.

Common law distinction of legitimacy abolished
1(4) Any distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined for the purposes of the common law in accordance with this section.

Application
(2) Subsection (1) applies to,
(a) any Act of the Legislature or any regulation, order or by-law made under an Act of the Legislature enacted or

made before, on or after the 31st day of March, 1978

DECLARATION OF PARENTAGE S 4 AND S 5 CLRA

Paternity and maternity declarations

. 4. (1) Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that **a** female person is **the mother** of a child.

Declaration of paternity recognized at law

4(2) Where the court finds that a **presumption of paternity exists under section 8** and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law.

Declaration of maternity

4(3) Where the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect.

Application for declaration of paternity where NO PRESUMPTION

5 (1) Where there is no person recognized in law under section 8 to be the father of a child, any person may apply to the court for a declaration that a male person is his or her father, or any male person may apply to the court for a declaration that a person is his child

Declaratory order

S5(3) Where the court finds on the balance of probabilities that the relationship of father and child has been established, the court may make a declaratory order to that effect and, subject to sections 6 and 7, the order shall be recognized for all purposes

PRESUMPTIONS OF PATERNITY S 8 CLRA

Unless the contrary is proven on a balance of probabilities, there is a presumption that a male person is, and he shall be recognized in law to be, the father of a child in any one of the following circumstances:

1. The person is married to the mother of the child at the time of the birth of the child.
2. The person was married to the mother of the child by a marriage that was terminated by death or judgment of nullity within 300 days before the birth of the child or by divorce where the decree *nisi* was granted within 300 days before the birth of the child.
3. The person marries the mother of the child after the birth of the child and acknowledges that he is the natural father.
4. The person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child or the child is born within 300 days after they ceased to cohabit.
5. The person has certified the child's birth, as the child's father, under the *Vital Statistics Act* or a similar Act in another jurisdiction in Canada.
6. The person has been found or recognized in his lifetime by a court of competent jurisdiction in Canada to be the father of the child. R.S.O. 1990, c. C.12, s. 8 (1).

****DEFINITION EXLUDES BASICALLY ONE NIGHT STAND/CASUAL FORNICATOR**

ADOPTION

KEY LEG:

- ***Children's Law Reform Act***

- ***Child and Family Services Ac***

Two Categories

1. **Involuntary Adoption**
   →**Arranged and carried out by the state's child welfare authority**: removed from parent's care and had become crown ward.

2. **Private Adoptions**
   →**Private Adoptions** (agency adoptions, private without intermediaries)

HISTORY OF ADOPTION

Adoption legislation really only came into effect after the years following WWI, in terms of outside of aboriginal tradition, CL perspective we did not seem to have that.

- After this domestic adoption happened quite frequently. This is less so now. Why?
  - Internationally less because some countries are starting to ban
  - Social stigma about having children out of wedlock, for a long time this was taboo
  - Legalized abortion
  - Much about the legislation that was aimed at wiping out any evidence of the biological beginnings of the child
- One increase is in stepparent adoptions

Why so much regulation—you are saying that this previous person is no longer recognized as parent (MAJOR CHANGE)

ADOPTION LEGISLATION / REGULATION → CHILD AND FAMILY SERVICES ACT

s1(1) "**purpose**" – "To promote the **best interests**, protection, and wellbeing of children"

Best Interest of the child s 136(2)

s136(2) – IMPORTANT – creates statutory factors Judge must take into consideration re re "best interests of the child" in issuance of adoption order:

"Where a person is directed **in this Part** to make an order or determination in the **best interests of a child**, the person **shall take into consideration those of the following circumstances of the case that he or she considers relevant**:

1. The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.
2. The child's physical, mental and emotional level of development.
3. The child's cultural background.
4. The religious faith, if any, in which the child is being raised.
5. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family.
6. The child's relationships by blood or through an adoption order.
7. The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.

8. The child's views and wishes, if they can be reasonably ascertained.
9. The effects on the child of delay in the disposition of the case.
10. **Any other relevant circumstance**."

Definition of "Parent" to consent to Adoption 137(1)

s137(1) → definition of "parent" who has to consent in order for the child to be adopted

In this section, "parent", when used in reference to a child, means each of,

(a) the child's mother,

(b) an individual described in one of paragraphs 1 to 6 of subsection 8(1) of the *Children's Law Reform Act*, unless it is proved on a balance of probabilities that he is not the child's natural father,

(d) An individual who, during the twelve months before the child is placed for adoption under this Part, **has demonstrated a settled intention to treat the child as a child of his or her family,** or has acknowledged parentage of the child and provided for the child's support,

(e) an individual who, under a written agreement or a court order, is required to provide for the child, has custody of the child or has a right of access to the child, and

(f) an individual who has acknowledged parentage of the child in writing under section 12 of the *Children's Law Reform Act*, but does not include a licensee or a foster parent

Note that (b) references the *CLRA* – a statute that makes "presumptions of paternity": If mother is married or cohabiting at time of the child's birth, person she is married to or cohabiting with is presumed to be father of the child, unless on balance of probs there is evidence proves contrary.

- **Not considered s15 discrimination**: *Re SS*; *Re AG of Ont and Nevins*

CHILD's consent for adoption s 137(6)

(6) An order for the adoption of a person who is seven years of age or more shall not be made without the person's written consent

Parents must consent to Adoption s 137(2)

Consent of parent, etc.

S137(2) An order for the adoption of a child who is less than sixteen years of age, or is sixteen years of age or more but has not withdrawn from parental control**, shall not be made without,**

(a) the written consent of every parent; or [NB, not "both"]

(b) where the child has been made a Crown ward under Part III (Child Protection), the written consent of a Director.

Presumptions of Paternity CLRA s 8

Unless the contrary is proven on a balance of probabilities, there is a presumption that a male person is, and he shall be recognized in law to be, the father of a child in any one of the following circumstances:

1. The person is married to the mother of the child at the time of the birth of the child.
2. The person was married to the mother of the child by a marriage that was terminated by death or judgment of nullity within 300 days before the birth of the child or by divorce where the decree *nisi* was granted within 300 days before the birth of the child.
3. The person marries the mother of the child after the birth of the child and acknowledges that he is the natural father.
4. The person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child or the child is born within 300 days after they ceased to cohabit.
5. The person has certified the child's birth, as the child's father, under the *Vital Statistics Act* or a similar Act in another jurisdiction in Canada.
6. The person has been found or recognized in his lifetime by a court of competent jurisdiction in Canada to be the father of the child. R.S.O. 1990, c. C.12, s. 8 (1).

****DEFINITION EXLUDES BASICALLY ONE NIGHT STAND/CASUAL FORNICATOR**

"PARENT" CONSENT S 137(1) CFSA AND 8 CLRA

A(G) V NEVINS

1. Example of substantive equality / Familialism

Facts	○ s137 of the Ont *Child and Family Services Act* included all biological mothers within the definition of "parent' but excluded bio fathers *unless* they were married to or cohabited with the mother, or **acknowledged** parenthood or otherwise **demonstrated responsibility** for the child ○ **S15 Challenge:** Man whose consent was not required for adoption of his bio child (b/c did not fall under s137 defition) challenged s137's s15 validity.
Decision	○ **no s15 violation**
Reasoning	○ applied older "similarly situated" s15 test (pre-*Law* 1989 SCC), ○ "casual fornicator" who has not demonstrated: • any interest in whether he did cause a pregnancy or • **demonstrated even the minimum responsibility** to the child required by s137 → is not "similarly situated" to the mother who **out of physical necessity bears responsibility** of carrying and giving birth to the child
Policy	Biology doesn't matter for parent status – but that doesn't mean its irrelevant for BIC see Re SS -responsibility yes – but because it is going to be passed off to her – after care more dominant

RE SS 2009

Facts	• M and F have a relationship over 18 months → **never cohab**

	• The relationship not exclusive→ **ceased contact after birth** • M put child up for adoption → kid in a great placement • Evidence that F was fired and faced criminal charges • She never notified the father of birth or adoption even though a) she knew his name b) where he lived and c) he could easily be contacted
Issue	Currently **NO REQUIREMENT under s 137(2)** to notify a father if he is not a "father" under the statute • The objective of the act are to a) facilitate a speedy placement for the kid b) avoid emotional stress and c) that success is unlikely
Holding	Suggests that we read in an obligation that mothers must notify fathers if: 1) Relationship is more than casual, although not of some permanence 2) Father is easily located 3)No safety concerns, violence or otherwise **NB right now NO requirement to notify father if he does not fit into a category of paternity**
Counter Argument	• Sure, you can read this exception in but I would disagree that the argument is "outdated" • Ignoring the biological component and subsequent expectation on mothers that we have studied in the course, Re SS leans more towards formalism • Biology is important – but not synonymous with parentage per se – general identity cultural and family. – evidenced by Aboriginal provisions that allow a band member who does not have a relationship to keep in contact with the child – ie "roots" • While we argue a lot about paternity – I think what is really underlying this case is when we see someone who could be a ***mother*** **and has chosen to unilaterally reject that**. • Adoption inferior – speculate on the relationship with father to get support etc.

AFTER ADOPTION CFSA

Order final
157(1) An adoption order under section 146 is final and irrevocable, subject only to section 156 (appeals), and shall not be questioned or reviewed in any court.

Validity of adoption order not affected by openness order or agreement
S157(2) Compliance or non-compliance with the terms of an openness order or openness agreement relating to a child does not affect the validity of an order made under section 146 for the adoption of the child.

Status of adopted child
158.(1) In this section,"adopted child" means a person who was adopted in Ontario.

Same
158(2) For all purposes of law, as of the date of the making of an adoption order,
(a) the adopted child becomes the child of the adoptive parent and the adoptive parent becomes the parent of the adopted child; and
(b) the adopted child ceases to be the child of the person who was his or her parent before the adoption order was made and that person ceases to be the parent of the adopted child, except where the person is the spouse of the adoptive parent

How relationships determined
(3) The relationship to one another of all persons, including the adopted child, the adoptive parent, the kindred of

the adoptive parent, the parent before the adoption order was made and the kindred of that former parent shall for all purposes be determined in accordance with subsection (2)

Effect of foreign adoption
159. An adoption effected according to the law of another jurisdiction, before or after the 1st day of November, 1985, has the same effect in Ontario as an adoption under this part.

No order for access by birth parent, etc.
160.(1) Where an order for the adoption of a child has been made under this Part, no court shall make an order under this Part for access to the child by,
(a) a birth parent; or
(b) a member of a birth parent's family.

GENERAL OPENNESS AGREEMENTS

Who may enter into openness agreement
153.6 (1) For the purposes of facilitating communication or maintaining relationships, an openness agreement may be made by an adoptive parent of a child or by a person with whom a society or licensee has placed or plans to place a child for adoption and any of the following persons:

1. A birth parent, birth relative or birth sibling of the child.
2. A foster parent of the child or another person who cared for the child or in whose custody the child was placed at any time.
3. A member of the child's extended family or community with whom the child has a significant relationship or emotional tie.
4. An adoptive parent of a birth sibling of the child or a person with whom a society or licensee has placed or plans to place a birth sibling of the child for adoption.

When agreement may be made
153.6(2) An openness agreement may be made at any time before or after an adoption order is made.

Agreement may include dispute resolution process
153.6(3) An openness agreement may include a process to resolve disputes arising under the agreement or with respect to matters associated with it.
Views and wishes of child
153.6(4) Where the views and wishes of the child can be reasonably ascertained, they shall be considered before an openness agreement is made

RE BRITISH COLUMBIA BIRTH REGISTRATION (1990 BCSC)

RATIO: Openness agreements only work when everyone is on board – particularly new parents

Facts:

- Court says access by the birth father in child's life is positive for the kid
- biological mom and her adoptive father say it makes things difficult.

Decision : The court says denied the biological father's contact.

P(MAR) v V(A) (Ont Gen Div 1997)—Sibling Bonds??

Ratio: No real mechanisms to ensure that siblings get to stick together when they are given to different homes

Fact:

- mom initially adopts 2 kids but decides she only wants to keep one,
- access order granted to facilitate communication between kids
  ➔the adoptive mother refuses to show this access.

Adoption and Aboriginality

Aboriginality and BIC

S 136(3) ➔ "best interests of the child" in the context of an Aboriginal child
Where a person is directed in this Part to make an order or determination in the best interests of a child **and the child is an Indian or native person**, the person shall take into consideration the **importance**, in recognition of the uniqueness of Indian and native culture, heritage and traditions, **of preserving the child's cultural identity**.

Involvement of Band when notice of adoption Issued

Where child an Indian or native person
141.2 (1) If a society intends to begin planning for the adoption of a child who is an Indian or native person, the society shall give written notice of its intention to a representative chosen by the child's band or native community.
Care plan proposed by band or native community
(2) Where a representative chosen by a band or native community receives notice that a society intends to begin planning for the adoption of a child who is an Indian or native person, the band or native community may, within 60 days of receiving the notice,
(a) prepare its own plan for the care of the child; and
(b) submit its plan to the society.
Condition for placement
(3) A society shall not place a child who is an Indian or native person with another person for adoption until,
(a) at least 60 days after notice is given to a representative chosen by the band or native community have elapsed; or
(b) if a band or native community has submitted a plan for the care of the child, the society has considered the plan.

Openness agreements with Band s 156(6)(1) #5

153.6 (1) For the purposes of facilitating communication or maintaining relationships, an openness agreement may be made by an adoptive parent of a child or by a person with whom a society or licensee has placed or plans to place a child for adoption and any of the following person
'
5. If the child is an Indian or native person, a member of the child's band or native community who may not have had a significant relationship or emotional tie with the child in the past but will help the child recognize the importance of his or her Indian or native culture and preserve his or her heritage, traditions and cultural identity.

RACINE V WOODS

ANR v SCR or Racine v Woods (SCC 1983)

F:

- de facto adopted parents (looked after a child for basically 5 years
- mom who was aboriginal was trying to get her life back together.
- After a while mom comes in and says she wants to take child back—but parents say no, they have adopted this child. → NB she came back **three years** after stating that she wanted the kid to go with her sister

Decision : court says it is most appropriate for the child to stay with the adoptive parents.
➔ Mom had called in media and **judge did not like that**.

Wilson J: the closer the bond that develops with the prospective adoptive parents the less important the racial element becomes

- The court is trying to think about in the **life of the child how does bonding** play a role
- **MITIGATING CIRCUMSTANCE** → adoptive parents Métis → able to maintain cultural identity

LINGERING QUESTION: what does it really mean? **To what extent do you need to engage your child fully in their cultural backdrop**—will people actually follow through with it?

PROBLEM: yes on these facts it **made perfect sense for the child to stay with these de facto adopted parents** —>it is when you get a general principle that is removed from the specifics that there is a problem. Applied to other facts it may not be so applicable. **See H v M**

H v M (SCC 1999)*p. 178*

Facts:

- Potential adoptive white parents who were also the adoptive parents of the biological mom.
- Mom returns to band → WHITE PARENTS CLAIM CUSTODY
- Child in care of **paternal** grandfather for about 2 and a half years by the time it gets to a final decision in SCC. (about half her life)

D: Trial judge grants custody to white adoptive parents. The SCC says that the trial judge **did not err.**

PROBLEM? THINK RACINE → yet there has been **bonding on both sides**. Child **should** be with the grandfather (because culture and bonding).

****Inconsistent Outcome/ POSSIBLE EXPLAINATION** → Possibility that other social factors (economic status) were at play. The grandfather was on social assistance (there is no indication that grandfather was not caring well for the child).

- courts are paying more attention to what the legislation dictates to take into account the child's background the wellbeing of the child is also extremely important
  —>some people would say more serious thoughts need to be given to the background because of historical issues that have happened. **(Intervenor in *Van De Perre*) White people don't take it into account enough → lingering racism**

→ *A v R*—using the approach of Hall JA that ethnicity becomes less important after bonding is too simplistic

Some provinces…

- Veto provided to First Nations communities with respect to adoption of children by non-Aboriginal families (not Ontario)

SOCIAL PARENTAGE

Natural parents s 1(1) CLRA
Adoptive Parents s 1(2) CLRA

DIVORCE ACT SOCIAL PARENTAGE

2(1)	
2(2)	For the purposes of the definition *"child of the marriage"* in subsection (1), a child of two spouses or former spouses includes (*a*) any child for whom they both **stand in the place of parents**; and (*b*) any child of whom one is the parent and for whom the **other stands in the place of a parent.**

FLA SOCIAL PARENTAGE

1(1)	**A parent** includes a person who has demonstrated a **settled intention to treat as a child of his or her family,** except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody "child" includes a person whom a parent has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody
31(1)	Every parent has an obligation to provide support for his or her unmarried child who **is a minor** or is **enrolled in a full time program of education**, to the extent that the parent is capable of doing so

CHILD SUPPORT

Evolution of Child Support Principles
Child support guidelines are legislatively incorporated
Both corollary area of divorce and but also stand alone provincial provision

SHARE LEGISLATIVE JURISDICTION

FLA – OBLIGATION TO SUPPORT A CHILD S 31

s. 31. OBLIGATION

(1) **Every parent** has an obligation to provide support for his or her **unmarried child** who is **a minor** OR is enrolled in **a full time program of education**, to the extent that the parent is capable of doing so

(2) The obligation under subsection (1) does not extend to a child who is sixteen years of age or older and has withdrawn from parental control

→ Parent has an extended meaning in 1(1) exception is foster

PURPOSE OF CHILD SUPPORT FLA S33(7)

Purposes of order for support of child

s. 33 (7) An order for the support of a child should,

(a) recognize that each parent has an obligation to provide support for the child;

(b) apportion the obligation according to the child support guidelines.

CS IN ACCORDANCE WITH GUIDLEINES S 33(11) FLA

Application of child support guidelines

s. 33(11) A court making an order for the support of a child **shall do so** in accordance with the child support guidelines.

→ legislation refers to these guidelines (mandatory statement)

→ A court may approve an arrangement where parents come to an agreement

PRIORITY OF CHILD SUPPORT FLA S 38.1(1)

S38.1(1) Where a court is considering an application for the support of a child and an application for the support of a spouse, the **court shall** give priority to the support of the child in determining the applications

EXCEPTION TO GUIDELINES UNDER THE FLA

Exception: special provisions

S 33(12) Despite subsection (11), a court may award an amount that is different from the amount that would be determined in accordance with the child support guidelines if the court is satisfied,

(a) that **special provisions** in an order or a written agreement respecting the financial obligations of the parents, or **the division or transfer of their property, directly** or **indirectly benefit** a child,

→or that special provisions have otherwise been made for the benefit of a child; and

(b) that the **application** of the child support guidelines would **result in an amount of child support that is inequitable given those special provisions**.

Exception: consent orders

33(14) Despite subsection (11), a court may award an amount that is different from the amount that would be determined in accordance with the child support guidelines on the consent of both parents if the court is satisfied that,

(a) **REASONABLE** arrangements have been made for the support of the child to whom the order relates; and

(b) where support for the child is payable out of public money, the arrangements **do not provide for an amount less** than the amount that would be determined in accordance with the child support guidelines.

Reasonable arrangements

(15) For the purposes of clause (14) (a), in determining whether reasonable arrangements have been made for the support of a child,

(a) the court shall have regard to the child support guidelines; and

(b) the court shall not consider the arrangements to be **unreasonable solely** because the amount of support agreed to **is not the same as the amount** that would otherwise have been determined in accordance with the child support guidelines

DIVORCE ORDERS FOR SUPPORT

2(1)	**"Child of the marriage"** means a child of two spouses or former spouses who, at the material time, (a) is under the age of majority and who has not withdrawn from their charge, or (b) is the age of majority or over and under their charge but unable, by reason of illness, disability **or other cause**, to withdraw from their charge or to obtain the necessaries of life; → note: court has held that "or other cause" includes **post-secondary education**.
s. 15.1 (1)	**ORDER FOR SUPPORT** **s. 15.1 (1)**A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.
S. 15.1 (3)	**GUIDELINES APPLY** **S. 15.1 (3)** A court making an order under subsection (1) or an interim order under subsection (2) shall do so in accordance with the applicable guidelines. → Requirement of guidelines
S 15(5)	**COURT CAN TAKE AN AGREEMENT INTO ACCOUNT** **(5)** Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.
S15(7)	**(7)** Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines **on the consent of both spouses if it is satisfied that reasonable arrangements** have been made for the support of the child to whom the order relates.
S 15(8)	**(8)** For the purposes of subsection (7), **in determining whether reasonable arrangements** have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines
S11(1)(a)	**POWER TO STAY DIVORECE** 11. (1) In a divorce proceeding, it is the duty of the court (b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made; and

PARAS V PARAS (1970) → CS PRIOR TO GUIDELINES

Principle	**CS would be:** **a)** set to maintain the child's pre-separation standard of living **b)** this would be apportioned between spouses in proportion to income
Problems	a) too much discretion b) depended on how incomes were represented in the budgets c) no way to ensure that money was actually going to the child → 1990's spurned legislative response b/c of continued rising level of child poverty

THE CHILD SUPPORT GUIDELINES

OBJECTIVES S(1)(1)

1. The objectives of these Guidelines are

(*a*) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

(*b*) to reduce conflict and tension be- tween spouses by making the calculation of child support orders more objective;

(*c*) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(*d*) to ensure consistent treatment of spouses and children who are in similar circumstances.

S 5 FEDERAL CHILD SUPPORT GUIDELINES

S 2(1)	"Child" means a child of marriage
S 5	Where the spouse against whom a child support order is sought **stands in the place of a parent for a child**, the amount of a child support order is, in respect of that spouse, **such amount as the court considers appropriate**, having regard to these Guide- lines and any other parent's legal duty to support the child.

CHARTIER V CHARTIER → SOCIAL PARENT REQUIRED TO SUPPORT

1. A person who stood in place of a parent cannot unilaterally withdraw, regardless of stated intention.

- A finding of a social parent relationship does not require **expression of intent and can be inferred from conduct**
- **INTENTION IS ONLY ONE FACTOR in the analysis**

2. The court will look to the **nature of the relationship** when determining if obligation exists

3. A court will look at all relevant factors objectively

- Did the child participate in extended family gatherings the same as bio?
- Provide for child financially?
- Disciplined child?
- Represent to the world, **implicitly or explicitly,** that they were responsible for the child?
- Nature or existence of child's relationship with the **BIOLOGICAL** parent

Facts	• Couple were married for one year→ had a kid together • **W had child from a previous marriage →** H had [2(2)] stood in place • After divorce W applied for support for <u>both children</u>
Issue	Can child support be ordered from somone who is in place of parent
Decision	No – support ordered – appeal allowed
Reasoning	**The Act** looks at BIC and NOT bio parenthood or the child's legal status → to do otherwise is in the interest of the adult, and not the parent

<u>GARDINER V GARDINER → SOCIAL PARENT HAD NO OBLIGATION TO SUPPORT</u>

Facts	• Couple were married for 5 year • H had 2 kids from previous marriage → one had cerebral palsy • Evidence that she had taken some care → but worked out of house • There was a nanny for the boys
Decision	No obligation to support
Reasoning	• The level of involvement did not justify a lifetime of support payments → NB since married and boy disabled, support payments could potentially be indefinite.

<u>MONKMAN V BEAULIEU → SOCIAL PARENTS IN COHABITING COUPLES</u>

1. Chartier applies → choice not to marry is one factor to be considered

Facts	• Couple cohba for 4 years • W had 4 kids from previous marriage → 1 child a month old when H moved in • Called him dad, etc.
Holding	**CHARTIER test applied to Cohabiting couples**
Reasoning	The test is BIC → not best interest of adult
Policy chat	• Interesting how autonomy and choice had no place in CS → paternity is not a choice but property is. • Compare to the ***DO CARMO*** case where there was an onging relationship but no cohabitation

<u>CORNELIO → MISTAKES ABOUT BEING A BIOLOGICAL PARENT → SUPPORT RIGHT OF THE CHILD</u>

Facts	• H finds out he is not the father of twins he cared for during marriage • After separation, H had entered in a consent order for support • H claimed that his consent was obtained by fraud • he had not been able to make an informed decision during marriage as to **his intention to treat the girls as his children**
Issue	Intention versus actual conduct?

Decision	Dimissed
Reasoning	Child support is the right of the child → **you can't backdate parentage→ the process of bonding has already occurred <u>for the child</u>** and that is all that matters

<u>WRIGHT V ZAVER (2002)—BIO PARENTS CANNOT RELY ON S 5</u>

Facts	• H and W cohab for three years • Separate after birth of son • K said no access but D pays lump sum of $4000 • W gets remarried → separates after 10 years • The **step father is paying support for son from previous relationship** • W still in need → applies to bio dad
Issue	Does the Bio parent have to pay support if another parent has been ordered to pay support under s 5
Holding	**Access is entirely independent from the obligation to support (*Antone*)** → H had a "moral and legal" obligation to support child and **s 5 does not apply to bio parents**

<u>GUIDELINES – IMPUTING INCOME</u>

Usually the calculation of income is standard but the court has **huge discretion under s 17-19**

<u>FCSG – CALCULATING AND IMPUTING INCOMES</u>

16. Subject to sections 17 to 20, a spouse's annual income is determined u ing the sources of income set out under the heading "Total income" in the **<u>T1 General form</u>** issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

19. (1) The court may **<u>impute such amount of income</u>** to a spouse as it **<u>considers appropriate</u>** in the circumstances, which circumstances include the following:

(*a*) the spouse is intentionally underemployed or unemployed, other than where the underemployment or unemployment **<u>is required by the needs of a child</u>** of the marriage or any child under the age of majority **<u>or</u>** by the **<u>reasonable educational or health needs of the spouse;</u>**

<u>NO BAD FAITH REQUIREMENT FOR INTENTION S19(1)(A) DRYGALA VPAULI</u>

INTENTION MEANS <u>VOLUNTARY:</u>

- When you ***choose*** not to work, or to earn money in a different way

→**<u>DOES NOT</u>** require a **bad faith** element (**Drygala v Pauli)**

<u>Case Examples</u>

Riel v Holland

- Income imputed when H when from freelance Electrical contracting to a salary position

→ Narrow approach; overlooks other possible benefits

Odenhal v Burle

- Imputed when H stopped working overtime

Baldini

- Being dismissed for cause

A vA

- Won the lottery

Bak v Dobell – Income NOT Imputed

Facts	• H and W separate • H has disability • Grandfather gives H money to support himself
Issue	Grandfather's contribution be imputed income
Decision	No → would make Grandfather obligated to continue to make payments for CS

Other Income provisions

17(1)	**Pattern of Income:** if using a calculation from s 16(1) would not be fair • Court can look at 3 years and deter- mine an amount that is fair and reasonable in light of **any pattern of income**, **fluctuation in income** or receipt of a **non-recurring** amount during those years
S 17(2)	**NON –recurring loses**
18**(1)**	If spouse is a shareholder or Director can look at a) pre-tax income of corporation b) amount commensurate with spouse's services or contributions
S 19(1)	**19.** (1) The court may **impute such amount of income** to a spouse as it **considers appropriate** in the circumstances, which circumstances include the following: **(*a*)** the spouse is intentionally underemployed or unemployed, other than where the underemployment or unemployment **is required by the needs of a child** of the marriage or any child under the age of majority **or** by the **reasonable educational or health needs of the spouse;** (*b*) the spouse is exempt from paying federal or provincial income tax; (*c*) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada; (*d*) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines; (*e*) the spouse's property is not reasonably utilized to generate income; (*f*) the spouse has failed to provide in- come information when under a legal obligation to do so; (*g*) the spouse unreasonably deducts expenses from income; (*h*) the spouse derives a significant portion of income from dividends, capital gains

	or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and (*i*) the spouse is a beneficiary under a trust and is or will be in receipt of in- come or other benefits from the trust.

PRESUMPTION – GUIDELINE AMOUNT

PRESUMPTION S 3(1) – KID IS A MINOR

THE AMOUNT WILL BE THE GUIDELINE + S7(1)
3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

(*a*) The amount set out in the applicable table, according to

i. the number of children **UNDER THE AGE OF MAJORITY** to whom the order relates and;
ii. the income of the **PAYOR** spouse; and

(*b*) the amount, if any, determined under section 7.

S 3(2)—KIDS IS OVER MAJORITY

3(2) Where a child to whom a child support order relates is the **AGE OF MAJORITY OR OVER**, the amount of the child support order is

APPLY PRESUMPTION [GUIDELINE + s7(1)]
(*a*) The amount determined by applying these Guidelines as if the child were under the age of majority; or

(*b*) OR the **amount that the court considers appropriate**, having regard to:

i. the condition, means, needs and other circumstances of the child and;
ii. the financial ability of each spouse to contribute to the support of the child.

SECTION 7 EXPENSES – CREATES UNCERTAINTY

→ More common in well off families.

S 7 (1) In a child support order the court may, on **either spouse's** request, provide for an amount to cover **all or any portion** of the following expenses, which expenses may be estimated,
[Court will] take into account:

1. The necessity of the expense in relation to the **child's best interests** and;

2. The **reasonableness** of the expense in relation to the means of the spouses **AND** those of the **child** and;

3. To the family's **spending pattern PRIOR** to the separation:

EXPENSES UNDER S 7(1)

(*a*) **child care** expenses incurred as a result of the **custodial parent's employmen**t, illness, disability or education or training for employment;
(*b*) that portion of the medical and dental insurance premiums attributable to the child;
(*c*) health-related expenses that exceed insurance reimbursement by at least $100 annually,

(*D*) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
(*e*) expenses for post-secondary education; and
(*f*) extraordinary expenses for extracurricular activities.

S 7(1.1) "EXTRAORDINARY" EXPENSES

S 1(1.1) EXTRAORDINARY EXPENSE MEANS
(*a*) expenses that **EXCEED** those that the **spouse requesting** an amount for the extraordinary expenses **can reasonably cover,** taking into account:

1. That spouse's income and;
2. The amount that the spouse would receive under the applicable table or,
3. Where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate

(b) where paragraph (*a*) is not applicable → IE do not **necessarily *exceed* the**

Expenses that the **COURT CONSIDERS** are extraordinary taking into account
(i) the amount of the expense in **relation to the income of the spouse requesting the amount**, including

- The amount that the spouse would receive under the applicable table or,
- Where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) **The nature and number** of the educational programs and extracurricular activities,
(iii) Any special needs and talents of the child or children,
(iv) The overall cost of the programs and activities, and
(v) Any other similar factor that the court considers relevant.

7(2) APPORTIONMENT OF S 7(1) EXPENSES BETWEEN SPOUSES

7(2) The guiding principle in determining the amount of an s7(1) expense is that →**t**he expense is shared by the spouses in proportion to their respective incomes **after deducting from the expense, the contribution…from the child**.

[Amount] – [child $] = [x]
→ Percentage of expense that reflect percent of the combined parent's income
Example
Expense is 110
Kid chips in $10

Mum makes 30 K
Dad makes 70 K

110- 10 = 10 → M pays $30; Dad pays $70

LEWI V LEWI

Facts	• H paying child support for Kids → M makes claim for s 7(1) expenses for post-secondary • K have 40K inheritance from grandparents for education • Dad says they should contribute ALL of it→ M says they should contribute NONE • 1 K away for school-- **s 3(2)(b)**, 1 at home -- **s 3(2)(a)** • NB Dad had another family
Issue	To what extent are children require to contribute to their own education
Decision	Kids required to contribute some, but not all → type of asset may have factored into the decision
Reasoning	• Both **s 7(1) and s 3(2)** require the court to consider the **"means" of the child ALONGSIDE the financial capability of the spouses**

SPLIT CUSTODY S (8)

Situation where you have 1 child living with one parent and 1 child living with the other

TEST

- Calculate the amount that **EACH** spouse would pay to the other → based on income and guide lines
- **SUBTRACT/SET off the distance→ spouse owing more will transfer difference to the other spouse**

EX

A owes T 200
T owes A 300

2. 300-200 = 100 → T owes A 100

S. 8. Where each parent or spouse has custody of one or more children, the amount of an order for the support of a child is the **difference** between the amount that each parent or spouse would otherwise pay **if such an order were sought against each** of the parents or spouses.

SHARED CUSTODY S (9) – 40% RULE

When a child spends time at both parents – to the point where it is getting expensive for the parent paying support

RULE: Once you hit threshold of 40% start to look at factors (a), (b), and (c)
S. **9.** Where a parent or spouse exercises a right of access to, or has physical custody of, a child **for not less than 40 per cent** of the time over the course of a year, the amount of the order for the support of a child must be determined by taking into account,

(a) the amounts set out in the applicable tables for each of the parents or spouses;
(b) the increased costs of shared custody arrangements; and
(c) the condition, means, needs and other circumstances of each parent or spouse and of any child for whom support is sought.

WHAT IT "TIME" → PAYNE IN SIRDEVAN V SIRDEVAN

The amount of time the child is in the care and control of the parent → Does NOT require the parent to be physically with the child

TEST FOR S 9 – LEONELLI-CONTINO V CONTINO

1) Step One:

i. Set-Off CS amounts pursuant to (s. 9 ((a))

- **this is starting point only – may change in light of paras (b) and (c)**

2) Step Two:

i. Consider the **OVERALL cost to BOTH parents**
ii. **APPORTION between the spouses**
iii. Compare the apportionment to the initial set off

→ This will require **BUDGETS** and not common sense multipliers

3) Step three

I . **Consider the ability of each parent to bear the increase costs of shared custody**

ii. Consider the STANDAR OF LIVING for the child in EACH HOUSEHOLD

Leonalli-Contino v Contino

Facts	• F had a job where he left at 7 came back at 7 • Had a nanny→ is this time "with" children?
Decision	• Yes, it is time, but still had to pay → probably because W had just bought a house
Policy chats	• W was a pharmacist , new H a dentist – how would this calculation play out in families without funds

UNDUE HARDSHIP S 10

CLAIMING HARSHIPS

1. Is there a circumstance that may cause undue hardship? 2. Would, after taking the amount of child support into account, the **claimant** (payor) spouse **household** standard of living still be higher than the recipient spouse?

SCHMID V SMTIH

Facts	• H lived in England • Claimed that undue under s 10(1) because of **s 10(2)(b) Access costs** and a **high cost of living in**

	England
Decision	No finding of undue hardship→ **H's standard of living would still be higher than mum's, even after child support AND factoring in the cost of access** • Based on the fact that he had a car from his Employer
Note	This also seems to be an evidentiary issue—no real evidence on how the higher standard of living actually impacted the H • On the other hand, provided a lot of reports from OCED

LEGISLATION s(10)

10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount de- termined under any of sections 3 to 5, 8 or 9 if the court **finds that the spouse making the request**, **OR** a **child in respect of whom the request is made, would otherwise suffer undue hardship**.

S10(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
(*a*) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
(*b*) the spouse has unusually high expenses in relation to exercising access to a child;

(*c*) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
(*d*) the spouse has a legal duty to support a child, other than a child of the marriage, who is
(i) under the age of majority, or
(ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and
(*e*) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability

(3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that **the household of the spouse who claims undue hardship would**, after determining the amount of child support under any of sections 3 to 5, 8 or 9, **have a higher standard of living than the household of the other spouse.**

(4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household stan- dards of living test set out in Schedule II.

ENFORCEMENT OF CHILD SUPPORT

Family Responsibility and Support Arrears Enforcement Act

Serious sanctions for non-compliance:

- Siezing driver's license
- Take wages
- Judge may refuse to hear an appeal from someone who hasn't applied

DICKIE V DICKIE—COURT HAS DISCRETION NOT TO HEAR THE APPEAL

Facts	• Order for child support – 9000 • H move to bahamas • Reached SCC – 700,000 • When he returned to Canada cited for contempt → ONCA cited appeal
Ratio	• Court can exercise to hear discretion if there is an appellant who has an oustanding CS order

RETROACTIVE AND RECALCULATION OF CS

- Payor spouse ordered a certain amount consistent with income
- BUT THEN INCOME GOES UP
- Payor a) does not notify recipiet spouse and b) **child support remains the same**
  → should the payor be required to pay the amount that would have been ordered if he had disclosed his new income?

DBS V SRG

MAJORITY – Bastarache…

KEY: **OBJECTIVES of child support versus CERTAINTY for the payor spouse**

- Presumptive validity of order or agreement, we are not going to say that that is invalid
- This presumption can be rebutted by specific circumstances on presumptive validity
  1. Recipient parent
     - Delay in seeking disclosure (for no good reason or valid reason. Valid has been held to be you are intimidated by party and would result in conflict), there is part of guidelines that allows for recipient to seek disclosure but it is proactive (recalculation scheme would correct this)
  2. "Blameworthy conduct" of payor→ did they try to hide fact they were earning more
  3. Child's past and present circumstances→ how much hardship did kids sustain because of non-payment
  4. Hardship to payor→ if had to pay additional

In the end…SOMETIMES PARTIES WILL HAVE TO PAY FOR AMOUNTS GOING BACK A FEW YEARS

SCC Minority View (Justice Abella)

- "A system of support that depends on when and how often the recipient parent takes the payor parent's financial temperature is impractical and unrealistic."—this is a problem, if income goes up the parties should be required to pay more

There should be no role for blameworthy conduct and no necessity to demonstrate hardship

Child Support, Poverty and Public Policy

- At page 913, the authors write: "So while child and spousal support is useful to share financial difficulties pursuant to divorce, it is unlikely to bring a large proportion of divorced parents out of poverty.
  - ➔ Claiming lack of child support as the cause and increased child support as the cure of child poverty in Canada will most likely increase hostility between divorced spouses while removing the impetus for society to assist with the problem. Poor families by themselves are not likely to pull themselves out of powerty. To insist otherwise would only make poverty increase.

AND

- At page 914, Professor Mossman writes: "The [governmental' strategy of defining the problem as one of deadbeat dads ensures the continuation of post-divorce "private" families and distances the state from any [major] "public responsibility to respond to the problem [of child poverty]".
  - ➔ The privatization of obligations for ongoing financial support for children after divorce contrasts with public policies permitting freely accessible divorce to adults in Canadian society. There is public suppor for private decision to divorce or separate BUT privatization of child support shows how the family continues to exist post-divorce AND limited extent of public support for the consequences of the state policies ensuring accessible divorce

Poor families will stay poor – keeping them off welfare, but not in a way that could break cycle.

SUPPORTING PARENTS S 32 *FLA*

S 32. Every child who is not a minor has an obligation to provide support, in accordance with need, for his or her parent who has cared for **or** provided support for the child, to the extent that the child is capable of doing so.

ASK
1. Child a minor
2. Did the parent **A) care for OR B) Provide support for the child**
3. Need of the parent
4. Is the child capable of supporting parent?

DRAGULIN V DRAGULIN

Facts	• H abuses daughter when young • Daughter wins lottery latter in life – frugal and saves it • H wants some and claims under s 32 • D says "you didn't care for me"
Decision	Grants support – evience that the H paid SOME money as a kid Staute says "or" → evidence that H remarried → needs are his basic needs only

RELIGION AND DOMESTIC CONTRACTS

MUSLIM FAITH – MAHR

Mahr in the Muslim Faith (incorporating norms from the faiths that the Canadian legal system and jurisprudence seems to be built on)

Kaddoura

- Should the civil court enforce an agreement involving a traditional payment by the groom to the bride in a

Muslim marriage?

- **DECISION:** Ont Court declines to recognize in
- **D:** we are not going to enforce because it is leading us into a religious thicket. These religious promises go beyond what basic commitment is required by civil law system for marriage. They bind the conscience as a matter of religious principle not as enforceable civil law
- Probably only of historical interest

The Mahr has been upheld in other cases *Nathoo, Almani, Odatalla* but *Khan* according to Ontario FLA the couirt upheld enforceability of a *nika* or a valid marriage contract in Pakistan

Khan v Khan(2005 Supt Ct. J Ontario)

D: more recent of superior court of justice where court upholds Muslim marriage contract but there is piece that cannot be upheld. This was the one that allowed for waiver of spousal support because that is unconscionable but court will deal with contracts based on religious principles.

- Court trying to find an appropriate role to deal with religious factors in balance with other aspects of the CL (cultural groups given complete freedom this may tread on the freedoms of individuals within a group in a way that is unacceptable to Canadian society
- **Natasha Bakht Positive Comment on decision:** The court was quite nuanced in the way it dealt with this issue and the Ontario courts has been nuanced as well with the religious arbitration issue. Rather than proposing a blanket prohibition of religious arbitration, a more nuanced approach that showed consideration for the religious rights AND equality rights of women would have been more useful

THE GET AND JEWISH FAITH

According to Jewish law you have a civil marriage but also marriage within Jewish faith. To get religious divorce both parties must consent. Issue when party refused religious divorce unless they received favourable economic settlement. There are repercussions within the faith for the this refusal for the get—more harsh for woman

- Consequences are more harsh for wife:

→ Cannot remarry in religious form

→ If wife dates or lives with or civilly marries another man, she is guilty of adultery; any children born of such relationship will be considered "mamzer"

- Divorce Act **21.1(5)** and FLA s. 2(4)/ 56(5)
- Responses:

(1) Halaka – Solutions from Jewish Law itself

(2) Relief from Secular Courts – Problem? Concern with separation of Church/State – different jurisdictions have taken differing approaches to whether to grant relief. Incentive for other party to not use this tool as a way to gain this unfair advantage in the civil proceedings

(3) Legislation

- Problems with this religious enactment?

→ law actually entering religious thicket, impacting religious freedom?

Barriers to remarriage

FLA 56(5) The court may, on application, set aside all or part of a separation agreement or settlement, if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in the making of the agreement or settlement.

***Divorce Act* - 21. 1(2) Affidavit re removal of barriers to religious remarriage**

In any proceedings under this Act, a spouse (in this section referred to as the "deponent") may serve on the other spouse and file with the court an affidavit indicating:

(a) that the other spouse is the spouse of the deponent;

(b) the date and place of the marriage, and the official character of the person who solemnized the marriage;
(c) the nature of any barriers to the remarriage of the deponent within the deponent's religion the removal of which is within the other spouse's control;
(d) where there are any barriers to the remarriage of the other spouse within the other spouse's religion the removal of which is within the deponent's control, that the deponent

(i) has removed those barriers, and the date and circumstances of that removal, or

(ii) has signified a willingness to remove those barriers, and the date and circumstances of that signification;

(e) that the deponent has, in writing, requested the other spouse to remove all of the barriers to the remarriage of the deponent within the deponent's religion the removal of which is within the other spouse's control;
(f) the date of the request described in paragraph (e); and
(g) that the other spouse, despite the request described in paragraph (e), has failed to remove all of the barriers referred to in that paragraph.

21. 1(3) Powers of court where barriers not removed

Where a spouse who has been served with an affidavit under subsection (2) does not

(a) within fifteen days after that affidavit is filed with the court or within such longer period as the court allows, serve on the deponent and file with the court an affidavit indicating that all of the barriers referred to in paragraph (2)(e) have been removed, and

(b) satisfy the court, in any additional manner that the court may require, that all of the barriers referred to in paragraph (2)(e) have been removed,

the court may, subject to any terms that the court considers appropriate,

(c) dismiss any application filed by that spouse under this Act, and

(d) strike out any other pleadings and affidavits filed by that spouse under this Act.

***Bruker v Marcovitz (SCC 2007)[*Within the Quebec context]**

F: A divorce context where you have a divorce being granted the parties consented to some of the corollary relief. Parties agreed they would take steps necessary to get religious get. Husband delays participating for 15 years regardless of requests. This means she cannot remarry etc. Wife brings civil action seeking damages as result of non-compliance with that part of the divorce

QC Superior Court: damages for agreement that agreement is binding. You are entitled to $47.500 CA under the consent created for a valid civil obligation

QC CA: Consent matters were not valid matters for corollary relief; Court should not get into religious "thicket"; consent was not a civil obligation, but one of "le devoir morale, le devoir de conscience"

D: SCC (Abella) Even if you agree to something that has a religious element that is driving it—if you created a civil obligation in relation to that issue that has a religious character as long as you have this civil obligations the court can enforce it. There are religious elements. Civil Code (Quebec) does not preclude transforming moral obligations into legally valid and binding obligations as long as the object of the contract is not prohibited by law or public policy

- The husband says there were religious motivations and you should not be delving into this court says no—overall civil. Further, any intrusions into his religious freedom were overshadowed by need to observe "statutorily articulated commitments to equality, religious freedom and autonomous choice in marriage and divorce

CONSISTENT WITH ONTARIO DECISION where court recognizes there are traditions and legal rights protected and those will sometimes take priority over those elements. Damages were reinstated.

Covenant Marriage

→ does not exist in Canada but certain states in the US that allow for parties to enter covenant marriage where when you agree to enter you are saying you will only divorce if there is serious fault by one or both of the spouses