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FAMILY LAW

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I. OVERVIEW

1. *The distribution of powers and legislation*

Parliament has the power to make laws in relation to “marriage and divorce”.¹ Legal, religious and political perspectives on marriage and divorce varied in Canada at Confederation. Federal authority over “marriage and divorce” ensured that a single statute could determine marital status for citizens throughout Canada.

The [Divorce Act](#)² is the federal legislation that governs divorce in Canada. The [Divorce Act](#) also contains provisions dealing with the corollary matters of decision making and parenting time for children (including mobility), child support and spousal support.

The *Civil Marriage of Non-residents Act*, SC 2013, c. 30 permits same-sex couples who were married in Canada but reside in a different country where same-sex marriage is illegal to get a divorce processed in Canada, albeit no corollary relief can be ordered.

Aside from divorce and its corollaries, family law largely falls within provincial jurisdiction as “property and civil rights in the Province”.³ “Property and civil rights” includes the division of matrimonial property, payment of child support and spousal support, custody and parenting of children, as well as child protection and adoption.

The federal authority over “marriage” must be read in a manner consistent with provincial authority over the “solemnization of marriage in the province”.⁴

The federal authority over “marriage” does include regulating the capacity of the parties to marry. *The Marriages (Prohibited Degrees) Act*⁵ deals with who may or may not marry, including degrees of familial relationships so close as to make the marriage void. The [Civil Marriage Act](#)⁶ extends civil marriage to same-sex couples⁷.

On the other hand, the provincial power over “solemnization of marriage” addresses the circumstances that may determine the **validity** of a marriage. In Nova Scotia, the [Marriage Act](#)⁸ (previously called the *Solemnization of Marriage Act*) regulates validity, in areas such as pre-ceremonial requirements, the issuing of ‘banns’, the qualifications of the person performing the ceremony, and parental consent.

¹ [Section 91\(26\)](#) of the [Constitution Act, 1867](#), RSC 1985, appendix II, no 5, the *Constitution Act, 1867*

² RSC 1985 (2nd Supp.), c 3, as amended, referred to as the [Divorce Act](#).

³ [Section 92\(13\)](#) of the [Constitution Act, 1867](#).

⁴ [Section 92\(12\)](#) of the [Constitution Act, 1867](#)

⁵ [SC 1990, c 46](#), referred to as the [Marriage \(Prohibited Degrees\) Act](#)

⁶ [SC 2005, c 33](#), referred to as the [Civil Marriage Act](#)

⁷ [Reference Re Same-Sex Marriage, 2004 SCC 79](#)

⁸ [RSNS 1989, c 436](#).

The [Matrimonial Property Act](#),⁹ *also provincial legislation*, addresses the division of matrimonial property in event of separation, divorce or death. Unmarried couples may bring themselves within the scope of this legislation by registration of a domestic partnership under the provincial *Law Reform (2000) Act*.¹⁰

The [Family Homes on Reserves and Matrimonial Interests or Rights Act](#),¹¹ federal legislation, addresses use, occupation and possession of a family home and division of its value on reserves, in light of federal jurisdiction over “Indians, and Lands reserved for the Indians.”¹²

The provincial [Parenting and Support Act](#) (previously called the *Maintenance and Custody Act*) addresses custody and parenting of children (including mobility), child support and spousal support, for couples who have either not married or have married but have not filed for a divorce.

A given client’s “Family Law” issues may overlap with criminal matters (as a result of assault, uttering threats, or acting to deny a parent custody of a child contrary to an order)¹³. Of course, criminal law is within federal jurisdiction, but domestic violence is also addressed in a preventative manner under the [Domestic Violence Intervention Act](#),¹⁴ and by means of a Peace Bond application under the [Criminal Code, s. 810](#)¹⁵. Family violence is also a consideration when addressing the best interests of children under the [Parenting and Support Act](#). Other complicated cross-sections in family law include bankruptcy law and immigration law.

Finally, the [Children and Family Services Act](#)¹⁶ is a provincial statute offering a comprehensive code dealing with child protection and adoption, which are areas of exclusive provincial jurisdiction.¹⁷

2. The structure of Nova Scotia Courts

The Supreme Court (Family Division) is a unified family court that deals with all family law matters, including:

- divorce
- adoptions
- child protection and adult protection

⁹ [RSNS 1989, c 275](#), referred to as the *Matrimonial Property Act*

¹⁰ SNS 2000, c 29, referred to as the *Law Reform (2000) Act*

¹¹ [SC 2013, c 20](#); this legislation is discussed in Part XV of these materials, “*Family Law In An Aboriginal Context*”

¹² [Section 91\(24\)](#) of the [Constitution Act, 1867](#), RSC 1985, appendix II, no 5, the [Constitution Act, 1867](#)

¹³ See discussion below of the [Criminal Code, section 282\(1\)](#) [Enforcement of Custody]

¹⁴ [SNS 2001, c 29](#), referred to as the [Domestic Violence Intervention Act](#)

¹⁵ [Criminal Code, RSC 1985, c C-46, s 810](#)

¹⁶ [SNS 1990, c 5](#), referred to as the [Children and Family Services Act](#)

¹⁷ For “comprehensive code” see: *Re DT (1992), 113 NSR (2d) 74 (CA)*; for “exclusive jurisdiction” see: *Reference re: Adoption Act (Ontario), [1938] SCR 398*; *Communications, Energy and Paperworkers’ Union of Canada v. Native Child and Family Services of Toronto, 2010 SCC 46*

- property and pension issues
- parenting arrangements (decision-making responsibility and parenting time and contact time), and
- child support and spousal support.

The Family Division has been expanded to all areas of the province. Prior to the unification of the Family Division, family law matters (in all areas of the province except Halifax, Sydney and Port Hawkesbury), excluding divorce and the division of property, were heard in the Family Court of Nova Scotia. Matters relating to divorce and division of property were heard in the Supreme Court.

The *Judicature Act* is the provincial legislation that establishes the Supreme Court and Court of Appeal, its structure and authorizes the enactment of the rules of the court. The amendment, known as Bill 105, received Royal Assent on April 12, 2019 but the unified family court has not yet been “rolled out” throughout the province.

The justices of the Supreme Court of Nova Scotia have broad powers under statute, common law and equity. The *Judicature Act*¹⁸ governs this Court, granting the power to make the **Rules** that govern procedure. Family law matters in the Supreme Court are addressed in the *Civil Procedure Rules*, Part 13, Rules 59 to 62.

Applications under the [Divorce Act](#) and the [Matrimonial Property Act](#) proceed in this Court, as well as actions under pension division and adoption legislation.

1. **Jurisdiction** – This Court hears all family law matters, including support and decision-making (custody), child abduction, child welfare, adoption, divorce, matrimonial property division, pension division, common law property division and adult protection. Where the Court’s docket permits, it has jurisdiction to deal with some related criminal matters.¹⁹
2. **Conciliation** – An important feature of this Court is the role of the conciliation officer.²⁰ When a proceeding begins (except for a divorce), self-represented parties meet with a conciliation officer, who will consider and direct the options for dispute resolution and ensure that the proper documentation is exchanged between the parties. The conciliation officer may recommend appropriate education programs for the parties. If matters are resolved during the conciliation process, the conciliation officer can prepare a consent order for the parties, who will be advised to obtain independent legal advice before they consent to the order. The conciliation officer is also empowered to make interim orders for child

¹⁸ – [The Rules](#) may be found at www.courts.ns.ca

¹⁹ [Judicature Act, Section 32A\(2\)](#)

²⁰ See *Civil Procedure Rules* 59.29 to 59.36 governing Conciliation.

support at the table amount under the Child Support Guidelines.²¹ If both parties have lawyers, conciliation does not take place.

3. **Information programs** – Parents are required to attend the Parent Information Program if there is any dispute concerning decision-making and/or parenting time of a child before the Court (Voluntary parent information programs also exist in the Family Court). The Parent Information Program consists of two, two-hour sessions or one three-hour session, offering information on the legal process, and how to support children and keep them out of parental conflict following separation.
4. **Custody and Access Assessments, Parental Capacity Assessments and Voices of the Child Reports** – These may be recommended by the conciliation officer ordered by the Court.²² The Court will coordinate the assessment, but the parties are typically required to contribute to the cost, in an amount pro-rated on the basis of income.
5. **Mediation** – While mediation is a voluntary process, a referral may be made by the Court or a conciliation officer.
6. **Judicial Settlement Conferences** – These are akin to mediation except they are led by a Justice. The presiding Justice will typically advise both parties why they think may occur if a matter proceeds to trial. This is very persuasive and securing settlements. Once a settlement is reached, it is recorded and creates a binding agreement that cannot be changed.
7. **Family Law Information Centres (FLIC)** – There are staffed, “Family Law Information Centres” at Halifax and Sydney, providing legal information to self-represented litigants, with online resources also available on the Family Law Nova Scotia website at www.nsfamilylaw.ca.
8. **Civil Procedure Rules** – Rule 59 governs matters heard in this Court. Rule 60A deals with matters under the [Children and Family Services Act](#).

The Supreme Court (Family Division) applies significant resources to the resolution of disputes without a trial or hearing. Clients may well be able to resolve matters by these mechanisms.

The benefits of a “**collaborative law**” approach by lawyers to resolution of family law matters should also not be overlooked. Collaborative law is a way of practising in which lawyers for both parties in a family dispute agree to assist their respective clients in

²¹ The [Federal Child Support Guidelines, SOR/97-175](#); and Provincial Child Support Guidelines, [NS Reg 53/98](#), are both referred to as the **Guidelines**

²² Under [Section 32F](#) of the [Judicature Act](#) and/or [Section 19](#) of the [Parenting and Support Act](#);

resolving conflict, using cooperative strategies rather than adversarial techniques and litigation.²³

Non-adversarial participation by lawyers via collaborative family law methods allows lawyers to use analysis and reasoning to solve problems, generate options, and create a positive context for settlement. Such methods may not be effective once an adversarial family law proceeding begins.²⁴

The amendments to the ***Divorce Act*** place a spotlight on the utilization of alternative dispute resolution mechanisms and include a new definition in section 2 for “family dispute resolution process”, which is a means to proceed outside of court to attempt to resolve disputes including mediation, negotiation and collaborative family law.

The Court of Appeal

This Court hears appeals from the Supreme Court and the Supreme Court (Family Division).

Family Law decisions are difficult to appeal, given the standards of appellate review, the highly discretionary nature of rulings, and the advantages the trial judge has in hearing the evidence.

The Court of Appeal has consistently stressed the need for it to show deference to trial judges in family law matters. The application of this principle is not limited to appeals of parenting orders, but also applies to support orders²⁵ and orders regarding the division of property.²⁶

In the absence of an identifiable error of law or legal principle, clear misapprehension of the evidence that changed the outcome, or an award that is clearly wrong, the Court of Appeal will not intervene.

“Palpable and overriding error” or “clear and material error” must be established in relation to all alleged factual or evidentiary determinations.²⁷ The Court will not overturn an order simply because the appeal judges may have balanced the relevant factors differently.²⁸

Successful appeal of a ***parenting*** order is particularly difficult in the absence of error of law or a clear and determinative error of fact. The advantaged views of the trial judge are self-evident.

²³ For more information on “Collaborative Family Law”, see <http://www.collaborativefamilylawyers.ca/>

²⁴ For more information on “Collaborative Family Law”, see <http://www.collaborativefamilylawyers.ca/>

²⁵ *Boudreau v Marchand*, [2012 NSCA 79](#) at para 9; *Woodford v MacDonald*, [2014 NSCA 31](#) at para 9

²⁶ *MacLennan*, [2003 NSCA 9](#) at para 9; *Volcko*, [2015 NSCA 11](#) at paras 8 & 27

²⁷ *Housen v. Nikolaisen*, [2002 SCC 33](#); *Haines*, [2013 NSCA 63](#) at para 6; *Strecko*, [2014 NSCA 66](#) at para 12

²⁸ *Hickey*, [\[1999\] 2 SCR 518](#) at paras 10-12; *Van de Perre v Edwards*, [2001 SCC 60](#); *Haines*, [2013 NSCA 63](#) at para 5.

3. Concurrent jurisdiction

The ***Parenting and Support Act*** and the ***Divorce Act*** both deal with parenting time, decision making and support, both with valid constitutional authority.

Both statutes may concurrently address family law matters, as long as there is no actual conflict between the federal and provincial regimes.²⁹

Once a parenting issue concerning a child is raised in a divorce proceeding, the jurisdiction of the ***Parenting and Support Act*** is ousted as such issues come within the exclusive jurisdiction of the ***Divorce Act***.³⁰

²⁹ *Fancy v. Shephard* (1998), 164 NSR (2d) 274 (SC); what amounts to a “conflict” is discussed in *Multiple Access Limited v. McCutcheon* [1982] 2 SCR 161.

³⁰ *RM v SG* (1999), 174 NSR (2d) 101 (SC).

4. Common-law partners, spouses and domestic partners

It has long been only marriage that confers on a man and a woman specific legal rights and obligations. Over the past 30 years, the law evolved to extend certain legal rights and obligations to cohabiting relationships.

The rights and obligations attaching to unmarried conjugal relationships, whether involving opposite or same sex partners, have accrued through legislative amendments and the development of case law. The **Charter** has had a dramatic impact on this area of law.

In Nova Scotia, the legal definitions of spouse, common-law partner and domestic partner are both legislated and the result of judge-made law. The following definitions may be used when discussing rights and obligations:

“Common-law partner” means an individual who has cohabited with another individual in a marriage-like but not marital relationship, regardless of the gender of the two persons. The requisite time period for their cohabitation differs, based on the relevant legislation and purpose.

“Spouse” means individuals who are married, in most legislation. Nova Scotia recognizes the marriage of opposite sex and same-sex individuals. In the *Parenting and Support Act*, the term “spouse” encompasses both married partners and common-law partners who have lived together in a conjugal relationship for more than two years, or who live in a conjugal relationship and have a child together.

A **“conjugal”** relationship is one that is “marriage-like” and includes same-sex and opposite sex couples who are not married but cohabit in the same manner as spouses.

“Domestic partner” means an individual who is cohabiting or intends to cohabit with another individual and has entered into a domestic partner declaration.³¹ This definition encompasses same-sex and opposite sex couples.

“Common-law cohabitee(s)” and **“common-law couple”** refer to those who live together in a conjugal relationship but who have not married or registered a domestic partnership declaration. The rights of these individuals are the same whether they are a same-sex or opposite sex couple.

More on “domestic partners”

There are two important distinctions between domestic partners and common-law partners:

³¹ These declarations must be registered under the [Vital Statistics Act, RSNS 1989, c 494](#).

1. Domestic partnership status arises on registration of the declaration. There is no minimum cohabitation period required, as there may be under various federal or provincial statutes before a common-law relationship gains status.
2. Domestic partnership registration causes the application of much legislation relating to married people, whereas common-law cohabitation may not.

In Nova Scotia, the legislation to which domestic partnership under the ***Law Reform (2000) Act***³² applies is as follows:

- [***Fatal Injuries Act***, RSNS 1989, c 163](#)
- [***Health Act***, RSNS 1989, c 195](#)
- [***Hospitals Act***, RSNS 1989, c 208](#)
- [***Insurance Act***, RSNS 1989, c 231](#)
- [***Intestate Succession Act***, RSNS 1989, c 236](#)
- [***Parenting and Support Act***, RSNS 1989, c 160](#)
- [***Matrimonial Property Act***, RSNS 1989, c 275](#)
- [***Members Retiring Allowances Act***, RSNS 1989, c 282](#)
- [***Pensions Benefit Act***, RSNS 1989, c 340](#)
- [***Probate Act***, SNS 2000, c31](#)
- [***Provincial Court Act***, RSNS 1989, c 238](#)

Further rights were provided by the ***Justice Administration Amendment (2001) Act***,³³ which extended the application of spousal rights to domestic partners including under:

1. [***Public Service Superannuation Act***, RSNS 1989, c 377](#)
2. [***Teachers' Pension Act***, S.N.S. 1998, c 26](#)
3. [***Wills Act***, RSNS 1989, c 505](#)
4. [***Workers' Compensation Act***, SNS 1994-95, c 10](#)

Domestic partnerships end and the parties become “former” domestic partners upon the earlier of one of four events:³⁴

1. The parties file an executed statement of termination in the prescribed form;
2. The parties live separate and apart **for more than one year** and one or both parties intend that the relationship not continue (the period of separation may be interrupted for up to 90 days of attempted reconciliation or by a party becoming incapable of having the intention to separate, where it is probable that the separation would have continued);
3. One of the domestic partners marries another person; or

³² SNS 2000, c 29, referred to as the ***Law Reform (2000) Act***

³³ SNS 2001, c 5, referred to as the ***Justice Administration Amendment (2001) Act***

³⁴ Section 55 of the ***Law Reform (2000) Act***

4. The parties make a written agreement that would qualify as a separation agreement under [section 52](#) of the [Parenting and Support Act](#).

Once the domestic partnership ends, the domestic partners become former domestic partners and have the same rights and obligations as former spouses under any statute that had applied to them as domestic partners. Very few people register their partnerships and it is uncommon to see in practice. That being said, it is still important to determine whether a registration has occurred as the law applicable to a registered common law relationship is vastly different.

II. MARRIAGE

1. *The effect of invalidity (void and voidable marriages)*

A party to a marriage may apply to a superior court (supreme court) for a declaration that a marriage is void or voidable.³⁵ The defect giving rise to nullity must be present at the time of the marriage.

While fraud and duress may render a marriage void, no marriage is void merely upon proof that it was contracted upon false representations, unless a party has been deceived by those representations as to the very nature of the ceremony or the true identity of the other person.³⁶

A **void** marriage is regarded by the law as never having taken place.³⁷

A **voidable** marriage is a valid marriage until the innocent party seeks a declaration annulling the marriage and the declaration is granted by a court. The parties are validly married until the marriage is annulled or they are divorced.³⁸ A declaration of annulment obtained from another country can be registered and enforced in Canada.³⁹

The distinction between whether a marriage is **void** or **voidable** is important because it has repercussions in dealing with the parties' property and with the rights of third parties.

In proceedings to determine rights of a third party, a court may hold that a particular marriage is **void** whenever the validity of the marriage is relevant to the third party's rights; however, the validity of a **voidable** marriage can only be raised in proceedings brought by one of the parties to the marriage.

³⁵ In the Family Division: [Section 32A\(1\)\(g\)](#) of the [Judicature Act](#) (declarations of validity of a marriage), and by implication also in the Trial Division where there is no Family Division: [Section 5](#) of the [Judicature Act](#).

³⁶ *Iantsis (falsely called Papatheodorou)*, [1971] 1 OR 245 (CA)

³⁷ *De Reneville v De Reneville*, [1948] 1 All ER 56 (CA)

³⁸ *De Reneville v De Reneville*, [1948] 1 All ER 56 (CA)

³⁹ *Mills*, [2018] A.J. No. 649

Statute law provides for the legitimacy of a child born in a **void** marriage where the mother and father have, at any time, celebrated a marriage in accordance with the laws of the place in which the marriage was celebrated and if either the mother or the father believed that the marriage was valid.⁴⁰

Statute law also provides for the continued legitimacy of a child born in a **voidable** marriage where the child would have been legitimate if the marriage had been dissolved instead of annulled.⁴¹

The [Matrimonial Property Act](#) defines “spouse” to include either of a man and woman who are married to each other by a marriage that is **voidable** and has not been annulled by a declaration of nullity; or have gone through a form of marriage with each other, in good faith, that is **void** and are cohabiting or have cohabited within the preceding year. It is important to note that a person who marries, knowing the marriage is **void**, cannot rely upon the provisions of the [Matrimonial Property Act](#) to claim a division of matrimonial property.

The *Parenting and Support Act* includes in the definition of “spouse” two persons who are married by a voidable marriage that is not yet annulled or who have entered into a form of marriage if either or both believed the marriage to be valid. This allows individuals in those scenarios to pursue relevant claims like spousal support.

Spousal support may be ordered to offset the economic consequences of finding that a marriage is void. The marriage being void, the award must be made under provincial support legislation.⁴²

2. Essential validity

“Essential validity” involves the legal capacity of the parties to marry. This is an area of federal jurisdiction. The statutes that have been passed dealing with capacity to marry are the [Marriage \(Prohibited Degrees\) Act](#) and the [Civil Marriage Act](#).

The [Marriage \(Prohibited Degrees\) Act](#) provides that a person may not marry another person to whom they are related lineally by consanguinity (blood relations) or adoption, if they are brother or sister by consanguinity, whether whole- or “half-blood”, or by adoption.⁴³

⁴⁰ [Section 47](#) of the [Parenting and Support Act](#)

⁴¹ [Section 48](#) of the [Parenting and Support Act](#)

⁴² *Ahmed v Naseem*, [2016 NSSC 74](#), para. 129-153

⁴³ [SC 1990, c 46](#)

The [Civil Marriage Act](#)⁴⁴ extends civil marriage to same-sex couples.⁴⁵ The remaining law that governs essential validity is the common law.

At common law, for there to be essential validity in a marriage, the parties must have the ability to consummate the marriage, not be married to another person, consent (*i.e.*, have the capacity to understand, with no duress or fraud), and be of the minimum age. At common law, the marriage of a child of less than seven years is void. The marriage of a male older than seven years but younger than 14 years, or a female older than seven but younger than 12 years, is voidable at the instance of the infant upon his or her attaining the requisite minimum age.⁴⁶

However, there are much older age requirements (minimum 16 years old with parental consent) to secure a marriage license in Nova Scotia, so the common-law age requirement is always met.

Failure to meet a condition of “essential validity” may result in a **void** or **voidable** marriage, depending upon the nature of the invalidity. For example, a prior existing marriage makes the later marriage **void** compared to an inability to consummate the marriage, which makes the marriage **voidable**. A person may be barred from bringing a nullity action if they acquiesced to the marriage after the discovery of the other person’s inability to consummate the marriage.

3. Formal validity

“Formal validity” involves the ceremony or evidential requirements imposed by statute as conditions precedent to marriage.

The **Marriages Act** deals with the formal requirements of contracting a valid marriage in the province, who is authorized to solemnize marriage, the process and requirements to secure a marriage license, age requirements, parental consent (including when consent may be dispensed with), and penalties for non-compliance. The Act also has provisions to retroactively validate certain non-compliant marriages.

To obtain a marriage license in Nova Scotia, a person must be 19 years old, or be at least 16 years old and have parental consent. No marriage in Nova Scotia is valid unless it is solemnized by a person authorized to solemnize marriage and a license has been obtained. This must be read with other sections, which validate certain marriages performed in good faith by a minister, cleric or staff officer who was not authorized, and which marriage was not registered.

⁴⁴ [SC 2005, c 33](#)

⁴⁵ See also *Reference Re Same-Sex Marriage*, [2004 SCC 79](#)

⁴⁶ *Legebokoff*, [\(1982\), 28 RFL \(2d\) 212 \(BCSC\)](#) at para 12.

Parental consent may be judicially dispensed with, and a judge may authorize the marriage of a person under 16 years old.⁴⁷ [Section 45](#) of the *Solemnization of Marriage Act* outlines the court's ability to declare that a valid marriage did not occur, if an underage person was married without parental consent, provided that the couple did not cohabit as husband and wife after the ceremony, consummation has not occurred, and the action is brought before the person has reached the age of 19 years.

⁴⁷ See *Bennett et al. v Bennett et al.*, [1973] NSJ No 234 (CoCt), for an example of such an application.

4. Foreign marriages

The law of the place where the marriage is celebrated generally determines whether or not it is a valid marriage: *locus regit actum*.

Nevertheless, courts in Nova Scotia have not traditionally granted matrimonial relief if the marriage was not a contracted union between two spouses.⁴⁸ Thus, potential or actual polygamous marriages will not be recognized as valid.⁴⁹ It is common for parties to get married in different countries, particularly Caribbean destinations and this is encountered frequently in practice.

5. Marriage contracts

Marriage contracts may be executed either in anticipation of marriage or during the marriage. The general law of contract applies to marriage contracts, with some modifications.

Marriage contracts normally deal with property and establish the regime under which the parties intend to govern their relationship. The contract can exclude the application of provisions of the [Matrimonial Property Act](#).

A marriage contract (or term within the contract) may be found to be void as contrary to public policy. Provisions may be void that attempt to take away from one or both of the parties the right to submit questions of law to a court, such as those relating to decision-making, parenting, child support and spousal support.⁵⁰

A marriage contract can deal with the parties' property during the marriage, on separation, annulment, dissolution or death.⁵¹ Marriage contracts must be written, signed and witnessed.⁵²

One of the factors to be taken into account in determining whether to grant an unequal division of matrimonial property, or a division of non-matrimonial property, is the existence of a valid marriage contract.⁵³

The terms of a marriage contract between spouses or common law partners shall also be considered when a court is determining spousal support under provincial legislation.⁵⁴

⁴⁸ *Hyde* (1866), LR 1 P & D 130

⁴⁹ *Ali*, [1966] 1 All ER 342

⁵⁰ *Bood v McGunnigle*, 1998 CanLII 2198, [1998] NSJ No 534 (SC)

⁵¹ [Section 23](#) of the [Matrimonial Property Act](#)

⁵² [Section 24](#) of the [Matrimonial Property Act](#)

⁵³ Section 13 of the [Matrimonial Property Act](#)

⁵⁴ [Section 4\(c\)](#) of the [Parenting and Support Act](#). The term “marriage contract” is not defined in the [Parenting and Support Act](#).

A court “may” consider the terms of any agreement with respect to parenting of a child, but the court is not bound by the agreement if the court is of the opinion that the terms of the agreement are not in the best interests of a party or the child.⁵⁵

An agreement may be registered with the court, which results in the agreement having the effect of an order. However, the court is entitled to inquire into the merits of an agreement at the time it is registered and, after allowing the parties to be heard, may vary the terms before registering it.⁵⁶

The ***Vital Statistics Act, R.S., c.494*** provides that domestic partners who have registered their domestic partnership declaration have the same rights as spouses under both the ***Matrimonial Property Act*** and the ***Parenting and Support Act***, which means domestic partners can enter into “marriage contracts”.

III. DIVORCE

A divorce proceeding is commenced under the ***Divorce Act*** in the Supreme Court of Nova Scotia or Supreme Court (Family Division), the latter in areas where it exists.⁵⁷

The Court has the authority to determine “corollary matters” such as decision-making responsibility (this phrase changes what was called custody prior to the amendments to the ***Divorce Act***), parenting time (previously called access), and support matters that are rationally and functionally connected to the granting of a divorce. After a divorce is granted, former spouses can pursue variation of corollary relief under the ***Divorce Act*** if there is a material change in circumstances

It is desirable, and expected, to deal with divorce and ***Matrimonial Property Act*** proceedings at the same time.⁵⁸ Other family-related claims, for example, claims for damages in the case of domestic violence, pension division and trust claims to property, may also be heard with the divorce proceeding.⁵⁹

The Court adjudicates matters beginning with determining the divorce and parenting the children. The division of assets and child support precede spousal support.

1. Jurisdiction

⁵⁵ ***Section 31*** of the ***Parenting and Support Act***.

⁵⁶ ***Section 52*** of the ***Parenting and Support Act***.

⁵⁷ ***Civil Procedure*** Rule 59 governs divorce matters in the Family Division, and Rule 62 in the rest of the Province.

⁵⁸ ***Ryan*** (1980), 43 NSR (2d) 423 (SC)

⁵⁹ See Forms 59.07 & 59.08; 62.09 & 62.10, for the range of legislation addressed on application or by answer.

The superior court in a province has jurisdiction to hear and determine a divorce if either spouse has been “ordinarily resident” in the province for at least one year immediately preceding the commencement of the proceeding.⁶⁰

Ordinary residence grants the Supreme Court in the province with “jurisdiction *simpliciter*” in relation to the divorce petition.⁶¹ It may be the case, however, that another jurisdiction is more “convenient” to rule on some or all elements of the proceeding (applying “*forum non conveniens*” principles and/or the [Court Jurisdiction and Proceedings Transfer Act](#)).⁶²

Foreign residents married in a province, whose marriage is not recognized in their country of residence (e.g., a same-sex marriage), may have their marriage dissolved by superior court order granted in the province of marriage, but without further corollary relief.⁶³

“**Ordinarily resident**” is not defined in the [Divorce Act](#). It is a question of fact, determined by considering circumstances including the following:

- the residence used in a person’s customary mode of life, contrasted with a special, occasional or casual residence;
- the place where, in the settled routine of a person’s life, he or she regularly, normally or customarily lives, contrasted with unusually, casually or intermittently visits or stays;
- the residence of a person that has an element of permanence, contrasted with one that is temporary;
- it is not the length of the visit or stay that determines the question: a person’s ordinary residence may change in a day, but it is that person’s ordinary residence until that day.

Transfers of employment, periods of spousal separation, and other events or circumstances may make the determination difficult. However, it remains fundamentally a factual determination.⁶⁴

If divorce proceedings are commenced in two different provinces on different days, the court in which the divorce proceeding was commenced first has exclusive jurisdiction, provided the criteria of ordinary residence are met. Where the two divorce proceedings

⁶⁰ [Section 3](#) of the [Divorce Act](#)

⁶¹ [Armoyan, 2013 NSCA 99](#) at paras 210-216

⁶² [Court Jurisdiction and Proceedings Transfer Act, SNS 2003, c 2](#); see [Armoyan, 2013 NSCA 99](#), para 217-360; See [Lamonthe, 2014 NSSC 137](#), for an example of the issue arising in a case concerning only spousal support and property (pension) division.

⁶³ [Civil Marriage of Non-residents Act](#), SC 2013, c 30 (Royal Assent 2013-06-26)

⁶⁴ See [Quigley v. Willmore, 2007 NSSC 305](#), para 40-51; aff’d [2008 NSCA 33](#); [DeWolfe](#), [1989] NSJ No 169 (SC); principles reaffirmed and explained in [Armoyan, 2013 NSCA 99](#)

are commenced on the same day, the Federal Court Trial Division has exclusive jurisdiction.⁶⁵

Ordinary residence is also the test for corollary relief, not for one year prior to the commencement of the proceedings, but at the time the proceeding is commenced. The parties can also accept a court's jurisdiction.⁶⁶

With the pending amendments to the ***Divorce Act***, under s. 6 the court can now transfer a divorce, corollary relief, or variation proceeding that includes an application for or to vary a parenting order to the province where the child habitually resides instead of the province to which a child is most substantially connected. The amendment also merges ss 6(1) and 6(2).

2. The grounds for divorce

The ***Divorce Act*** was significantly amended in 1986 in response to the ***Report on Family Law***,⁶⁷ which recommended that marriage breakdown should be the sole criterion of divorce in Canada. "No-fault" divorce is central to the current ***Divorce Act*** and how the courts apply the legislation.

Under the ***Divorce Act***, most divorces are granted (finalized) on the ground that there has been a permanent breakdown of the marriage.

Permanent marriage breakdown is established by one of the following: the spouses have lived separate and apart for at least one year; the spouse against whom the petition is issued (the respondent) has committed adultery; or the respondent has treated the petitioning spouse with mental or physical cruelty that has rendered continued cohabitation intolerable.

Proving the breakdown of the marriage with evidence of adultery or cruelty means that there is no requirement to wait one year after the separation to finalize the divorce. However, it is much less common for parties to proceed with a divorce proven by adultery or cruelty, as the evidence required is normally more extensive and the parties are often separated for one year or more by the time a divorce hearing actually occurs. In rare cases a Respondent may agree that they committed adultery, in which case this admission can serve to expedite the divorce process.

A petition seeking divorce on the basis of separation for one year may be commenced immediately upon separation but cannot be completed until the one year has passed.

⁶⁵ [Section 3](#) of the ***Divorce Act***

⁶⁶ [Section 4](#) & 5 of the ***Divorce Act***

⁶⁷ Law Reform Commission of Canada, ***Report on Family Law***, Ottawa: March 1976

Filing immediately upon separation allows the parties to obtain interim relief in matters such as support, parenting time or exclusive possession of a matrimonial home.

3. Proof of a permanent marriage breakdown

Living separate and apart

Parties are living separate and apart during any period when they have in fact lived “apart”, if one spouse had the intention to live “separate and apart”.⁶⁸

This unilateral intention requires recognition by that spouse that the marriage is at an end; the other spouse does not need to believe that the marriage is at an end.

In order to prove that the parties have lived separate and apart for divorce purposes, it is necessary to establish that the parties live apart and at least one of the parties had the intention to live separate and apart. The Court gives the following explanation:

Unlike the decision to marry, the decision to separate is not a mutual one. ... [O]nce one party has decided to permanently separate and has acted on it, the other party has no ability to stop the process or object to it. ... [S]eparation occurs when “the parties knew or, acting reasonably, ought to have known, that their relationship was over and would not resume.”⁶⁹

The date of separation is important not only for no fault divorce but also for asset division. It is primarily a factual matter, and no one fact pointing to a date necessarily trumps all other facts.⁷⁰

It is possible to live “separate and apart” under the same roof, as the expression refers to the status of the marriage, not the physical arrangement in which spouses live.⁷¹

The following conditions are necessary for a couple to be living “separate and apart”:

- (1) withdrawal by one or both spouses from the matrimonial obligation,
- (2) with the intent of destroying the matrimonial consortium, and
- (3) physical separation.⁷²

⁶⁸ [Section 8\(3\)](#) of the *Divorce Act*

⁶⁹ *MacNeil*, [2016 NSSC 128](#), para. 9, citing *McKenna* (1974), [10 NSR \(2d\) 268](#) (SC(AD)) and *O'Brien*, [2013 ONSC 5750](#), para. 50, as well as the authorities cited in the latter decision.

⁷⁰ e.g., the relative importance of separate residence and continuing sexual relations: *Wells v King*, [2015 NSSC 232](#)

⁷¹ *McKenna*, (1974), [10 NSR \(2d\) 268](#); 19 RFL 357 (CA)

⁷² *Rushton* (1968), [2 DLR \(3d\) 25](#) (BCSC); *Dupere* (1975), [19 RFL 270](#) (NBQB),

When parties are living under the same roof, courts look at many factors to determine if they were actually living separate and apart, including the following:

- occupying separate bedrooms,
- an absence of sexual relations,
- the level of communication between the spouses,
- an absence of joint ventures,
- failure to perform domestic tasks for the other spouse,
- separation of finances,
- lack of joint social activities, and
- holding themselves out as separated in dealings with third parties.⁷³

Periods of attempted reconciliation by resumption of cohabitation, not exceeding 90 days (cumulative), are not counted against the one-year period of separation.⁷⁴

Adultery

Adultery is proven by a spouse being shown to have had consensual sexual intercourse with a person of the opposite sex to whom the spouse is not married.⁷⁵ It is not necessary to name the third party in the Divorce Petition.

A spouse cannot rely upon their own adultery to prove a breakdown of the marriage. The petitioner is required to adduce sufficient proof to establish adultery on the balance of probabilities if the respondent does not admit the adultery.

In an uncontested proceeding, where there is evidence before the court proving the uncondoned adultery of the respondent (e.g., his or her own affidavit), the divorce should be granted.⁷⁶

Proving adultery on the balance of probabilities does not require direct evidence. Adultery can be inferred by the court from proven facts, such as familiarity between the parties, opportunity for commission of adultery, proof that the opportunity would be used, and facts consistent with the commission of adultery and inconsistent with any other rational alternative.⁷⁷

⁷³ See the factors listed in *Volcko v. Volcko*, [2015 NSCA 11](#) *KLS v. DRS*, [2012 NBCA 16](#), para. 20, cited in *MacNeil*, [2016 NSSC 128](#), para. 12

⁷⁴ [Section 8\(3\)](#) of the *Divorce Act*

⁷⁵ Same-sex extra-marital sexual relations have also been held to meet this common-law requirement: e.g., *SEP v DDP*, [2005 BCSC 1290](#); *Thebeau*, [2006 NBQB 154](#)

⁷⁶ *D'Entremont* (1992), [118 NSR \(2d\) 51 \(CA\)](#)

⁷⁷ *Bezanger* (1969), [1 NSR \(2d\) 412](#) (SC)

The test is objective, as the evidence must “establish adultery 'by fair inference as a necessary conclusion' ... which 'would lead the guarded discretion of a reasonable and just man to [that] conclusion.’”⁷⁸

Cruelty

Proof of “cruelty” requires evidence of “grave and weighty” conduct. The petitioner must establish each of the following:

- (1) she or he was the object of cruel treatment;
- (2) the cruel treatment was that of the respondent; and,
- (3) as a consequence, the continued cohabitation of the spouses would be intolerable.⁷⁹

The test is an objective one. The absence of any intention by the respondent to be cruel is irrelevant and not a factor to be weighed.⁸⁰

⁷⁸ *Paulin*, [\[1938\] 1 DLR 686](#) (Sask. CA)

⁷⁹ *Spurr v. Brown* (1990), [90 NSR \(2d\) 424 \(SC\)](#)

⁸⁰ *Ibid*

4. Bars to divorce

A court may be prohibited from granting a divorce. If the ground for divorce is adultery or cruelty, the respondent may oppose the divorce, offering as a defence the petitioner's *condonation* (forgiveness) of the offending actions or *connivance* (the guilty promotion of the adultery by the willful refusal to prevent continuing adultery).⁸¹

The court must be satisfied there is no *collusion* (or agreement to manufacture or suppress evidence or to deceive the court to achieve the desired end). Where the court finds there has been collusion, the petition for divorce is to be dismissed. Where a court finds there is condonation or connivance, the divorce is to be dismissed unless, in the court's opinion, the public interest is better served by granting the divorce.⁸²

Finally, the court is not to grant a divorce until it is satisfied that reasonable arrangements have been made for the support of any children of the marriage. This requires reference to financial provision and life and health insurance protection for the children.⁸³

5. Divorce judgment

Where a divorce judgment is granted, the judgment becomes final 31 days after the judgment is rendered. This 31-day period, which is the usual appeal period, may be abridged only where the court has been persuaded that there are special circumstances that warrant the judgment being given earlier effect, and both spouses agree and undertake that they will not appeal the divorce judgment or that any appeal that has been taken will be abandoned.⁸⁴

In these cases, the court may order that the divorce will take effect at whatever earlier date it believes is appropriate. In the past, this 31-day period has been abridged only where the birth of a child is expected during that time and the expectant mother wishes to marry prior to the birth of the child. The order, however, is discretionary and the circumstances must be "special".⁸⁵

Where a divorce is granted in any province or territory, the divorce is effective throughout Canada and both former spouses will be viewed as single people.⁸⁶ A

⁸¹ [Section 11\(1\)\(a\) & \(c\) of the *Divorce Act*](#)

⁸² [Section 11\(1\)\(c\) of the *Divorce Act*](#)

⁸³ [Section 11\(1\)\(b\) of the *Divorce Act*](#)

⁸⁴ See [Section 12](#) of the *Divorce Act*

⁸⁵ See *Arsenault*, [2001] OJ No 463; 15 RFL (5th) 12 (SC), in which such an application was denied.

⁸⁶ [Section 13](#) of the *Divorce Act*

“Certificate of Divorce” is issued,⁸⁷ but the absence of an issued Certificate does not mean the divorce is not yet “official”.⁸⁸

⁸⁷ [Section 12\(8\)](#) of the [Divorce Act](#); Civil Procedure Rules 59.49 (Family Division) & 62.25 (Trial Division)

⁸⁸ *Galesloot*, [1992] OJ No 242 (CJGD)

6. Recognition of foreign divorces

A foreign divorce granted on or after June 1, 1986, will be recognized by Canadian courts if it was granted on the same jurisdictional basis as the [Divorce Act](#) specifies, *i.e.*, one spouse was ordinary residence in the country granting the divorce for one year immediately preceding the commencement of proceedings.⁸⁹

At common law, a foreign divorce was recognized by Canadian courts if it is recognized under the law of a country or subdivision of a country other than Canada, by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision, determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority. This recognition is preserved for divorces obtained after July 1, 1968.⁹⁰

With the amendments to the **Divorce Act**, s. 22 has been expanded to recognize an order of a foreign court that has the effect of varying a parenting order or contact order made under the *Divorce Act*, unless one of the grounds for non-recognition exists.

Under this provision, the court would be required to recognize a decision of a foreign court, unless specified exceptions exist. These rules are modelled on those in the 1996 *Convention on the Protection of Children*.

Recognition can be refused if

- a. the decision was made by an authority in a jurisdiction where the child was not habitually resident, or that would not have had jurisdiction had it applied rules similar to those set out in s 6.3. Recognition does not need to occur if the court that made the original order was not legally authorized to make the order;
- b. the order was made, except in an urgent case, without the child's voice having been heard, in violation of fundamental principles of procedure of the province. For example, recognition could be refused if the foreign court, without justification, refused to consider evidence before the court about the views of the child;
- c. a person claims that the foreign order negatively affects the exercise of their parental responsibilities or their contact with the child, and the order was made, except in an urgent case, without the person having been given an opportunity to be heard. This reflects the basic principle that a party affected by an order generally should have had an opportunity to participate in the proceeding related to it;
- d. recognition is manifestly contrary to public policy, taking into consideration the best interests of the child. For example, this could apply if the foreign court solely considered the interests of one or both parents, without taking into account the interests of the child; or

⁸⁹ [Section 22\(1\)](#) of the [Divorce Act](#)

⁹⁰ [Section 22\(2\)](#) & (3) of the [Divorce Act](#)

- e. the order is incompatible with a later order that fulfils the requirements for recognition under this section. This reflects the fact that an order that is more recent, and thus more likely reflects the current situation of the child, should take precedence.

7. Duties to examine reconciliation

Legal Advisors: The petitioner's legal advisor must highlight the provisions of the [Divorce Act](#) that have, as their objective, the spouses' reconciliation and discuss the possibility of reconciliation with her client while informing the client of the facilities available to assist in reconciliation, such as counselling.⁹¹

With the amendments to the **Divorce Act**, under s. 7.2, the legal advisor must

- encourage clients to try a family dispute resolution process, unless inappropriate
- inform clients of family justice services that can help to resolve matters or comply with their obligations under the **Divorce Act**
- inform clients about their duties under the **Divorce Act**

The legal advisor must certify that she has fulfilled these duties when the divorce petition is filed.⁹²

Judges: The court that grants the divorce also has specific duties that must be fulfilled before a divorce is granted. Before considering any evidence regarding a divorce, the court must satisfy itself that there is no possibility of reconciliation between the spouses. Where it appears that reconciliation is possible, the court must adjourn the proceeding to allow the parties a chance to try to reconcile and resume the hearing after 14 days have elapsed.⁹³

The court can nominate a counsellor or other individual to help the parties reconcile, where the parties have consented to this nomination. The efforts of the spouses and the nominee to achieve reconciliation are not admissible in evidence.⁹⁴

The court must also, as discuss above, satisfy itself that there has been no collusion, condonation or connivance, and that reasonable arrangements have been made for the support of the children of the marriage.⁹⁵

8. Corollary relief

⁹¹ [Section 7](#) of the **Divorce Act**

⁹² Forms 59.09 (Family Division) & 62.09 (Trial Division) of the *Civil Procedure Rules*, as required in [Section 9\(3\)](#) of the **Divorce Act**

⁹³ [Section 10\(1\), \(2\)](#) & (3) of the **Divorce Act**

⁹⁴ [Section 10\(4\)](#) & (5) of the **Divorce Act**

⁹⁵ [Section 11](#) of the **Divorce Act**

The court has broad powers to make interim or final orders dealing with decision-making responsibility, parenting time for children, child support and spousal support under the [Divorce Act](#).⁹⁶

The court can also hear applications to vary terms of corollary relief upon the application of a former spouse.⁹⁷

Corollary relief will now be discussed under the headings 'Parenting', 'Child Support' and 'Spousal Support'.

IV. PARENTING

Under section 16.3 of the amended [Divorce Act](#), "decision-making responsibility" (previously called custody)⁹⁸ can be allocated in a variety of ways. For example, a court can allocate responsibility for decisions about the child's health, education, religion, culture and significant extra-curricular activities to each spouse jointly, to only one spouse, or to person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent. The court may also allocate responsibility for some elements of decision-making, such as decisions about the child's health and education, to one parent and allocate responsibility for other decisions, such as decisions about religion and culture, to another parent. As always, the court must base its decisions on the best interests of the child.

Parenting time (previously called access) refers to the visits or parenting time a parent or party spends with the child. The parent with "parenting time", usually makes the day-to-day decisions for the child while the child is in his or her care.

Previously described arrangements, such as 'joint' and 'shared' custody, shared 'parenting time', and 'parallel parenting' are all discussed below.

A parent or guardian may apply for an order for decision-making responsibility or parenting time of a child under the [Divorce Act](#). A parent or guardian may apply for custody or parenting time with a child, or specification of a matter addressed in a parenting plan for a child under the [Parenting and Support Act](#), whether or not the parents were married. A grandparent or other person may apply for the same relief and orders in these areas as a parent or guardian, with leave of the court.

A "parenting plan" sets out in writing agreements made by parents regarding decision-making, and parenting arrangements for a child including the following:

⁹⁶ [Sections 15](#) & 16 of the [Divorce Act](#)

⁹⁷ [Sections 17](#) & 18 of the [Divorce Act](#)

⁹⁸ See *Glasgow* (1982), [51 NSR \(2d\) 13](#), [1982] NSJ No 85 (FamCt) at paras 22-24

- living, residence and association arrangements;
- parenting time;
- medical, dental and other health-related matters and consent to treatments;
- education and extracurricular activities;
- culture, language and heritage, and religious and spiritual upbringing;
- travel and relocation;
- obtaining information and communication; and
- use of dispute resolution processes.

Section 16.6(1) of the **Divorce Act** states that a court must include in parenting and contact orders any parenting plan (defined in section 16.6(2)) agreed to by the parties, unless the court considers that the plan is not in the best interests of the child. In such cases, the court can omit or modify the parenting plan. If the parties cannot come to an agreement about some or all parenting arrangements, the court will make a detailed parenting plan using trial evidence⁹⁹. Similarly, in high conflict cases, if the parenting plan does not address the practical aspects of how parenting time will work “on the ground” the Court may intervene¹⁰⁰. This provision encourages the use of parenting plans and promotes agreement between parties while ensuring judicial oversight, particularly in high conflict parenting cases.

With the amendments to the **Divorce Act**, under s. 16.5(1) a court can now make an order for contact between a child and a person other than one of the divorcing spouses. Non-spouses, such as a grandparent or someone else important to the child, can apply for a contact order. Leave to apply will typically be required (s. 16.5(3) or 17(2) if a variation application).

A parent or guardian may also have court-ordered “interaction” or “contact time” with a child under the *Parenting and Support Act*.

“Interaction” means direct or indirect association with a child that is not parenting time (above) or contact time (below), including attending specified activities, sending and receiving gifts, communicating or receiving photographs and information regarding the health, education and well-being of the child.

On the other hand, “contact time” means the time when, under an agreement or a court order, a person who is not a parent or guardian is with the child. During contact time with the child, that person is responsible for the care and supervision of the child and must comply with the decisions regarding the child made by the person or persons who have custody of the child.

A grandparent may apply as of right (without leave) for “interaction” or “contact time” with a grandchild. In determining whether grandparent contact or interaction time will be

⁹⁹ See *S. v. D.*, [2021 ONSC 1710](#).

¹⁰⁰ See *VLM v. AJM*, [2021 ABCA 267](#).

ordered, the following must be considered as taken from the decision of **Spence v. Stillwell**, [2017 NSSC 152](#) (paragraph 115):

- a. The paramount consideration in determining whether to grant grandparent access is the best interests of the child.
- b. Parental decisions and views are entitled to a level of deference. However, the level of deference depends on the context. *Simmons v. Simmons*, [2016 NSCA 86](#).
- c. There is no preferred judicial approach to determining whether grandparent access is in the best interests of the child, which approach is appropriate depends on context.

Any other person (who is not a parent or guardian or grandparent) may seek interaction or contact time only with leave of the court.¹⁰¹

1. *Inherent jurisdiction*

In addition to its statutory jurisdiction, the Supreme Court (including its Family Division) has inherent jurisdiction to act for the protection and education of minor children. The fact that parents of a child cannot bring themselves within the [Divorce Act](#) does not foreclose having the dispute resolved in the Supreme Court.

The Sovereign is guardian of all persons under a legal disability, including infants. This inherent jurisdiction is described in the Latin phrase, *parens patriae*. It originated as a jurisdiction exercised by the Sovereign in person, was later delegated to the Lord Chancellor for exercise upon petition, and later still to the High Court of Chancery. This empowered the High Court of Chancery to act judicially to protect those not capable of protecting themselves. Chancery jurisdiction now rests with the Supreme Court under the Judicature Act.¹⁰²

The Sovereign in Parliament, however, has also enacted laws and appointed government Ministers (and therefore government departments) responsible for addressing the protection of the same such persons. The relationship between the exercise of inherent jurisdiction by a superior court and the exercise of statutory jurisdiction by the same court or an administrative actor, is determined by case law.¹⁰³

¹⁰¹ SNS 2015, c. 44, s. 19

¹⁰² See [Sections 3 to 8](#) & 43(10) of the [Judicature Act](#)

¹⁰³ In Canada, see *Re Eve*, [\[1986\] 2 SCR 388](#); *Beson v. Newfoundland (Director of Child Welfare)*, [\[1982\] 2 SCR 716](#). In England and for the history of this relationship, see *W(A Minor) (Re)*, [1985] HLJ No 16; *A v Liverpool City Council and another*, [1981] 2 All ER 385 (HL); *Re Baker (Infants)*, [1961] 3 All ER 276 (CA); *Re M (an infant)*, [1961] 1 All ER 788 (CA)

If the two sources of jurisdiction come into conflict, the court's inherent jurisdiction must give way to the supremacy of Parliament, reflected in any statutory jurisdiction.

In result, the *parens patriae* jurisdiction continues to exist but may only be exercised if there is a “gap” in the legislation not foreseen by the legislature,¹⁰⁴ or by true judicial review under Rule 7 of the Civil Procedure Rules (*i.e.*, an administrative law review of the actions of those with statutory powers).¹⁰⁵

The limits on the use of *parens patriae* jurisdiction have been addressed by the Court of Appeal: for example, the power cannot be used to change a statutory definition of “parent” for the purpose of adoption notice.¹⁰⁶ Similarly, it cannot be used to ground an application for third party standing in such an application, as the legislation appears intended to avoid this outcome.¹⁰⁷

2. Married parents

The [Divorce Act](#) deals with decision-making responsibility, parenting time and support for children of a marriage.. Courts have long considered only the best interests of the child in decisions about parenting. This test is also found in provincial and territorial family law, and in the United Nations *Convention on the Rights of the Child*. As each child is different and each family is different. A parenting arrangement that might be in one child's best interests might not be in the best interests of another. Parenting arrangements for a child would have to be what is best for that child in that child's particular situation.

“Child of the marriage” includes a child of whom both spouses are the parent, or of whom one spouse is the parent and for whom the other spouse stands in the place of a parent.

“Standing in the place of a parent” (*in loco parentis*) in a divorce context means a person is a step-parent, married to a child's parent. Such a person can pursue claims to decision-making and parenting of the stepchildren provided he or she has stood in the place of a parent. (These principles are examined in more detail under ‘Child Support’.)

Married parents can also apply for orders respecting decision-making and parenting of children under the [Parenting and Support Act](#), without seeking a divorce (there will then be treated in all respects like unmarried parents, as discussed in the following section).

¹⁰⁴ See *Nova Scotia (Community Services) v RP*, [2007 NSSC 111](#) for an example of finding the absence of a “gap”, and *Nova Scotia (Community Services) v AB*, [2011 NSSC 114](#) for the finding of the presence of a “gap”.

¹⁰⁵ Principles governing judicial review by a superior court of administrative decision making concerning children (*i.e.*, in the selection of adoptive parents by a child protection agency) may be found in *Nova Scotia (Minister of Community Services) v. NNM*, [2008 NSCA 69](#) and *Nova Scotia (Minister of Community Services) v. TG*, [2012 NSCA 43](#) (leave to appeal to the SCC denied: [2012] SCCA 237).

¹⁰⁶ *Re DT (1992)*, [113 NSR \(2d\) 74 \(CA\)](#)

¹⁰⁷ *D v Nova Scotia (Community Services)*, [2015 NSSC 74](#) at paras 79-87

3. Unmarried parents

The ***Parenting and Support Act*** defines status by the relationship to the child (e.g., “parent”), rather than by the relationship between parents (e.g., “spouse”).¹⁰⁸

The definition of “parent” in the ***Parenting and Support Act*** includes, a parent of the child, a person with settled intention to treat the child as his or her own, or a person who has been ordered to pay support for the child.¹⁰⁹

A “guardian” may also seek custody or access, and guardians any other person who has in law or in fact the custody or care of a child.¹¹⁰

An adoptive parent (including a parent in a same-sex adoption) can pursue a claim for decision making or parenting time to their partner’s child under the ***Parenting and Support Act***.

4. Third parties

With the amendments to the ***Divorce Act***, under s. 16.5(1) a court can now make an order for contact between a child and a person other than one of the divorcing spouses. Non-spouses, such as a grandparent or someone else important to the child, can apply for a contact order. Leave to apply will typically be required (s. 16.5(3) or 17(2) if a variation application).

Under the ***Parenting and Support Act***,¹¹¹ the court may make an order that a child shall be in or under the care and custody of, or have parenting, interaction or contact time with a person, including the child’s grandparent or other person. To seek custody or parenting time, a grandparent must seek leave of the court. Any other person who makes an application must have leave of the court to seek custody, parenting time, interaction time or contact time.

The considerations to be weighed in granting leave to apply for custody or parenting time include (all under the overarching umbrella of the best interests of the child) the following:

- Is the application frivolous or vexatious?
- Is there a sufficient interest or connection such that the custodial parent should be called to respond to the application?

¹⁰⁹ Section 2(i) of the *Parenting and Support Act*.

¹¹⁰ Section 2(e) of the *Parenting and Support Act*; above.

¹¹¹ *Parenting and Support Act*,

- Are there more appropriate means of resolving the problem or having the court hear the issue?
- Is there a justiciable issue raised by the application (*i.e.*, an issue the court would have jurisdiction to address if it has arisen between two parents)?
- Are there risk factors that call for court intervention?
- Will the leave application place the child in more risk of litigation or uncertainty?
- Are there extenuating circumstances, such as a change in access or denial of access?
- Does the death of one of the custodial parents constitute extenuating circumstances?
- Is the involvement of the third party destructive or divisive in nature?¹¹²

¹¹² *G(C) v G(M)* (1995), [137 NSR \(2d\) 161](#) (FamCt); upheld (1995), 147 NSR (2d) 269 (SC); *Brooks v Joudrey*, [2011 NSFC 5](#)

5. The test in parenting cases

Divorce Act: The only consideration in determining decision-making responsibility or parenting time is the best interests of the child, with reference to the safety, security and well-being of the child above all other considerations.¹¹³

The new provisions in section 16 of the **Divorce Act** establish a broader scope of factors to be considered by a court in determining the best interests of the child, including a child's age and stage of development, the existing relationship between the child and each parent and extended family, the ability of each parent to support the child's relationship with the other parent, each parent's history of care and plan of care for the child, and the child's views and preferences regarding the parenting arrangements to be made, among other considerations. The list of best interests criteria is a non-exhaustive list. Parents and courts could therefore consider factors that are relevant to the circumstances of a particular child even if such factors do not appear on the list. No single criterion is determinative, and the weighting for each criterion depends on the circumstances of the particular child. It is also specifically acknowledged that a child's needs also change over time. A child's stage of development influences their reaction to any situation.

This provision sets out the general content of a parenting order, including decision-making responsibilities, parenting time and communications. The court can also include any matter that it deems appropriate in a parenting order.

Section 16.1(4) sets out the main components of a parenting order taken from <https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div77.html>):

Section 16.1(4)(a) relates to parenting time, which is the period of time that the child spends in the care of a person under a parenting order, whether or not the child would be physically with that person during all of that period.

Section 16.1(4)(b) relates to decision-making responsibility, which is responsibility for making significant decisions about the child's well-being, including with respect to health and education. Section 16.3 provides the court guidance on the many ways that this responsibility can be shared or divided.

Section 16.1(4)(c) relates to communications between a parent (or someone else with parenting time or decision-making responsibility) and a child outside of that person's parenting time. For example, in some cases, courts might make orders with respect to telephone calls, texts or videoconferences (such as Skype or FaceTime) between a parent and a child when the child is under the care of another parent. The court may order that this communication is to occur and/or specify when it is to occur. These types of orders generally aim to help maintain relationships between children and parents when they are apart.

¹¹³ Section 16(2) of the **Divorce Act**; *Young*, [1993] 4 SCR 3 (SCC)

Section 16.1(4)(d) authorizes the court to include anything else in a parenting order that it considers appropriate. For example, the court may order that the child participate in a hockey camp for two weeks each year.

The **Divorce Act in s. 16 (4)** also requires courts to consider the relevance of family violence (defined as any conduct that is violent or threatening, a pattern of coercive and controlling behaviour or conduct that causes a family member to fear for their safety, including financial violence) when determining what parenting arrangements are in a child's best interests. Among other things, a court will need to consider the impact of family violence on a parent's ability and willingness to care for and meet the child's needs and whether cooperation from a parent who has engaged in family violence is required in making decisions affecting the child.

Section 16(6), specifies that in "allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child."

Promotion of alternative dispute resolution

The Divorce Act places a duty on divorcing spouses to protect children from conflict that arises from their family law proceeding and to try to resolve matters outside of court through "family dispute resolution processes", which include negotiation, mediation and collaborative family law (section 7.3). This not only reflects the fact that it is faster and less expensive to resolve issues through dispute resolution rather than litigation, but also instills the need for divorcing spouses to learn to communicate effectively with one another, as they will need to do for years to come for the benefit of their children.

Parenting and Support Act: "In any proceeding ... concerning custody, parenting arrangements, parenting time, contact time or interaction in relation to the child, the court shall give paramount consideration to the best interests of the child."¹¹⁴

In 2012, the Nova Scotia Legislature adopted a *Foley*-like list of factors for best interest decisions under the Maintenance and Custody Act, which were maintained in the *Parenting and Support Act*.¹¹⁵ The courts have since applied the "new" principle, but judicially informed by long-standing case law including *Foley*.¹¹⁶ As the two formulations have substantial overlap, courts may continue to structure decisions within the *Foley* factors; it is the substance of what is considered that matters, not the formulation.¹¹⁷

The statutory factors include the following:

- (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;

¹¹⁴ [Section 18\(5\)](#) of the *Parenting and Support Act*.

¹¹⁵ Section 18(6) of the *Parenting and Support Act*

¹¹⁶ *KDR v TPP*, [2014 NSFC 11](#) at paras 30-35

¹¹⁷ *Weatherby v Muise*, [2015 NSCA 42](#) at paras 16-22

- (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
- (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
- (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
- (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;¹¹⁸
- (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
- (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
- (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
- (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
- (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
- (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
 - (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.¹¹⁹

Recently, the importance of facilitating grandparent contact and interaction with a child as a factor governing custody and parenting decisions in a child's best interests was further emphasized by the Legislature, as seen in its inclusion in sections 18(1) and (2) of the *Parenting and Support Act*.

¹¹⁸ Which would include "race" as a factor among others: *Van de Perre v. Edwards*, [2001 SCC 60](#), para 40

¹¹⁹ *Parenting and Support Act*

The *Parenting and Support Act* includes direction on creating and executing a parenting plan, and gives a broad overview of the possible areas a parenting plan may cover:

- 17A (1) The particulars respecting care, supervision and development of a child may be set out in a parenting plan for the child.
- (2) A parenting plan may assign to one or more parents or guardians the decision-making authority for any area of the child's care, supervision and development.
- (3) A parenting plan may cover any areas of the child's care, supervision and development including
- (a) the child's living arrangements including where the child will reside and with whom the child will reside and associate;
 - (b) parenting time;
 - (c) emergency, medical, dental and other health-related treatments including all preventative-care treatments for the child;
 - (d) the giving, refusing or withdrawing of consent to treatments referred to in clause (c);
 - (e) the child's education and participation in extracurricular activities;
 - (f) the child's culture, language and heritage;
 - (g) the child's religious and spiritual upbringing;
 - (h) travel with the child;
 - (i) the relocation of the child;
 - (j) obtaining information from third parties regarding health, education or other information about the child;
 - (k) communication between the parents and guardians, as the case may be, regarding the child; and
 - (l) a preferred dispute-resolution process for any non-emergency dispute regarding parenting arrangements.

In light of this long list of potentially relevant legal factors, custody litigation must focus primarily on eliciting relevant facts. The court has a broad discretion in determining what is in the best interests of the child. Custody rulings are difficult to be overturned on appeal.

6. *Ascertaining a Child's Wishes*

As noted in *BJG v. DLG*, 2010 YKSC 33: Children have legal rights to be heard during all parts of the judicial process, including judicial family case conferences, settlement conferences, and court hearings or trials. An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming their own views, and, if so, whether the child wishes to participate. If the child does wish to participate, then there must be a determination of the method by which the child will participate. In Nova Scotia, a child's wishes are typically ascertained by having a Voice of the Child Report completed, either by consent or court order. These reports are completed by social workers and psychologists who meet with the children, typically no younger than ten and often older than 12, and report back the children's wishes. There is no set age when a child can determine with whom they want to reside and ultimately it is for the Judge to decide what weight should be given to a child's wishes (*Parent v. MacDougall*, [2014 NSCA 3](#)). In very rare cases, a child may be interviewed by a Judge (see *Lubin v. Lubin*, [2012 NSSC 31](#)).

Pursuant to NS Civil Procedure Rule 59.40 (6) and (7): Hearing

6) A child who is under the age of majority may not testify, and a prothonotary or court officer may not issue a subpoena that requires a child to appear at a hearing, unless a judge permits.

(7) A judge who permits a child to be a witness may give directions for the presentation of the evidence, such as directions limiting the duration of the testimony and the types of questions that may be asked

Pursuant to NS Civil Procedure Rule 59.54 (1) and (2): Litigation Guardian

(1) A judge may appoint a person to act as litigation guardian for a child who is under the age of majority, or a party who is not capable of managing their affairs under Rule 36 – Representative Party, if the person consents to act as litigation guardian and certifies that they are not a party, and that they have no interest in the proceeding adverse to the interests of the child or the party.

(2) A person under the age of majority is not required to start or respond to a proceeding by a litigation guardian unless a judge orders otherwise.

7. *Decision-making responsibility*

The *Divorce Act* amendments oust the old language of decision-making, which was framed around the word "custody". The *Divorce Act* changes now differentiate between "day-to-day" decisions and larger decisions that must be made regarding children. Section 16.1(4) will now state that a person allocated parenting time under s 16.1(4)(a) has sole responsibility for making day-to-day decisions about the child during their parenting time, unless ordered otherwise. The theory behind the addition of this clause is to clarify that a parent with day-to-day care of a child should normally be able to make

decisions relating to bedtime, diet, etc. without the need to consult any other person with decision-making responsibility in relation to the child.

Under 16.3, the court can allocate decision-making responsibility as a whole, or in any part, solely to one person or jointly to more than one person. The court may also allocate responsibility for some elements of decision-making, such as decisions about the child's health and education, to one parent and allocate responsibility for other decisions, such as decisions about religion and culture, to another parent. As always, the court must base its decisions on the best interests of the child.

Access to information is different from decision-making responsibility. Under s. 16.4 of the **Divorce Act (as amended)** any person with parenting time or decision-making responsibility can ask for information about the child's well-being from anyone else with parenting time or decision-making responsibility, and from anyone else likely to have information about the child. Thus, someone with parenting time or decision-making responsibility is entitled to request and receive information about the child's well-being from anyone else with parenting time or decision-making responsibility for the same child. They can also seek relevant information directly from third parties, such as doctors, schools and others. However, a court may limit this general entitlement to information.

Under the **Parenting and Support Act** "joint custody" means that major decisions affecting the child are shared. Parents with joint custody have the right and the responsibility to share in such important decisions as the child's health, education, spiritual guidance, involvement in extracurricular activities and other major concerns. Neither party has a 'veto'. Each makes day-to-day decisions when the child is in that person's care and, where required by emergency circumstances, may make decisions that might otherwise be shared.¹²⁰

The cooperation of the parents is one, but not the only, factor to consider in identifying how decisions will be made.¹²¹ The parents' ability to communicate is often a decisive consideration, although optimism about a future capacity to communicate may suffice.¹²² One parent making serious allegations against the other, even unsubstantiated allegations of sexual abuse, may suggest the parties are unable to co-parent and sole custody is in the child's best interests.¹²³

Consistent with this principle, some courts have recently granted "parallel parenting" orders, in circumstances where neither sole nor joint custody appears to be in the child's best interests.¹²⁴

¹²⁰ *Murray* (1989), [93 NSR \(2d\) 66](#) (FamCt), para 18-19

¹²¹ A critical issue remains their ability to communicate effectively: *Kaplanis*, [2005 CanLII 1625 \(OCA\)](#)

¹²² *MacDonald*, [2016 NSSC 71](#), para. 74, citing *Mo v. Ma*, [2012 NSSC 159](#), para. 96

¹²³ e.g., *RRN v LMM*, [2014 NSSC 396](#)

¹²⁴ *C.L. v. J.L.*, [\[2018\] N.S.J. No. 110](#); *Baker-Warren v. Denault*, [2009 NSSC 59](#); *CM v RP*, [2010 NSSC 330](#).

Under a parallel parenting order, each parent may be primarily responsible for the care of the child and decision-making during that parent's time with the child. Specified decision-making may either be allocated between the parents or entrusted to one party. The goal of a parallel parenting order is to remove conflict by imposing a comprehensive parenting plan, rather than leaving parenting decisions either to a sole custodial parent or dependent upon healthy communication between the parents, which is often required for joint custody to be successful.

Section 18(4) of the **Parenting and Support Act** provides that the mother and father of the child are joint guardians of the child, and that they are equally entitled to the care and custody of the child¹²⁵ unless otherwise provided by the **Guardianship Act**¹²⁶, or ordered by a court of competent jurisdiction.

There is as a result some practical burden on the party seeking a departure from joint custody to show that it is not in the best interests of the child.¹²⁷

7. Past conduct

With the exception of domestic violence which is addressed directly in the legislation, past conduct of any person is not to be considered in assessing parenting order unless it is relevant to the individual's ability to act as a parent of a child.¹²⁸ This is intended to avoid the parties' natural tendency to raise irrelevant fault-based arguments in favour of their parenting claim, such as which parent is responsible for the breakdown of the marriage.

8. Parenting time, contact and interaction¹²⁹

Parenting time allows a parent to develop and maintain a relationship with the child and to be informed about the health, education and welfare of the child; however, it does not necessarily involve a role in major decisions in raising the child.¹³⁰

The court will make every effort to ensure parenting time is exercised. Parenting time is often said to be a "right of the child". Difficulties arise if a child does not wish to exercise time with a parent. If access is the child's right, it is hard to rationalize compelling parenting time if the child does not wish it. However, courts will scrutinize the conduct of the parent with whom the child resides to see if the parent has played a part in the child's decision.¹³¹

¹²⁵ [Section 18\(4\)](#) of the **Parenting and Support Act**.

¹²⁶ SNS, 2002, c 8 as amended, referred to as the **Guardianship Act**

¹²⁷ *MacPherson v. Jardine* (1997), [160 NSR \(2d\) 290](#) (FamCt)

¹²⁸ [Section 16\(9\)](#) of the **Divorce Act**

¹²⁹ See above the discussion of the move to more neutral language in the new **Parenting and Support Act**.

¹³⁰ See *Glasgow (1982)*, [51 NSR \(2d\) 13](#), [1982] NSJ No 85 (FamCt) at paras 25-29

¹³¹ *Curry (1998)*, [166 NSR \(2d\) 384 \(SC\)](#)

When evaluating access or parenting time, the best interest of the child is the only test, and each child's relationship with the parents must be examined in each case.¹³²

It is desirable for each child to know the parent and there must be very serious reasons to deny parenting time. Generally, the courts believe that a child has the right to benefit from the love of both parents. However, the court will parenting time it is not in the best interests of the child.¹³³

The courts will consider a number of factors in deciding whether or not to order supervised parenting time or other protective restrictions, including whether the child is being reintroduced to the parent after a significant absence, the presence of concerns about substance abuse,¹³⁴ or the parent's mental health.¹³⁵ It must, however, be seen as an exceptional remedy and is not considered a long term solution by the courts.¹³⁶ The amendments to the **Divorce Act** introduce a new section, s. 16.1(8). This section clarifies that a court can order that the transfer of the child from one person to another must be supervised and/or that parenting time must be supervised.

9. Parenting Assessments

When there is any application or proceeding dealing with decision-making, parenting time, contact time or interaction, the court can order a written report respecting the child and her parents or guardians to be made.¹³⁷

Information concerning assessments in the Supreme Court (Family Division) may be found on its [Services – Parent Assessments](#) webpage.

10. Unmarried parents & paternity applications

Litigation regarding child support for children of unmarried parents may require a determination of paternity prior to an evaluation of child support. The **Parenting and Support Act** and its regulations govern this area of parenting law.¹³⁸ Married parents have the matter simplified by a rebuttal presumption of legitimacy.¹³⁹

¹³² *Young*, [1993] 4 SCR 3; *DP v CS*, [1993] 4 SCR 141

¹³³ E.g., *Westhaver v Howard* (2007), 260 NSR (2d) 117 (SCFD)

¹³⁴ E.g., *Kanasevick v Robinson*, 2014 NSSC 96

¹³⁵ E.g., *LES v MJS*, 2014 NSSC 34

¹³⁶ *Lewis*, 2005 NSSC 256; *Crews v Daigle*, (1992), 110 NSR (2d) 75 (FamCt); *Slawter v Bellfontaine*, 2012 NSCA 48

¹³⁷ Section 19 of the *Parenting and Support Act*; Section 32F of the *Judicature Act*

¹³⁸ Sections 24, 26 and 27 27 of the *Parenting and Support Act*;

¹³⁹ *Cox v. Bunbury Estate (Public Trustee of)* (1983), 56 NSR (2d) 657, [1983] NSJ No 204 (SC)

Paternity may be admitted or contested. The court may order a paternity test to determine if a possible father is the father of the child, or if he can be excluded as a possible father.

An application can be made either during pregnancy for “lying-in” expenses, or after birth for support of the child, or for the funeral expenses of the child or mother.¹⁴⁰

Where there are two or more “possible fathers”, a court may order each of them to make such payments. A “possible father” is defined including one or more persons who have had sexual intercourse with a single woman who is the mother of a child and by whom it is possible that she became pregnant.¹⁴¹ There is no longer a limitation on such applications.¹⁴²

11. Variation of decision-making responsibility and parenting time

In order to vary a parenting order under the *Divorce Act*, a judge must be satisfied of a change in the condition, means, needs, or circumstances of the child or one of the parties which was either not foreseen or could not have been reasonably contemplated by the judge making the initial order.¹⁴³ Section 17.5(2) is a new section in the *Divorce Act* (as amended), which states that a relocation of a child is a change in the circumstances for the purposes of varying a parenting order or contact order.

For variation of parenting orders made under provincial legislation, there must have been a change in circumstances since the making of the order or the last variation order.¹⁴⁴

While it is common sense that a parenting arrangement will, in fact, evolve over time,¹⁴⁵ the mere passage of time, in and of itself, does not amount to a “change in circumstances”.¹⁴⁶

However, the child’s “increased maturity” over time, which may cause greater weight to be given to child’s wishes within his or her best interests, may be a “change in circumstances”.¹⁴⁷

12. Mobility

¹⁴⁰ [Section 11](#) of the *Parenting and Support Act*.

¹⁴¹ [Section 11\(2\)](#) of the *Parenting and Support Act*.

¹⁴² *P.A.D. v. L.G.* (1998), 89 N.S.R. (2d) 7 (FC)

¹⁴³ [Section 17](#) of the *Divorce Act*

¹⁴⁴ [Section 37](#) of the *Parenting and Support Act*.

¹⁴⁵ *Elliott v Loewen*, [1993] MJ No 15 (CA)

¹⁴⁶ *Kozma v. Kozma*, 2012 NSSC 380

¹⁴⁷ *Kennedy v McNiven*, 2014 NSSC 162

Sometimes variation of a parenting order occurs when a custodial parent is seeking to move out of a jurisdiction with the children.

A new legal framework for relocation cases

Relocation, or moving a child to a new jurisdiction after separation and divorce, is one of the most litigated family law issues. The amendments to the Divorce Act located in section 16.9 serve to introduce sweeping changes to this area of the law and codify and clarify the legal principals that have been established over time.

Previously, parents seeking to relocate had to obtain approval from the court if the other parent objected to a proposed move. Under the ***Divorce Act***, the parent seeking to relocate will be required to provide written notice to the other parent at least 60 days in advance of the proposed move, even if the move is local. The notice must include the following information:

- the proposed date of the move
- the parent's new contact information
- a proposal for a new parenting arrangement, if necessary, including any changes to parenting time and decision-making in light of the relocation

Once the notice has been provided, the other parent may object, either by providing a standard objection in writing, in which case the other parent will be forced to either agree not to move, or to bring a mobility application in court. The objecting parent may also choose to bring an application, allowing the court to decide on the issue of mobility.

The court must focus on whether a proposed move is in the best interests of a child. In doing so the court must consider specific factors, in addition to those listed in s 16. Because relocation is a highly contested matter in family law. Providing an explicit list of factors that the court must consider will help improve the consistency and predictability of outcomes.

The first factor (reasons for the relocation), explicitly overrules the Supreme Court of Canada decision in *Gordon v Goertz*, [\[1996\] 2 SCR 27](#). The Court held that the reasons for a relocation should generally not be considered. However, the reasons for a relocation can relate directly to the best interests of the child. For example, a relocation might enable a parent to earn a significantly higher salary, improving the financial circumstances of the child. There are many reasons for relocations, and it can be important for the court to be aware of these. The other factors include:

- Impact of the relocation on the child (Section 16.92(1)(b), ***Divorce Act***)
- Amount of time spent with the child (Section 16.92(1)(c), ***Divorce Act***)
- Compliance with notice requirements (Section 16.92(1)(d), ***Divorce Act***)
- Existence of an order, arbitral award or agreement specifying geographic area (Section 16.92(1)(e), ***Divorce Act***)
- Reasonableness of proposal (Section 16.92(1)(f), ***Divorce Act***)

- Compliance with obligations (Section 16.92(1)(g), **Divorce Act**)

The new provisions surrounding relocation in the **Divorce Act** also address the burden of proof at 16.93. When parents spend substantially equal time with a child pursuant to an order, it is up to the parent seeking a relocation to prove that the relocation is in the best interests of the child. Conversely, when one parent is responsible for the vast majority of the child's care pursuant to a court order or an agreement, disallowing a relocation is likely to have a significant impact on the child's relationship with their primary caregiver. The parent opposing the relocation must therefore demonstrate to the court that despite this impact, the disadvantages of the move would outweigh its advantages and that therefore the relocation is not in the best interests of the child. If neither of these circumstances clearly apply, each parent must demonstrate why the proposed relocation is or is not in the best interests of the child.¹⁴⁸

Section 16.92 prohibits courts from considering whether a party seeking to relocate would proceed with the relocation or not relocate if they were not permitted to bring the child. This ensures that parents seeking to relocate with their children are not tasked to answer the "impossible question": whether or not they would proceed with a relocation if they were not permitted to bring their children.

Inverse to the issue of mobility, in rare and highly unusual circumstances, a court may impose as a condition of a parenting order a requirement that the parent granted custody move with the children to a different location.¹⁴⁹

Commencing an application to vary parenting time for the purpose of moving to a new province may provoke variation of primary care. Once a change in circumstances is established, a court may review the children's best interests as a whole and conclude it is in their best interests to remain in this province and vary parenting time for the other parent.¹⁵⁰

Section 16.95 permits a court to specifically address that costs associated with exercising parenting time if a move is permitted can be divided between the parties.

A parent seeking to move must also provide notice to any third parties that may have contact time about the proposed move unless there is a risk of family violence (s. 16.96)

The recent decision of **Barendregt v Grebliunas**, [2022 SCC 22](#), interpreted the new provisions contained in the **Divorce Act** and emphasized that a court "shall consider all factors related to the circumstances of the child" including "each parent's willingness to support the development and maintenance of the child's relationship with the other parent". The court must ensure that "a child should have as much time with each parent, as is consistent with the best interests of the child". The SCC lists several illustrative factors to be considered: the child's views and preferences; the history of caregiving; any incidents of family violence; and a child's cultural, linguistic, religious and spiritual

¹⁴⁸ The Court does not necessarily have to apply these burdens on an interim application (s. 16.94)

¹⁴⁹ **Reeves**, [2010 NSCA 35](#)

¹⁵⁰ **Slade-McLellan v. Brophy**, [2012 NSCA 80](#), and the cases cited therein.

upbringing and heritage. Additionally, courts should consider the reasons for the relocation; the impact of the relocation on the child; the amount of time spent with the child by each person who has parenting time or a pending application for it and the level of involvement in the child's life of each of those persons; the existence of an order, or agreement that specifies the geographic area in which the child is to reside; the reasonableness of the proposal of the person who intends to relocate the child taking into consideration, among other things, the location of the new place of residence and the travel expenses; and whether each person who has parenting time or decision-making responsibility or a pending application for it has complied with their obligations under family law legislation, an order, or agreement, and the likelihood of future compliance.

The ***Parenting and Support Act*** also addresses change of residence of a parent as well as relocation.¹⁵¹

In short, if a parent decides to change residences, notice must be given to the other parent. Notice must be in writing, and you must provide the most notice possible. If notice is to be given less than 60 days in advance, the reason for the "short" notice must be included in the written notice.

Relocation, on the other hand, is defined as the change in the place of residence of a parent or guardian, a person who has contact time with the child, or the child, that can reasonably be expected to significantly impact the child's relationship with a parent, guardian or a person who has an order for contact time with the child.

If the proposed move meets the criteria listed above as "relocation", there are additional requirements that must be addressed by the relocating parent. The written notice must include a proposed relocation parenting plan, and again must provide as much notice in advance of the planned move as possible.

The non-moving parent can oppose the move by making an Application within 30 days of receiving notice of the move. If the non-moving parent does not make an application within 30 days of the written notice, the moving parent has the right to move.

When an application to oppose a move is before the court, the court is guided by the following in making its decision:

- (a) that the relocation of the child is in the best interests of the child if the primary caregiver requests the order and any person opposing the relocation is not substantially involved in the care of the child, unless the person opposing the relocation can show that the relocation would not be in the best interests of the child;

¹⁵¹ Section 18D and 18E of the *Parenting and Support Act*.

(b) that the relocation of the child is not in the best interests of the child if the person requesting the order and any person opposing the relocation have a substantially shared parenting arrangement, unless the person seeking to relocate can show that the relocation would be in the best interests of the child;

(c) for situations other than those set out in clauses (a) and (b), all parties to the application have the burden of showing what is in the best interests of the child.

The court also considers the relevant circumstances of the child and parents as set out in section 18(H)(4) of the *Parenting and Support Act*, which include the reasons for the relocation, the effect on the child of the change in parenting plan, the effect of moving the child out of his or her community and school area, and the compliance of parents with previous orders.

The ultimate test for relocation remains the best interests of the child.¹⁵²

13. Enforcement of parenting orders and child abduction

A decision-making or parenting order made in the context of divorce proceedings has legal effect throughout Canada. A parenting order made under provincial legislation, such as the *Parenting and Support Act*, must be enforced through reciprocal enforcement proceedings.

Nova Scotia's legislation is the [Reciprocal Enforcement of Custody Orders Act](#), which states:

A Court, upon application, shall enforce, and make such orders as it considers necessary to give effect to, a custody order made by a tribunal in a reciprocating state.¹⁵³

Where a court is satisfied that a child would suffer serious harm if the child remained in or was restored to the person named in the order, the court may vary the order or make such other order for the parenting of the child as it sees fit.¹⁵⁴

¹⁵² See the recent decision of S.L.J. v. K.B., [2019 NSSC 268](#), 2019 NSJ No. 392

¹⁵³ [Reciprocal Enforcement of Custody Orders Act, RSNS 1989, c 387](#), s 3.

¹⁵⁴ [Section 4](#) of the [Reciprocal Enforcement of Custody Orders Act](#)

Further emergency relief is available through The Hague Convention on the Civil Aspects of International Child Abduction.¹⁵⁵

This Convention applies only to contracting states. The Department of Justice in Ottawa can advise which states are signatories to the Convention. In Nova Scotia the **Child Abduction Act**¹⁵⁶ adopts the Convention and makes Nova Scotia a contracting state. The Nova Scotia Department of Justice is responsible as the authority for the contracting state.

There is a distinction between the ability of the Convention to enforce the rights of custody and the rights of access.¹⁵⁷ The Convention is designed to protect children from the harmful effects of their wrongful removal or retention, to establish procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access. However, the mandatory return procedure in the Convention is set in motion only where a child has been removed or retained in breach of rights of custody.

Under the Hague Convention, the child's habitual residence must be determined. The Supreme Court of Canada in the decision of the **Office of the Children's Lawyer v. Balev**, [2018 SCC 16](#) (CanLII) and the Nova Scotia Court of Appeal in **Beirsto v. Cook**, [2018 NSCA 90](#) have each rendered significant decisions on how to make the factual determination of habitual residence under the **Hague Convention**. As noted in **Balev**, at paragraph 34, the Hague Convention (and the Convention on the Rights of a Child), "seek to protect the child's identity and family relations...by mandating the return of a child to the place of his or her habitual residence...a place normally central to a child's identity." Determining habitual residence is a question of fact, not law (**Beirsto**, at paragraphs 50 and 109).

"Habitual residence" is not defined in the *Convention*." Historically, the courts looked at parental intention or a child's acclimatization to determine habitual residence. The Supreme Court of Canada in **Balev**, has concluded that the approach to be used in Canada in determining habitual residence is now the hybrid approach, which enables the Court to consider all relevant factors rather than focusing solely on parental intention or the child's acclimatization.

Child abduction is also addressed by the **Criminal Code**, which states:

Everyone who, being the parent, guardian or person having the lawful care or charge of a person under the age of 14 years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody order in relation to that person made by a Court anywhere in Canada, with intent to deprive a parent or guardian, or any other

¹⁵⁵ *The Convention on the Civil Aspects of International Child Abduction*, CanTS. 1983 No 35

¹⁵⁶ [RSNS 1989, c 67](#), referred to as the [Child Abduction Act](#)

¹⁵⁷ *W(V) v S(D)*, [\[1996\] 2 SCR 108](#)

person who has lawful care or charge of that person, of the possession of that person, is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding 10 years; or (b) an offence punishable on summary conviction.¹⁵⁸

The *mens rea* of the offence is met by proof that the accused intended to deprive the person with lawful care of the child, or of possession of the child in contravention of the valid and subsisting court order. This provision is not aimed at parents who refuse to act responsibly under a custody order.¹⁵⁹

Unlike The Hague Convention, there need not be a custody order for abduction to be punished under the **Criminal Code**. The conduct may only intentionally interfere with a parent's lawful exercise of care and control over a child.¹⁶⁰

A final emergency measure for enforcing a custody order, one that is rarely used, is the writ of *habeas corpus*. The statutory reference for this writ is found in the [Liberty of the Subject Act](#).¹⁶¹

Contempt proceedings are available to enforce a parenting order. A proceeding for civil contempt redresses a private wrong by forcing compliance with an order for the benefit of the party in whose favour the order was made. Sanctions for civil contempt are mainly coercive (their aim is to force compliance with the order) but may also be punitive.¹⁶² Not all breaches of an order may be the subject of contempt proceedings (e.g., failure to pay costs as ordered).¹⁶³

The matters to be considered are as follows:

- (1) the burden of proof is "beyond a reasonable doubt";
- (2) the terms of the order must be "clear and unambiguous";
- (3) notice of the terms of the order must have been given and proven;
- (4) there must be "clear proof" the terms of the order have been breached;
- (5) intention to breach must be proven or inferred from the evidence.¹⁶⁴

V. SUPREME COURT CIVIL PROCEDURE RULES

Divorce, relief corollary to divorce, property division (including pensions), and equitable relief must be applied for in a superior court, either the Supreme Court (Family Division) – in the Halifax and Cape Breton Regional Municipalities – or the Supreme Court – in all

¹⁵⁸ [Section 282\(1\)](#) of the *Criminal Code*

¹⁵⁹ *R v McDougall* (1990), 1 OR (3d) 247, 62 CCC (3d) 174 (OntCA)

¹⁶⁰ *R v Dawson*, (1996), 155 NSR (2d) 241 (SC).

¹⁶¹ [RSNS 1989, c 253](#), referred to as the *Liberty of the Subject Act*; see [Section 3](#), in particular

¹⁶² *Brown v. Bezanson*, 2002 SKQB 148 at para 12

¹⁶³ *Power*, 2015 NSSC 258

¹⁶⁴ *Soper v. Gaudet*, 2011 NSCA 11 at para 22; *Godin*, 2012 NSCA 54 at para 94

other counties in the province until the unified family court is rolled out throughout the province.

Civil Procedure Rules 59 (Family Division) and 62 (Supreme Court where no Family Division exists) govern all aspects of practice. There are further Practice Memoranda governing Family Law, as well as informative “*Practice Tips*” from the Bench, authored by a judge in 2014-16.¹⁶⁵ Most notably is the Family Division Practice Memorandum issued on May 11, 2017 that provides new forms to be filed coupled with extensive standard clauses to be included in orders.¹⁶⁶

1. Procedures in the Family Division

(a) Starting a proceeding

A proceeding in the Family Division must be started in the judicial district in which the applicant resides, absent special permission and subject also to transfer of proceedings. ([Rule 59.03](#))

A person starting a proceeding must file either a notice or petition, as well as (at the same time) all supporting documents. ([Rule 59.04](#))

Examples of common initiating documents for **non-divorce** applications¹⁶⁷ are as follows:

Subject Matter	Statute	Applicant’s Docs	Respondent’s Docs
Custody/Parenting Time, or Leave to Apply for (Rule 59.20)	Parenting and Support Act	Statement of Contact Information & Circ.; Notice of Application; Parenting Statement	Parenting Statement; Response to Application, if seeking own relief
Child Support (table amount only), and no other financial claim (Rule 59.22)	Parenting and Support Act	Statement of Contact Information & Circ.; Notice of Application	Statement of Income; Response to Application, if seeking own relief

¹⁶⁵ The *Practice Tips* address evidential procedures, style of addressing the Court, marginal rates of taxation and other taxation issues, courtroom procedures for divorces, proof of marriage and its breakdown, and where to sit. They may be found on the [Courts’ website](#), on the [Information for Legal Professionals](#) page.

¹⁶⁶ http://courts.ns.ca/Bar_Information/documents/nssefd_consolidated_practice_memo_17_06.pdf

¹⁶⁷ If seeking interim relief, an Interim Motion and Affidavit as well.

<p>Child Support (Including s. 7 costs) (Rule 59.22)</p>	<p><i>Parenting and Support Act</i></p>	<p>Statement of Contact Information & Circ.; Notice of Application; If intended recipient of support, add Statement of Income and Statement of Special & Extraordinary Expenses; if intended payor, add Statement of Income</p>	<p>If payor, Statement of Income; if recipient, same as previous column; Response to Application, if seeking own relief</p>
<p>Spousal Support (Rule 59.22)</p>	<p><i>Parenting and Support Act</i></p>	<p>Statement of Contact Information & Circ.; Statement of Income; Statement of Expenses; Statement of Property (all for originating application)</p>	<p>Response to Application, if seek other relief</p>

Additional documentation is required in several additional circumstances, such as the following (see [Rule 59.22](#)):

- (1) If custody of the children is to be “split”, both parents must file Statements of Income; if “shared”, both must file Statements of Income and Statements of Expenses;
- (2) If a person is applying for spousal support but has a new partner to whom he or she is married or has lived with (common law) for more than two years, that partner must also provide a sworn Statement of Income, Expenses and Property (same as applicant);
- (3) If the child to be supported is over nineteen, the claimant must additionally file a statement of the child’s income and expenses.

In short, [Rule 59](#) must be read together with the requirements of the applicable statute and any Practice Memorandum, to determine the scope of initiating documentation.

(b) Emergencies and other commencement options

Urgent or emergency matters may bypass “Intake” and “Conciliation” and proceed directly to a court appearance if the requirements of Civil Procedure Rules [28](#) & [59.53](#) are followed. Motions seeking interim relief may also be filed, and a date and time set for the hearing by a Court Officer, if the requisite documentation is all filed by the moving party.¹⁶⁸

The Court Officer has the discretion to identify cases that could proceed directly to settlement, mediation or a court appearance, on the judgment of the Court Officer or their Supervisor, particularly if both parties have counsel and agree to bypass a step on the “normal” route.

(c) Disclosure

Parent Information sessions must be attended by parties in most circumstances when children are involved in an application ([Rule 59.17](#))¹⁶⁹,

Responding disclosure must generally be made within 15 days from the date an application is processed (that is, working or clear days, as defined in [Rule 94](#)) ([Rule 59.24](#)). A Court Officer may direct disclosure ([Rule 59.25](#)) or grant an order to disclose or appear and disclose (as may a judge) ([Rule 59.26](#)), and a third party may be ordered to make disclosure ([Rule 59.27](#)). The general rules regarding discovery and disclosure, do not apply in family matters under Rule 59 absent judicial permission ([Rule 59.28](#)).

(d) Conciliation

When an application is filed, an employee of the court (a court officer, undertaking conciliation) must determine what steps should next be taken in the proceeding, acting with all the powers of a prothonotary ([Rule 59.29](#)). Conciliation involves in-person meetings with the parties initiated by the court officer on notice ([Rule 59.30](#)), following which the court officer may either make a range of orders or refer the parties to undertake additional steps, such as a hearing before a judge ([Rule 59.31](#)). If both parties have counsel, conciliation is not used. The Court Officer may draft Consent Orders, about which a party may seek independent legal advice, or order child support but only in the “Table Amount” (Guidelines) ([Rule 59.32-33](#))

(e) Judicial hearings

If the above steps have been undertaken, the parties may be referred to a judge for resolution. An application procedure is then followed, with Motions for Date and Direction, Pre-hearing Conferences, Settlement Conferences, and Hearings ([Rule 59.36-40](#))

¹⁶⁸ See [Rule 59.52](#)

¹⁶⁹ Note that [Rule 59.18](#) also provides that parties may be referred to mediation with their consent, although this does not happen often in practice.

A contested divorce, on the other hand, is trial of an action commenced by petition, proceeding through a Date Assignment Conference ([Rule 59.41](#)), Pre-Trial and Settlement Conferences ([Rules 59.38-.39](#)) and to a Divorce Trial ([Rule 59.42](#)). Counsel always robe for divorce trials.¹⁷⁰

(f) Uncontested divorces

An uncontested divorce may be granted without a hearing. There are effectively three methods of securing an uncontested divorce: (1) commencing a Petition for Divorce and then filing a motion for an uncontested hearing of the action; (2) commencing a joint application initiated by both parties that applies for both divorce and corollary relief (this cannot be done if a Petition for Divorce has already been filed) ; or (3) one party filing an application for divorce by agreement, that the other party consents to (typically based on an executed separation agreement).¹⁷¹

(g) Forms of order

The Family Division Practice Memorandum issued on May 11, 2017 provides extensive standard clauses to be included in orders.¹⁷² Care should be taken to include provisions that are mandatory as a result of statutory law (e.g., preserving the [Canada Pension Plan](#) entitlement to division of credits), or as a matter of enforcement (directions to sheriffs, constables and peace officers, as well as clarity in relation to support as discussed below under **Enforcement**).

2. Orders for Costs in Matrimonial Matters ¹⁷³

Costs in matrimonial matters are governed by **Civil Procedure Rule 77**. They are at the discretion of the Court and should strive to do justice as between the parties. [Rule 77.03](#)(3) provides that costs follow the event unless a judge orders otherwise. [Rule 77.06](#) provides that the order of costs must, unless the judge orders otherwise, be fixed by the judge in accordance with the tariffs. [Rule 77.07](#) outlines the relevant factors to be considered if there will be a deviation from the tariff.

The principles to be considered in addressing costs are as follows:

1. Costs are in the discretion of the Court.
2. A successful party is generally entitled to a cost award.
3. A decision not to award costs must be for a "very good reason" and be based on principle.

¹⁷⁰ See [Practice Memorandum Number 4](#), "Courtroom Attire for Counsel" (modified February 28, 2014)

¹⁷¹ See [Civil Procedure Rules 59.43 to 59.47](#), the latter for the evidence and information requirements

¹⁷² http://courts.ns.ca/Bar_Information/documents/nsscfd_consolidated_practice_memo_17_06.pdf

¹⁷³ What follows here is taken from *Breed*, [2016 NSSC 42](#), para. 105, citing *Fermin v. Yang*, [2009 NSSC 222](#), particularly at para. 3, as well as *Higgins v. Bourgeois Higgins*, [2015 NSSC 293](#).

4. Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision to not award costs to an otherwise successful party or to reduce a cost award.
5. The amount of a party and party cost award should "represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding but should not amount to a complete indemnity".
6. The ability of a party to pay a cost award is a factor that can be considered, but "Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third-party funding) but at a large expense to others who must 'pay their own way'. In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay."¹⁷⁴
7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
8. In the first analysis the "amount involved" required for the application of the tariffs and for the general consideration of quantum is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved".
9. When determining the "amount involved" proves difficult or impossible the court may use a "rule of thumb" by equating each day of trial to an amount of \$20,000 to determine the "amount involved".
10. If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses, "it is preferable not to increase artificially the 'amount involved', but rather, to award a lump sum". However, departure from the tariff should be infrequent.
11. In determining what "reasonable expenses" are, the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.
12. When offers to settle have been exchanged, consider the provisions of the Civil Procedure Rules in relation to offers and examine the reasonableness of the offer compared to the party's position at trial and the ultimate decision of the Court.¹⁷⁵

VI. PROPERTY DIVISION

¹⁷⁴ Citing *MQC v. PLT*, [2005 NSFC 27](#), which cited *Muir v. Lipon*[*AEM v RGL*, [2004 BCSC 65](#)]

¹⁷⁵ *Breed*, [2016 NSSC 42](#), para. 105;

1. The Matrimonial Property Act application to spouses and domestic partners

The Matrimonial Property Act¹⁷⁶ governs the division of property between spouses and between registered domestic partners, at the end of their marriage or domestic partnership.¹⁷⁷ The end of the **marriage** occurs on separation, death of spouse, annulment or filing for divorce. The end of the **domestic partnership** occurs on marriage to another person, separation, death or registration of a statement of termination.

The MPA applies to married spouses whose marriages are void or voidable.

The philosophy of the MPA is to promote the integrity of the family and to recognize that spouses and domestic partners contribute equally, if differently, to the conjugal relationship and to the family. The MPA is intended to provide a clear guide for the division of property, so this issue is addressed equitably.¹⁷⁸

When a domestic partnership is registered, the domestic partners have the same status as “spouses” under the MPA.¹⁷⁹ For the purpose of this discussion, spouses include domestic partners.

The MPA gives each spouse the entitlement to request an equal division of the value of matrimonial assets, which may include assets obtained prior to marriage, when the marriage ends. In limited circumstances, an unequal division of assets is made or a division of the value of non-matrimonial assets is made.

The MPA does not create a right of ownership. With the exception of the matrimonial home (and there may be more than one of these), the MPA does not limit a spouse’s right to acquire, manage or dispose of her or his property without regard for a possible claim by the other during the marriage.

There are four steps to be taken in a division of property:

1. identify the assets;
2. classify whether the assets are matrimonial assets or assets exempt from division;
3. value the assets which are to be divided; and

¹⁷⁶ RSNS 1989, c 275, as amended (hereinafter referred to as the “MPA”).

¹⁷⁷ For property on Reserve, see Part XV of these materials, “*Family Law In An Aboriginal Context*”

¹⁷⁸ See the MPA’s Preamble for some statements of principle. Note that the MPA has not been amended since 1980 and the Law Reform Commission of Nova Scotia issued final reports in 1997 and again in 2017 recommending significant changes to the MPA (see: <http://www.lawreform.ns.ca/Downloads/Division%20of%20Family%20Property%20-%20Final%20Report.pdf>).

¹⁷⁹ *Vital Statistics Act*, RSNS 1989, c 494, s. 54(2)

4. decide how the assets are to be divided.¹⁸⁰

For the fourth step, there is a presumption that matrimonial assets are to be divided equally (s. 12 of the [MPA](#)) although, in limited circumstances, s. 13 of the [MPA](#) allows for an unequal division of matrimonial assets and/or a division of non-matrimonial assets.

2. Categorizing property

Identifying the assets is a question of fact. The second step in property division is the determination of the category into which an asset is placed; it is only after classification that mechanisms permitting departure from statutory presumptions (e.g., uneven rather than equal division) should be considered. As a starting point for classification, assets are presumed to be matrimonial unless proven to be excluded.¹⁸¹

3. Matrimonial assets

Matrimonial assets include the matrimonial home and all property (including real estate and all manner of personal property) that one or both spouses acquired during the marriage and brought into the marriage.¹⁸²

4. Non-matrimonial assets

Certain assets are specifically excluded from being matrimonial assets.¹⁸³ These are:

- gifts, inheritances, trusts or settlements that one spouse receives from a third party, to the extent they are not used to benefit both spouses or the children;
- damages in favour of a spouse;
- insurance policy proceeds payable to a spouse;
- a spouse's reasonable personal effects;
- business assets;
- property specifically excluded under a marriage contract or separation agreement; and
- property a spouse acquires after separation unless cohabitation has resumed.

The exclusion of certain property from the definition of a "matrimonial asset" is narrowly interpreted. The burden rests upon the spouse who claims an asset is excluded from the definition of matrimonial assets to prove that exclusion.¹⁸⁴

¹⁸⁰ *Gates*, [2016 NSSC 49](#), para. 7

¹⁸¹ *Pothier*, [2017 NSSC 230](#), para. 20

¹⁸² [Section 4\(1\)](#) of the [MPA](#)

¹⁸³ See "with the exception of" list in [Section 4\(1\)](#) of the [MPA](#)

¹⁸⁴ [Sections 12\(1\)\(a\) & 13](#) of the [MPA](#), read together; *Werner*, [2013 NSCA 6](#) at para 63

5. Business assets

Business assets are defined in s. 2(a) of the [MPA](#):

“business assets” means real or personal property **primarily used or held for or in connection with a commercial, business, investment or other income or profit-producing purpose**, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes.
(emphasis added)

It is difficult to reconcile the exclusion of business assets as matrimonial property against the backdrop of the preamble to the [MPA](#). The preamble states that each spouse is entitled to an equal share of assets upon marriage dissolution regardless of whether the spouses worked for remuneration or worked at home to raise a family. The legislative sentiment that each spouse should share equally in the fruits of the marital partnership does not marry with the parallel exclusion of business assets.

It is for this reason that case law has evolved to narrow the definition of “business assets”. Business assets must be purposely held for production of income or profit¹⁸⁵; that a gain or benefit may accrue is not sufficient. The asset must be working in a commercial, business or investment way to be a business asset.¹⁸⁶ Only assets held for the generation of income in an “entrepreneurial sense” are business assets.¹⁸⁷ Courts may look for evidence that the asset is entrepreneurial in a “risk of profit/loss” sense, rather than being a passive asset accruing value without any “risk of profit/loss” character.¹⁸⁸

The characterization of assets as business assets depends (to a degree) upon the parties’ intention; a business asset is one used for relatively immediate gain and not one that is merely held for the purpose of future security.¹⁸⁹ Subjective intention, however, is not the sole consideration; how the asset actually functions may be more important than how it was intended to function.¹⁹⁰ An asset cannot have dual purposes, i.e. be both a business asset and a matrimonial asset.¹⁹¹

The onus rests with the party seeking to exclude an asset because it is a “business asset”.¹⁹²

¹⁸⁵ *Clarke*, [\[1990\] 2 SCR 795](#)

¹⁸⁶ *Lawrence* (1981), [25 RFL \(2d\) 130](#) (NSCA)

¹⁸⁷ *Clarke*, [\[1990\] 2 SCR 795](#)

¹⁸⁸ *Wolfson v. Wolfson*, [2023 NSCA 57](#); *Volcko*, [2015 NSCA 11](#), including para 25; see also *SLK v MMH*, [2009 NSSC 319](#) at paras 74-76

¹⁸⁹ *Hebb* (1991), [103 NSR \(2d\) 147](#) (NSCA)

¹⁹⁰ *Volcko*, [2013 NSSC 342](#) at para 38

¹⁹¹ *Wolfson*, [2023 NSCA 57](#) starting at para 52.

¹⁹² *Volcko*, [2015 NSCA 11](#) at para 23; *JWL v CBM*, [2008 NSSC 215](#)

Parties have been unsuccessful in meeting the onus of establishing that an asset meets the definition of “business asset” as required by the [MPA](#) in the following circumstances:

- (1) if it is determined that a business was intentionally structured to preclude division and thus thwart the purposes of the [MPA](#);¹⁹³
- (2) if family funds have been used to acquire the asset (for instance, an inherited cottage that was substantially renovated with family funds was deemed not to be a business asset and stocks and mutual funds acquired with family money were not deemed to be business assets);¹⁹⁴
- (3) if passive assets are being accrued that are intended to be used for retirement (such as a holding company that owns passive assets like a building¹⁹⁵);
- (4) rental properties, depending on the circumstances;¹⁹⁶
- (5) companies that are professional services corporations incorporated by individuals such as accountants, lawyers, and doctors for the predominant purpose of tax planning¹⁹⁷;
- (6) shares purchased by an employee from an employer’s business during the course of employment if the acquisition and management of the shares is deemed to be entrepreneurial in nature.¹⁹⁸

Caution must be exercised in advising clients regarding the exemption of assets claimed to be “business assets”. This is a nuanced and complex area of the law.

The non-owning spouse can attempt to defeat or mitigate a classification of property as a business asset in at least three ways:

1. by objecting to the initial classification of the asset as a business asset pursuant to the [MPA](#);
2. by seeking compensation for a contribution to the business asset through s. 18 of the [MPA](#); and/or
3. by seeking compensation through an unequal division of matrimonial and/or other property via s. 13 of the [MPA](#).

Section 18 of the [MPA](#)

If an asset is deemed to be a business asset, a spouse who has contributed to the acquisition or maintenance of a **business asset** owned by his or her spouse may still be compensated for this contribution.¹⁹⁹ These claims are difficult to establish.

¹⁹³ *Murphy*, [2015 NSSC 41](#) at paras 29-48

¹⁹⁴ *Tibbetts* (1992), 44 RFL (3d) 281 (NSCA)

¹⁹⁵ *Hebb* (1991), 103 NSR (2d) 147 (NSCA)

¹⁹⁶ *Syms*, [2017 NSSC 243](#)

¹⁹⁷ *Johnson*, [1999 CanLII 4696](#) (NS CA) paras. 19-20

¹⁹⁸ See *Osmond v Clarke*, [2006 NLCA 47](#), and *Volcko*, [2015 NSCA 11](#) at paras 26-40, upholding such a distinction but also note the cautionary treatment of *Volcko*, [2015 NSCA 11](#) in *Murphy*, [2015 NSSC 41](#), para. 47.

¹⁹⁹ [Section 18](#) of the [MPA](#)

Where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset owned by the other spouse, the contributing spouse may apply to the court for an order that does the following: (1) directs the other spouse to pay an amount to compensate the contributing spouse for his or contribution; or (2) award a share of the business asset to the non-owning spouse commensurate with the contribution.

The [MPA](#) requires that the court determines the contribution of the other spouse "without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances".²⁰⁰

To sustain a claim under [section 18](#) of the [MPA](#), the spouse must show a direct and significant contribution to the business. The following provides a sampling of the claims that have been considered by the Nova Scotia Courts:

- i. A claim advanced by a husband for an interest in his wife's physiotherapist clinic was denied despite finding that the husband was actively involved in the set-up, construction, answering phones and other administrative duties on an almost daily basis because he received other indirect substantial benefits.²⁰¹
- ii. A wife claimed that for about 11 years she worked in her husband's auto repair shop completing administrative duties, errands and greeting customers who contacted their home. She received \$2,000.00.²⁰²
- iii. Assisting a spouse by hosting clients was not sufficient to establish a claim.²⁰³
- iv. A claim advanced because a spouse has helped finance the business by guaranteeing a loan or using the matrimonial home as security for a business loan may or may warrant a claim.²⁰⁴
- v. A wife ran errands in connection with her husband's farm operation, prepared meals for hired farm hands, helped in cleaning cattle stalls, and assumed the major responsibility for keeping the financial records for the accountant. The Wife received 10% of the net value of the business assets.²⁰⁵

Division of a Business Asset under Section 13 of the [MPA](#)

Section 13 of the [MPA](#) gives discretion to the Court to "make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial

²⁰⁰ [Section 18](#) of the [MPA](#)

²⁰¹ *Hurst v. Gill*, 2011 NSCA 100 (CanLII)

²⁰² *Murphy*, 2015 NSSC 357 (CanLII)

²⁰³ *Bruce v Ramey*, 2016 NSSC 31 (CanLII)

²⁰⁴ See *Todd* (1995), 144 NSR (2d) 340 (SC) and *Mood*, 1997 CanLII 4542, 77 ACWS (3d) 802, [1997] NSJ No 531 (SC), Wolfson, 2023 NSCA 57

²⁰⁵ *Matthews*, 1990 CanLII 4213 (NS SC)

assets in equal shares would be unfair or unconscionable". As noted in *Donald v. Donald*, [1991 CanLII 2563](#) (NS CA), the test is a two-part test:

In *Archibald v. Archibald* (1981), [1981 CanLII 4859](#) (NS SC), 48 N.S.R. (2d) 361 Hallett, J. stated that the court is limited to considering the factors enumerated in s. 13 in determining in the first instance if it would be unfair or unconscionable to simply divide matrimonial assets equally, **and then, applying the same factors determine what division thereof would be fair and conscionable.** I agree.

In determining whether an excluded asset, such as a business asset, should be divided, the court must consider whether any of the factors enumerated in section 13 are applicable. Again, these claims are difficult to establish. What typically occurs, if such a claim can be made, is an unequal division of the matrimonial assets, leaving the business assets undivided.

The Court has considered cases that involve an indirect contribution to a business, such as providing child care, under section 13(f) of the [MPA](#) which permits the court to assess "the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset".²⁰⁶ The courts have also considered the overall value of a business asset in the context of the division of matrimonial assets to conclude that an equal division of matrimonial assets would be unfair and unconscionable because of the pure disparity in the value of property.²⁰⁷

It is wise to consider alternative pleadings under sections 13 and 18 when business assets are in issue.²⁰⁸

It is worth noting that the distinction between matrimonial and business assets is not a feature of matrimonial property law in most provinces. Many jurisdictions throughout Canada include business assets in their definitions of matrimonial property. The Law Reform Commission of Nova Scotia has recommended this approach in its report issued in 2017.

²⁰⁶ *Todd*, [1995 CanLII 4439 \(NS SC\)](#), [1995] NSJ No. 395 (CA); *Ryan*, [2010 NSCA 2](#) at paras 11-15.

²⁰⁷ *Archibald*, [1981] N.S.J. No. 498; *MacDonald*, [2007 NSSC 174](#) (CanLII)

²⁰⁸ See *Volcko*, [2015 NSCA 11](#) at paras 49-51, which simply notes the burden of proof for each of such claims.

6. Pensions: [MPA](#)

Pensions are “matrimonial property” within the meaning of the [MPA](#).²⁰⁹ They are often the largest matrimonial asset and care should be exercised when dealing with the division of the same.

There are two main types of employment pensions:

1. **Defined Benefit Pensions** – These pensions provide a guaranteed income through the course of retirement, based on a formula that considers income earned while employed, years of service, and age. For instance, a defined benefit pension plan may provide 60% of the average income earned by an employee over the last five years of employment for life. Defined benefit pension plans are usually quite valuable.
2. **Defined Contribution Plans** – A defined contribution plan means that there is a set amount of money invested into a fund. The employee is not guaranteed a set annual income, as they are with a defined benefit plan. Extractions from a defined contribution pension plan may not be as formulaic but when the funds are gone, they are not replenished.

Self-employed individuals who own corporations may also have a pension plan structured through his or her company, such as an **individual pension plan**. While these are not commonly seen, they may become more popular in the future .

Pension benefits earned prior to marriage are technically matrimonial assets. For a spouse not to share equally in the benefits accrued before marriage, a claim for unequal division must be brought.²¹⁰ The applicable legislation may not permit a division of a pension at source prior to cohabitation, despite that it is a matrimonial asset under the [MPA](#). Therefore, the pre-cohabitation portion of a pension will likely need to be appraised and off-set against other assets that are divided between spouses.

Equal division of a pension is the norm in marriages of long duration.²¹¹

7. Pensions: Provincial legislation

The general statute that governs pension plans in Nova Scotia is the [Pension Benefits Act](#).²¹² The [Vital Statistics Act](#) extends the definition of “spouse”, for the purposes of the [Pension Benefits Act](#) to include registered domestic partners.²¹³ In addition, common-law partners are also included under the [Pension Benefits Act](#).

²⁰⁹ *Clarke*, [1990] 2 SCR 795, an appeal concerning the Nova Scotia [MPA](#)

²¹⁰ *Morash*, 2004 NSCA 20

²¹¹ *Ivey*, 2014 NSSC 108, although there was also an Agreement in this case mandating equal division.

²¹² [SNS 2011 c 41](#)

²¹³ *Vital Statistics Act*, RSNS 1989, c 494, s. 54(2)

There are other provincial statutes that deal with specific pensions, such as the [Teachers' Pensions Act](#)²¹⁴, [Public Service Superannuation Act](#)²¹⁵, and [Members' Retiring Allowance Act](#).²¹⁶

It is important to review any statute that governs a specific pension plan because it provides the mechanism available to divide the actual pension benefits. These statutes do not **create** legal entitlements for spouses, common law partners or domestic partners to a portion of their spouse or partner's pension plan, as any entitlement is determined under the [MPA](#). Rather, such statutes provide a mechanism to divide pensions after entitlement is determined.²¹⁷

The [Pension Benefits Act](#) provides that the spouse or common-law partner of the member or former member of a pension plan shall receive **up to one-half** of the pension benefit earned during marriage or cohabitation. [Section 61](#) provides that the pension or pension benefit earned during the marriage or the cohabitation may be divided. [Section 61\(2\)](#) provides that the spouse or common-law partner shall not receive more than one half of the pension or pension benefit earned during the marriage or cohabitation of common-law partners.

"Earned during marriage" has been interpreted, generally, as meaning until separation, to conform to valuation principles in other statutes and as an equitable principle in treating pensions as a "matrimonial asset".²¹⁸ However, in appropriate circumstances, courts have given full effect to the term "during marriage".

The [Pension Benefits Regulations](#) expressly recognize that the spouse's share of the pension benefits must be determined by a court order or agreement.²¹⁹ Remarriage of the pension plan member or his/her multiple marriages can make the definition of "spouse" complex.²²⁰

Under the [Pension Benefits Act](#), any court order is granted against the pension fund; therefore, if a 50/50 division is made and the member dies, 50% of the pension dies and the remaining 50% is still paid to the surviving ex-spouse. Each person pays tax on the portion received. Payment of pension benefits after division begins when the pension comes "on stream".²²¹

²¹⁴ [SNS 1998, c 26](#), referred to as the *Teachers' Pension Plan*

²¹⁵ [RSNS 1989, c 377](#), referred to as the *Public Service Superannuation Act*

²¹⁶ [RSNS 1989, c 282](#), referred to as the *Members' Retiring Allowance Act*

²¹⁷ [Morash, 2004 NSCA 20](#)

²¹⁸ [Morash, 2004 NSCA 20](#)

²¹⁹ [Section 70](#) of the [Pension Benefits Regulations](#) made under [Section 105](#) of the [Pension Benefits Act](#). [RSNS 1989, c 340](#). NB: *the PBA was repealed in 2011, but by a statute not yet proclaimed into force as of March 20, 2014. See [SNS 2011, c 41](#)*

²²⁰ E.g., [MacEachern v Minnikin, 2014 NSSC 47](#)

²²¹ See Part 3 of the [Pension Benefit Regulations](#).

Since the [MPA](#) applies only to spouses, only spouses have the right to claim an equal division of a pension. Though they are mentioned in pension division legislation, those who are not married must advance their claims by way of constructive trusts.²²²

8. Pensions: Federal legislation

The [Pension Benefits Standards Act](#)²²³ governs employees in federally regulated industries (such as CN Rail), but not pensions for the federal civil service or other federal employment (such as National Defence), and provides that pension benefits shall be dealt with by provincial property law upon divorce. This reference has been interpreted to mean the [Pension Benefits Act](#) and the [MPA](#).

The [Pension Benefits Division Act](#)²²⁴ applies to federal civil servants, members of the armed forces, the R.C.M.P., Members of Parliament and Senators, regardless of where they reside in Canada. The [Pension Benefits Division Act](#) allows for an application for a division of up to 50% of pension benefits earned during the period of cohabitation by a spouse or ex-spouse. This will be done if there is an agreement or court order decreeing a division. A lump sum payment is transferred to a locked-in RRSP of the non-member spouse or alternatively, the non-member spouse can opt to purchase a RRIF.

The [Pension Benefits Division Act](#) merely facilitates division at source and there is no basis for a spouse to apply to the court for a division of the other spouse's pension benefits under the [Pension Benefits Division Act](#).²²⁵

As with provincial legislation, the [Pension Benefits Division Act](#) does not create substantive rights in the parties, but merely creates a mechanism for the division of a member's pension.²²⁶

9. The [Canada Pension Plan](#)

The [Canada Pension Plan](#) is not valued under the [MPA](#); rather, its credits are divided at source. **The division of the credits cannot be waived or prevented** by the terms of a spousal agreement signed on or after June 4, 1986, whether between married or common-law spouses.²²⁷ In the case of common-law spouses there is effectively a limitation period for application, which is four years from the time of separation.²²⁸

²²² See *Brownie v. Hoganson*, 2005 NSSC 314.

²²³ SC 1986, c 4, referred to as the [Pension Benefits Standards Act](#)

²²⁴ [SC 1992, c 46](#), Schedule II, referred to as the **PBDA**

²²⁵ *Croitor*, 2001 NSCA 37

²²⁶ *Connolly* (1998), 169 NSR (2d) 344 (SC); affirmed (1999), 172 NSR (2d) 382 (CA).

²²⁷ [Canada Pension Plan](#), RSC, 1985, c C-8, s 55.2

²²⁸ [Canada Pension Plan](#), RSC, 1985, c C-8, s 55.1(1)(c) (the parties may still consent to division)

It is important to note that CPP credits will only be divided if a spouse formally applies to do so. If a spouse dies, an application must be made within three years from the date of death.²²⁹

10. Early retirement/severance packages

Severance pay, or “bridging benefits”²³⁰, even if paid after separation, is a matrimonial asset subject to division if the entitlement was earned during the marriage as a term of a spouse's contract.²³¹

A “downsizing package” may be held to be “severance pay” and a matrimonial asset if it arose as an entitlement under a collective agreement. However, “pay in lieu of an unfulfilled surplus period” may not be a matrimonial asset if entitlement arose only after separation, and a “added enhancement” or “sweetener” offered to encourage retirement may not be a matrimonial asset.²³²

A portion of a spouse’s salary, received after separation, may however be treated as a “bonus” and not a matrimonial asset if the spouse remains an employee, even if not actively working as part of a retirement package.²³³

11. Valuation of property, discounts and costs of disposition

The [MPA](#) offers little guidance in valuing assets. It does not specify a date for valuation. This is left to the discretion of the trial judge. Different valuation dates may be selected by the judge for different assets.²³⁴

There are usually six principles for determining the choice of valuation date:²³⁵

1. **Was it acquired after separation?** Generally speaking, if an asset was acquired after the separation it is exempted from the definition of "matrimonial assets" by virtue of [section 4\(1\)\(g\)](#) of the [Matrimonial Property Act](#), and therefore it need not be valued except in those exceptionally rare cases of the division of a non-matrimonial asset under [section 13](#).

²²⁹ [Canada Pension Plan, RSC, 1985, c C-8](#), s 55.1(1)(b)(ii)

²³⁰ [Cashin, 2010 NSCA 51](#), paras. 7-8

²³¹ [Yaschuk v. Logan \(1992\), 110 NSR \(2d\) 278 \(CA\)](#); [Cashin, 2010 NSCA 51](#)

²³² [Connolly \(1998\), 169 NSR \(2d\) 344 \(SC\)](#); affirmed [\(1999\), 172 NSR \(2d\) 382 \(CA\)](#).

²³³ [Morash, 2004 NSCA 20](#)

²³⁴ [Weese, 2014 NSSC 435](#) at paras 30-31 citing [Thackeray, 2008 NSSC 223](#) (CanLII)

²³⁵ [Doncaster v. Field, 2016 NSCA 25](#), para. 54; [Simmons \(2001\), 196 NSR \(2d\) 140 \(SC\)](#). [Simmons](#) was described by the Court of Appeal in [Moore, 2003 NSCA 116](#) at para 24 as “a good review of the rationale behind the choice of valuation date”, and in [Morash, 2004 NSCA 20](#) at para 21 as "a comprehensive discussion of 'valuation date'", making the question really, is there a good reason on the facts of a given case to depart from [Simmons](#)? e.g., [Cogswell v. Wright, 2014 NSSC 173](#) at paras 94-112; [Gates, 2016 NSSC 49](#), para. 9

2. ***Did it exist at separation?*** To be valued, the asset or debt must have existed, or at least have accrued, as of the separation date. There are exceptions to this rule. If a transaction can be characterized as a plan to rearrange the separation date asset and debt mix, subject to an expressed or implied intention to account for these changes at trial, the fact that they did not exist at the time of the separation would not disqualify these post-separation assets and debts from being valued and divided, but only to the extent that they replace separation date assets and debts or funded the parties' transition.
3. ***Does it still exist at trial date?*** When separation date assets or debts no longer exist at trial date and have not been replaced by substitute assets or debts, their separation date value should be accounted for. In the case of assets, an exception would be where the liquidation had a mutually beneficial purpose, such as funding the parties' transitional financial needs. In the case of debts, an exception would be that debt pay down was funded by the liquidation of a matrimonial asset or was intermingled with a child/spousal support regime.
4. ***Has division in specie been affected?*** If it were possible to divide assets on the very day separation occurs, the outcome would be ideal because the parties would then be equally exposed to subsequent factors that affect value and each would be in charge of his or her ownership choices.
5. ***Who is responsible for material delay?*** Neither spouse can complain that an earlier division would have allowed a more remunerative outcome because they must both accept the accounting delay and its consequence (except of course where there was an impoverishment of assets by one spouse but that would be remedied by a [section 13\(a\) MPA](#) unequal division).
6. ***Valuation is imprecise:*** There must be recognition that valuation is an imprecise science in the case of many types of assets. The parties should be encouraged not to spend lawyer time and valuator time for appraisals as of a precise date when an appraisal in reasonable proximity of the valuation date is likely to be relatively reliable and is available.

In calculating the value of assets, it is appropriate to allow for tax consequences and other costs associated with the eventual, inevitable disposition of the asset.

If one spouse will retain all RRSP contributions, they are notionally discounted for a disposition of the approximate rate of 30%²³⁶ or some reasonable estimate of the tax rate to be paid on their disposition, assuming conscientious, prudent disposition. Where the plan contributions are to be divided by virtue of a tax-free inter-spousal rollover under [s.146 \(16\)](#) of the [Income Tax Act](#), no discounting is necessary. Each spouse will cash contributions and be responsible for his or her own tax. The initial division of plan contributions between the spouses can be affected without attracting income tax.

²³⁶ See [Wheeler, 2016 NSSC 154](#) at para. 13

Debts: Strictly speaking, it is matrimonial property that is divided, rather than matrimonial liabilities.²³⁷ Debts are not presumptively divisible and they must have been incurred for a matrimonial purpose.²³⁸ The person seeking to maintain that a debt is matrimonial has the burden of proof.²³⁹ However, debts are in practice considered upon property division, not just assets, as an unequal division of assets may be justified to address “the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred”.²⁴⁰

In practice, many judges approach debts incurred for the benefit of the family as presumptively divisible; others approach debts as an unequal division consideration. Both theories of “division” are found in the case law; that is, that “matrimonial debts” or “family debts” are (almost) always divided, or that debts may be considered to justify an unequal division of assets.²⁴¹

Future contingent liabilities (e.g., debts that will crystallize when an asset is realized), must also be considered, as they alter the true value of assets if sufficiently certain.²⁴² Unequal allocation of debts may be necessary in light of the capacity of each party to pay joint debts.²⁴³

12. The valuation of pensions

The valuation of pension plans is a complicated area of law. It is beyond the scope of these materials to examine the principles in detail.

As noted above, there are two main types of pension plans available through employment, “defined benefit” and “defined contribution”. Each is valued differently.

Upon separation, pensions are typically divided equally “at source”. This means the pension will be divided by the pension plan administrator according to the enabling legislation. Under some legislation, the non-pension owning spouse will become a limited member of the pension plan to receive his or her share of the pension. Some federal defined benefit pension plans permit the non-pension earning spouse to receive a lump sum all at once that can be invested and controlled as that spouse deems appropriate (subject to restrictions surrounding when the funds can be extracted). For most provincial defined benefit pension plans, the non-pension earning spouse will only begin to receive his or her share of the pension monthly once the pension earning spouse retires or reaches the age of 65.

²³⁷ [Section 12](#) of the *MPA*

²³⁸ *Gates*, [2016 NSSC 49](#), para. 33-38

²³⁹ *Lubin*, [2012 NSSC 31](#), para. 42

²⁴⁰ [Section 13](#)(b) of the *MPA*

²⁴¹ See *Gates*, [2016 NSSC 49](#), para. 33-38, which discusses the two approaches apparent in the case law.

²⁴² e.g., *Stein*, [2008 SCC 35](#)

²⁴³ e.g., *Larue*, [2001 NSSF 23](#)

Defined contribution plans are typically easily divided between spouses as they have a clear and identifiable value. The non-pension earning spouse will simply set-up an account into which the funds will be transferred.

Sometimes spouses are very reluctant to divide their pensions at source and instead wish to provide the other spouse with a greater share of other assets to compensate for retaining the pension. To determine the value of the pension the other spouse would be entitled to receive, an appraisal of the pension will need to be obtained to determine its value. This is completed by a trained actuary. Once this value is identified, it can be determined whether there are sufficient assets against which the pension can be off-set.

Actuaries must make assumptions in valuing a pension and typically provide more than one potential value. Under the "retirement" method of division, the actuary considers possible post-separation increases in the pension's value to determine as closely as possible what the pension benefit will be when the employee retires in the future. Under the "termination method", one assumes that the pension-holder stopped working as of the date of separation. The pension's value on that date is then determined by calculating the benefit earned under the pension's benefit formula, and the amount that, if invested on the date of separation, would provide that income stream starting at the assumed retirement date.

As noted above, pension entitlement may be "brought into the marriage" (e.g., years of employment service prior to the marriage), raising the question of whether a (presumed) equal division or an (arguable) unequal division is equitable. If an equal division occurs, there is a disconnect between the legislation that enables the division of pensions and the [MPA](#), which provides the authority for entitlement to the pre-cohabitation portion of a pension. Legislative intervention is arguably required to correct this discord.²⁴⁴ Until this occurs, as noted above, an appraisal of the pre-cohabitation portion of the pension may be needed to off-set the asset against other assets. If there are no other assets against which to off-set the pre-cohabitation portion, a trust may need to be established.²⁴⁵

If a pension is "in-pay" at the time of separation, it is important to consider the timing of a pension division and whether retroactive payments may be owed to the non-pension earning spouse.²⁴⁶ It is advisable to consider obtaining an appraisal of how to properly divide the pension.

13. Unequal division

Spouses are presumed to be entitled to an equal division of the value of matrimonial assets.²⁴⁷

²⁴⁴ *McKearney-Morgan v. Morgan*, [2016 NSSC 79](#)

²⁴⁵ *Robertson*, [\[2007\] N.S.J. No. 195](#)

²⁴⁶ *Ward v. Lucis*, [\[2018\] N.S.J. No. 261](#)

²⁴⁷ [Section 12](#) of the [MPA](#)

The Supreme Court has the authority to divide matrimonial assets unequally or to divide property that is not matrimonial where an equal division of matrimonial assets would be unfair or unconscionable considering certain enumerated factors.²⁴⁸ The test is disjunctive, unfair **or** unconscionable; one need not establish both.²⁴⁹

To make an unequal division, court must be satisfied, based on strong evidence²⁵⁰, that the division of matrimonial assets in equal shares would be unfair or unconscionable considering the following factors:

- the unreasonable impoverishment by either spouse of the matrimonial assets;²⁵¹
- the amount of and circumstances in which debts and liabilities were incurred;
- a marriage contract or separation agreement between the spouses;
- the length of time that the spouses have cohabited with each other during the marriage;
- the date and manner of acquisition of the assets;²⁵²
- the effect of the assumption by one spouse of any housekeeping, childcare or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset²⁵³;
- the contribution by one spouse to the education or career potential of the other spouse;
- the needs of a child who has not attained the age of majority;
- the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
- whether the value of the assets substantially appreciated during the marriage;
- the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse,²⁵⁴ which would include a Workers' Compensation Board damage award whether received as income in stream or already capitalized;²⁵⁵
- the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring; and
- all taxation consequences of the division of matrimonial assets.²⁵⁶

²⁴⁸ [Section 13](#) of the [MPA](#)

²⁴⁹ [Gates](#), [2016 NSSC 49](#), para. 22, citing [Bennett](#), [1992 CanLII 2623](#) (NSSC(AD))

²⁵⁰ [Gates](#), [2016 NSSC 49](#), para. 23

²⁵¹ e.g., gambling: [Crane](#), [2008 NSSC 33](#) or unreasonably adding to debt: [MacPhee v Doyle](#), [2014 NSSC 424](#)

²⁵² There is no presumption, however, that one spouse bringing significant assets into the marriage will automatically lead to an unequal division of assets in that spouse's favour: [Young](#), [2003 NSCA 63](#); see [MacLean v. Cox](#), [2017 NSSC 309](#) where the wife's pre-cohabitation portion of her pension (17 years of contributions) was excluded.

²⁵³ [Pothier](#), [2017 NSSC 230](#), see also the discussion under business assets

²⁵⁴ See Section 4(1)(b) of the [MPA](#)

²⁵⁵ [Martin](#), [2014 NSSC 236](#) at paras 38-40

²⁵⁶ [Section 13](#) of the [MPA](#). **NB:** the same principles apply if a court is asked to divide a *non-matrimonial asset*, arguing it would be unfair and unconscionable not to do so.

- the parties' relative ages are not a relevant consideration.²⁵⁷

The burden rests with the individual seeking unequal division to prove that an equal division is unfair or unconscionable. It has been described as a “heavy burden”, met only by providing “strong evidence” on these issues.²⁵⁸

14. Marriages of short duration

In marriages of reasonably long duration it is assumed that it is **not** desirable to trace the assets brought into the marriage by each party. Equal division would be applied, subject to unequal division arguments in appropriate cases.

In an “unusually short”²⁵⁹ marriage, the circumstances must be examined to determine if a deviation from the usual approach is justified. A judge is not precluded from deviating from the usual classification of an asset if circumstances warrant. Unequal division under Section 13 may then be affected.

It may, for example, be appropriate to conduct an individual assessment of the fair division of each asset. In taking this approach a court may allow one party to retain those assets accumulated before marriage but require an equal division of assets substantially accumulated during the marriage, despite being acquired through one spouse's income.²⁶⁰ This method of analysis may be applied even if there are children born of a marriage of short duration.²⁶¹

15. Matrimonial homes

The matrimonial home is defined to mean:

The dwelling and real property occupied by a person and that person's spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest.²⁶²

Where property that includes a matrimonial home is used for other than residential purposes, the matrimonial home only includes that portion of the property that can reasonably be regarded as necessary for the use and enjoyment of the family residence.²⁶³

²⁵⁷ *Parke v. Vassallo*, 2014 NSSC 68

²⁵⁸ *Weese*, 2014 NSSC 435 at paras 20-21; *Marshall*, 2008 NSSC 11 at paras 44-45

²⁵⁹ *Leigh v. Milne*, 2010 NSCA 36, para. 41.

²⁶⁰ *Roberts v. Shotton* (1997), 156 NSR (2d) 47 (CA) (14 month marriage); *Kearney-Morgan v. Morgan*, 2012 NSSC 236 (CanLII) (17 month marriage); *Boutilier-Stonehouse v. Stonehouse*, 2008 NSSC 74 (CanLII) (less than 2 years)

²⁶¹ *Gossen* (2003), 213 NSR (2d) 217 (SCFD)

²⁶² Section 3(1) of the *MPA*

²⁶³ Section 3(2) of the *MPA*

The ownership of a share or an interest in a share of a corporation entitling the owner to occupation of a dwelling owned by the corporation shall be deemed to be an interest in the dwelling for the purposes of this section.²⁶⁴

The person and the person's spouse may have more than one matrimonial home.²⁶⁵ A "dwelling" includes a house, condominium, cottage, mobile home, trailer or boat occupied as a residence.²⁶⁶

The [MPA](#) has special provisions concerning a matrimonial home.²⁶⁷

Each spouse has an equal right to possession of the matrimonial home, regardless of which spouse owns the property.²⁶⁸ This is a right of possession only and is not a proprietary right.

The court may award one spouse exclusive possession of the matrimonial home if, in the opinion of the court, other provision for shelter is not adequate in the circumstances; or it is in the best interests of a child.²⁶⁹

"Exclusive possession" is intended as an interim measure. It is an error of law to use [section 13](#) (unequal division) to grant one spouse **possession** of the matrimonial home at trial, as opposed to granting ownership under [section 11](#) (division of assets).²⁷⁰

Exclusive occupation may give rise to a claim by the other spouse for "occupation rent".²⁷¹

So-called "nesting orders" may also be granted, in which the children remain in the matrimonial home and the parents will alternate shared parenting time in the home.²⁷²

The court does not have jurisdiction under provincial legislation over possession of homes on First Nation Reserves, and the parties do not have an ownership interest in any home built on Reserve land.²⁷³ Recent federal legislation, however, has addressed this issue.²⁷⁴ The court may order compensation for possession of a home on reserve land.²⁷⁵

²⁶⁴ [Section 3\(3\)](#) of the [MPA](#)

²⁶⁵ [Section 3\(4\)](#) of the [MPA](#)

²⁶⁶ [Section 2\(d\)](#) of the [MPA](#)

²⁶⁷ There are a variety of factual circumstances that will largely determine outcome. See *Smith*, [2012 NSSC 432](#) for a review of the facts in several typical cases.

²⁶⁸ Section 6(1) of the [MPA](#)

²⁶⁹ [Section 11](#) of the [Matrimonial Property Act](#), esp. 11(4)

²⁷⁰ *MacLennan*, [2003 NSCA 9](#)

²⁷¹ *Soubliere v. MacDonald*, [2011 NSSC 98](#) (CanLII) as cited in *Roach v McNeil*, [2014 NSSC 112](#) at paras 69-70

²⁷² *Grandy*, [2012 NSSC 316](#)

²⁷³ *Paul*, [2008 NSSC 124](#); *Derrickson*, [\[1986\] 1 SCR 285](#)

²⁷⁴ [SC 2013, c 20](#); this legislation is discussed in Part XV of these materials, "*Family Law In An Aboriginal Context*"

²⁷⁵ *Hepworth*, [2012 NSCA 117](#)

The court has broad powers to make other orders with respect to the matrimonial home, including ordering that contents remain in the home, that a party pay for liabilities for the home and that a party is responsible to repair and maintain the home.²⁷⁶

The court may rely upon its authority under the [Partition Act](#)²⁷⁷, to order the sale of a home to a third party and the division between the parties of the proceeds of sale (including an unequal division between joint owners if the presumption of equal ownership can be rebutted²⁷⁸), but there is no authority under that legislation to order a notional sale in the form of a “buy-off” or “set-off” as between co-owners of the home.²⁷⁹

There are restrictions on a spouse’s right to convey or encumber the matrimonial home without the consent of the other spouse, or a similar form of release by marriage contract, separation agreement or court order.²⁸⁰ Fraudulent conveyances undertaken to avoid designation of a home as “matrimonial” may be set aside under Section 10(1)(d) of the [MPA](#).²⁸¹

Every form of conveyance should include an affidavit of matrimonial status verifying that the person making the disposition is not a spouse or that the property disposed of or encumbered has never been occupied as a matrimonial home or that the spouse of the conveyor has released all rights to the matrimonial home.²⁸²

The affidavit of matrimonial status is considered sufficient proof that the property is not a matrimonial home, unless the person to whom the disposition or encumbrance is made has been given notice to the contrary.²⁸³ In completing the matrimonial status affidavit, lawyers must consider any information which conflicts with the contents of the affidavit.

It is possible to execute a designation identifying a matrimonial home to exclude other dwellings from being matrimonial homes.²⁸⁴

16. Equitable claims and common-law spouses

The [MPA](#) does not apply to common-law partners, unless they have become domestic partners by registering their declaration.²⁸⁵

²⁷⁶ [Section 10](#) & 11 of the [MPA](#)

²⁷⁷ RSNS 1989, c. 333

²⁷⁸ *K.A.R. v. P.J.T.*, [2018] N.S.J. No. 24

²⁷⁹ See *Roach v McNeil*, [2014 NSSC 112](#) at paras 44-73; *Peters v. Reginato*, [2016 NSSC 345](#), paras. 124-135

²⁸⁰ [Section 6](#) & 8 of the [MPA](#)

²⁸¹ *Chisholm*, [2016 NSSC 245](#)

²⁸² [Section 8\(3\)](#) of the [MPA](#); see [Section 11\(1\)\(f\)](#) for remedies for fraudulent affidavits.

²⁸³ [Section 8\(3\)](#) of the [MPA](#)

²⁸⁴ [Section 7](#) of the [MPA](#)

²⁸⁵ The Supreme Court of Canada, in *Nova Scotia (Attorney General) v. Walsh* (sub. nom. *Walsh v. Bona*), [2002 SCC 83](#), held that it was not a breach of section 15 of the *Charter* that the [MPA](#) did not apply to common-law partners. For consideration of the constitutionality of differential treatment of family law issues more broadly (i.e., support, property, residence) under the Quebec [Civil Code](#) and provincial statutes, see *Quebec (Attorney General) v. A.*, [2013 SCC 5](#).

Spouses, common-law partners, and domestic partners have available to them claims to an interest in the other person's property or compensation for contributions that were made to the maintenance or acquisition of that property through the equitable remedies of constructive trust, resulting trust and an award of damages (unjust enrichment).

The law with respect to equitable remedies had previously been outlined in a series of older Supreme Court of Canada cases.²⁸⁶ Practitioners must be familiar with all these cases, particularly the most recent,²⁸⁷ as they state preferences in judicial approach to such claims.

For unmarried persons in domestic relationships in most common law provinces, judge-made law is the only option for addressing the property consequences of the breakdown of those relationships. For many years,²⁸⁸ the main legal mechanisms available have been the **resulting trust** and the action in **unjust enrichment**.

However, **constructive trust** and **unjust enrichment** are now the preferred avenues of relief. The law of unjust enrichment, including the remedial constructive trust, is preferred as the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances".

The law of **unjust enrichment** permits recovery whenever the plaintiff can establish three elements, namely:

1. an enrichment of the defendant by the plaintiff,
2. a corresponding deprivation of the plaintiff, and
3. the absence of a juristic reason for the enrichment.²⁸⁹

The Supreme Court of Canada²⁹⁰ has taken a straightforward, economic approach to the elements of **enrichment and corresponding deprivation**. The plaintiff must show that he or she has given a tangible benefit to the defendant that the defendant received and retained. Further, the enrichment must correspond to a deprivation that the plaintiff has suffered. Importantly, provision of domestic services may support a claim for unjust enrichment. In most cases, a monetary award will be sufficient to remedy the unjust enrichment but there are issues that raise difficulties in determining appropriate compensation.

As to methods of valuation, "fee for service" or "value received" monetary awards may be calculated, reflecting contribution on a *quantum meruit* basis, or the award may

²⁸⁶ *Rathwell* [1978] 2 SCR 436; *Pettkus v. Becker* [1980] 2 SCR 834; *Sorochan* [1986] 2 SCR 38; *Peter v. Beblow* [1993] 1 SCR 980

²⁸⁷ *Kerr v. Baranow*; *Vanasse v. Seguin*, 2011 SCC 10 (indexed only as *Kerr v. Baranow*)

²⁸⁸ *Rathwell* [1978] 2 SCR 436; *Pettkus v. Becker* [1980] 2 SCR 834; *Sorochan* [1986] 2 SCR 38; *Peter v. Beblow* [1993] 1 SCR 980

²⁸⁹ *Pettkus v. Becker* [1980] 2 SCR 834

²⁹⁰ *Kerr v. Baranow*; *Vanasse v. Seguin*, 2011 SCC 10 (indexed only as *Kerr v. Baranow*)

reflect the “value survived” contribution, being the overall increase in the couple’s wealth during the relationship. The latter may be most appropriate in a “**joint family venture**” relationship.

To determine whether the parties have been engaged in a **joint family venture**, the circumstances of each relationship must be considered. This is a question of fact and must be assessed by having regard to all the relevant circumstances, including factors relating to mutual effort, economic integration, actual intent and priority of the family. The more extensive the integration of the couple’s finances, economic interests and economic well-being, the more likely it is that they have engaged in a joint family venture.

The **actual intentions** of the parties, either express or inferred from their conduct, must be given considerable weight. Their conduct may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture, but may also conversely negate the existence of a joint family venture or support the conclusion that assets were to be held independently.

Regarding **remedies**, a finding of unjust enrichment may attract either a “personal restitutionary award” or a “restitutionary proprietary award”. What is essential is that there must be a link between the contribution and the accumulation of wealth. Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation.

Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during a “joint family venture” to which both partners have contributed, the monetary remedy should be calculated according to the **share** of the accumulated wealth **proportionate** to the claimant’s contributions.

The third step in the unjust enrichment analysis, **absence of a juristic reason**, means that there is no reason in law or justice for the defendant’s retention of the benefit (enrichment) conferred by the plaintiff. This third element also provides for due consideration of the autonomy of the parties, their legitimate expectations and the right to order their affairs by contract.

There are two steps to the **juristic reason analysis**. First, the established categories of juristic reason must be considered, which could include benefits conferred by way of gift or pursuant to a legal obligation. In their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether enrichments are unjust.

Claimants must show that there is **no juristic reason** falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. It is then open to the defendant to show that a different juristic reason for the

enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations. Mutual benefit conferral and the parties' reasonable expectations have a very limited role to play at the first step of the juristic reason analysis.

Most decisions applying *Kerr v Baranow* principles concern real, rather than personal property, but the principles apply in relation to other assets, such as pensions or pension death benefits.²⁹¹

17. Common-law spouse claims against pensions

The [Pension Benefits Act](#) allows common-law partners to apply to the court for a division of a pension.²⁹² The above constructive trust/unjust enrichment analysis could establish **entitlement**, and the [Pension Benefits Act](#) provides the **vehicle** for satisfying the *quantum meruit* claim.²⁹³

²⁹¹ e.g., *MacEachen v Minnikin*, [2014 NSSC 47](#); aff'd [2015 NSCA 81](#) and *Murray v McDougall*, [2015 NSSC 215](#)

²⁹² The [Pension Benefits Act](#) was "repealed" in 2011, but by a statute that itself has not yet been proclaimed into force (this is still the case as of March 12, 2015). See SNS 2011, c 41

²⁹³ *Barry v. MacDonald*, [2003 NSSF 17](#), 215 NSR (2d) 142 (SC); *Cook v. Crabb* (2002), [209 NSR \(2d\) 208 \(SC\)](#)

VII. CHILD SUPPORT

The [Parenting and Support Act](#) and the [Divorce Act](#) both have provisions for child support and have the same [Child Support Guidelines](#) (the “[Guidelines](#)”). Each act obliges parents or those who stand in the place of a parent to support their children.

Courts try to minimize the financial impact of family breakup on a child, even when this puts a greater financial burden upon the parents. Child support is the parents’ primary obligation and the parents share that obligation. For a child to receive support the child must come within the definition of child (of the marriage) in the [Divorce Act](#) or the [Parenting and Support Act](#).

A [Divorce Act](#) support application may be an interim application heard prior to trial, an application heard at the time of trial or an application commenced after the divorce has been granted.²⁹⁴

Support orders may be made for a definite period or an indefinite period, or the operation of the order may be tied to a specified event. The court may impose terms, conditions or restrictions on a support order, as the court thinks fit and just.²⁹⁵

Under the [Parenting and Support Act](#), a court may make an order requiring a parent or guardian to pay support for a dependent child.²⁹⁶

An order may be made for a definite period or an indefinite period, or the operation of the order may be tied to a specified event. The court may impose terms, conditions or restrictions on a support order, as the court thinks just.²⁹⁷

1. Married parents

The [Divorce Act](#) deals with child support for “children of a marriage”. Only married or divorced spouses can apply for support orders under the [Divorce Act](#).

Common-law partners, domestic partners and parents who were never married must make their applications under the [Parenting and Support Act](#).

Married parents may apply for an order for child support under the [Parenting and Support Act](#) if they are not seeking a divorce. This may be the case with a separated spouse who does not want to seek a divorce, for religious or other reasons.

²⁹⁴ [Section 15.1](#) of the [Divorce Act](#).

²⁹⁵ [Section 15.1\(4\)](#) of the [Divorce Act](#)

²⁹⁶ [Section 9](#) of the [Parenting and Support Act](#); however, see also footnote 15 above.

²⁹⁷ [Section 10](#) of the [Parenting and Support Act](#); however, see also footnote 15 above.

2. Unmarried parents

The [Parenting and Support Act](#) permits a parent, whether or not the child is born to married parents, to apply for an order for child support.²⁹⁸ There is no requirement that a parent be married to apply for child support.²⁹⁹

Under the [Parenting and Support Act](#), child support may be ordered against two or more possible fathers if it is not clear which man is the father of the child. To be exempted from the payment of child support, a putative father must show that he is not the father. Where there are multiple possible fathers, each can be ordered to pay child support.³⁰⁰

3. Step-parents

Under the [Divorce Act](#), step-parents may qualify to seek child support and may be required to pay child support for any child of their spouse if the child qualifies as a child of the marriage between the step-parent and the parent.³⁰¹

To qualify as a child of the marriage the step-parent must “stand in the place of a parent”.³⁰²

The [Parenting and Support Act](#) imposes an obligation to pay child support upon a “parent or guardian”.³⁰³ A parent includes a biological parent and any other person who has been ordered by a Court or any law district to pay support for a child.³⁰⁴

A ‘guardian’ is defined as including the head of a family and any other person who has, in law or in fact, the custody or care of a child.³⁰⁵

The [Parenting and Support Act](#) does not impose an obligation to pay child support upon persons who stand *in loco parentis* to a child;³⁰⁶ however, case law has found this obligation may exist for those who stand in the place of a parent.³⁰⁷

²⁹⁸ [Section 10](#) of the [Parenting and Support Act](#); however, see also footnote 15 above.

²⁹⁹ [Section 11](#) of the [Parenting and Support Act](#); however, see also footnote 15 above.

³⁰⁰ [Section 11](#) of the [Parenting and Support Act](#); however, see also footnote 15 above.

³⁰¹ See definition of “spouse” in [Section 2\(1\)](#) of the [Divorce Act](#), read together with [Section 15.1](#).

³⁰² See definition of “child of the marriage” in [Section 2\(2\)](#) of the [Divorce Act](#), and case law discussion below here.

³⁰³ [Section 9](#) of the [Parenting and Support Act](#); however, see also footnote 15 above.

³⁰⁴ [Section 2\(i\)](#) of the [Parenting and Support Act](#); however, see also footnote 15 above.

³⁰⁵ [Section 2\(e\)](#) of the [Parenting and Support Act](#); however, see also footnote 15 above.

³⁰⁶ *Reed v. Smith* (1988), 86 NSR (2d) 72 (CA); *LGP v JRH*, 2003 NSSF 22; *Casey v. Chute*, 2010 NSFC 8, 2010 CarswellNS 249

³⁰⁷ It may be open to a superior court judge to address this “omission” (if it is one) by means of the *parens patriae* jurisdiction in an appropriate case: *Peterson v. Baker*, 2001 NSSF 6.

It has since been suggested that, once agreeing to pay support, it is not open to a former step-parent to withdraw that consent upon variation of the order.³⁰⁸ However, a contrary view is that the parties may not confer jurisdiction upon the court, only the Legislature may, and any such original order is invalid.³⁰⁹

4. Other child support obligations (*in loco parentis*)

Under the **Divorce Act**, a spouse is required to support only a child who is a “child of the marriage”. The definition of “child of the marriage” includes any child for whom one or both spouses or former spouses stand “in the place of parents” (*in loco parentis*).³¹⁰

A spouse must support a biological child, an adopted child and a child for whom the spouse stands in place of a parent (*i.e.*, a step-parent). The obligation rests not only on the parent, but on the parent’s spouse.³¹¹

A person stands ‘*in loco parentis*’ to a child if she or he has acted in a way that shows an intention to be placed in the position of a parent. It must also be shown that the person voluntarily and willingly occupied the position of parent, with the full knowledge that someone else was the child’s (biological) parent.³¹²

It is difficult to end a relationship of *in loco parentis* at the time of the end of a conjugal relationship or when a support application is heard. The courts do not permit avoidance of this obligation simply because the parental relationship has come to an end.³¹³

When determining whether one stands in the place of a parent, a court must consider all factors relevant to that determination, viewed objectively, including the following factors:

- whether the child participates in the extended family in the same way as a biological child;
- whether the person provides financially for the child, depending on ability to pay;
- whether the person disciplines the child as a parent would;
- whether the person represents to the child, the family, the world, either implicitly or explicitly, that he or she is responsible as a parent to the child;
- the nature or existence of the child’s relationship with the absent biological parent.³¹⁴

A list of 16 factors to be considered, gleaned from a Nova Scotia decision, is as follows:

³⁰⁸ *Pottinger v. Hann* (2003), [215 NSR \(2d\) 176](#) (SCFD)

³⁰⁹ *Winford v. Dorton*, [2002 NSSF 14](#)

³¹⁰ As defined by [Sections 2\(1\) & 2\(2\)](#) of the *Divorce Act*

³¹¹ See [Sections 2\(1\) & 2\(2\)](#) of the *Divorce Act*

³¹² *Chartier*, [\[1999\] 1 SCR 242](#) at para 39

³¹³ *Chartier*, [\[1999\] 1 SCR 242](#) is the leading case on ending such status.

³¹⁴ *Chartier*, [\[1999\] 1 SCR 242](#) at para 39

- discussing the possibility of adopting the child;
- the child’s reference to the non-parent as “mom” or “dad”;
- whether the child uses the non-parent’s surname;
- the child’s perception that the person is a parent-figure
- the child’s age;
- the duration of the relationship with the child;
- participation in disciplining the child;
- providing financial support for the child;
- whether there’s any intention to terminate the relationship with the child;
- whether the child has a relationship with the non-custodial biological parent;
- whether any other person is obliged to pay support for the child;
- whether the non-parent spends time “one-on-one” with the child;
- whether the non-parent is a “psychological parent”;
- whether the non-parent has ever sought custody of or access to the child; and
- the nature of the post-separation conduct of the spouses.³¹⁵

A further question is the apportionment of child support between a biological parent **and** one *in loco parentis* under [Section 5](#) of the **Guidelines**.

A three-step procedure has been suggested for apportioning support, namely:

1. Determine the guideline amount payable by the person *in loco parentis*. This will involve consideration of the table amount, any [section 7](#) add-ons and any undue hardship adjustment (discussed below).
2. Determine the “legal duty” of any other non-custodial (biological) parent to contribute to the support of the child. This will be established by a pre-existing order or agreement or by a guideline calculation.
3. Determine whether it is appropriate to reduce the respondent’s obligation under the **Guidelines** by shifting the onus to the custodial parent to demonstrate why the respondent’s obligation should *not* be reduced by that of other non-custodial parent’s obligation, once the existence of a support duty resting with another (third party) parent has been established.³¹⁶

5. Children for whom support is payable

A child for whom support may be ordered as under the age of majority or, if the age of majority and over, under the spouse’s charge and unable to withdraw from that charge or to obtain the necessaries of life by reason of illness, disability, pursuit of reasonable education, or other cause.³¹⁷

³¹⁵ [Gardiner \(2001\), 194 NSR \(2d\) 233 \(SC\)](#)

³¹⁶ [MacArthur v. Demers \(1998\), 166 DLR \(4th\) 172 \(OntCtJ\); G.N.P. v. L.A.G. 2001 NSSC165](#)

³¹⁷ See definition of “child of the marriage” in [Section 2](#) of the *Divorce Act*, and “dependent child” in [Section 2\(c\)](#) of the [Parenting and Support Act](#); however, see also footnote 15 above.

For both the [Parenting and Support Act](#) and the [Divorce Act](#), it is easy to determine whether a child is under the age of majority or under the required age. The more challenging question is whether a child is unable, by reason of illness, disability, pursuit of reasonable education or other cause, to withdraw from the parent's charge or to obtain the necessities of life.

Generally, a child attending an educational institution on a full-time basis (until completion of the first undergraduate post-secondary degree) will be considered a child of the marriage. The Courts will consider the reasonableness of any academic course of study with regards to how it will help the child withdraw from the parent's charge.³¹⁸ Children pursuing a "second degree" will be considered on a case-by-case basis, to determine whether or not the (adult) child is still unable to withdraw from his or her dependence on parental support. Support should end, however, once the child reaches a level of education commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field.³¹⁹

A child who is no longer pursuing reasonable academic interests and who is out of work will not receive support for an indefinite period.³²⁰ However, the child will likely continue to receive support for a period of "transition" if "struggling" to find their way in life.³²¹

A child who has finished school and is working, albeit not in their field of study, may be found to have ceased to be a "child of the marriage".³²² A child who is not attending school regularly, "laying about", and "just doing what she wants", may no longer be a "child of the marriage".³²³

If, without good reason, a child moves out or discontinues contact with the parent paying support, the child may cease to be a child, for the purpose of the legislation.³²⁴

Once the court is satisfied that a child is a child within the meaning of the legislation, the next matter to address is the amount of child support to be paid.

6. Objectives of child support

The essential principles animating all child support rulings are as follows:

- child support is the right of the child;
- the right to support survives the breakdown of a child's parents' marriage;

³¹⁸ See *Leviston* (1984), [65 NSR \(2d\) 358](#), [1984] NSJ No 7 (FamCt), and cases cited therein

³¹⁹ *Penney v. Simmons*, [2016 NSSC 277](#), citing *Martell v. Height*, [\[1994\] NSJ No. 120](#) (CA)

³²⁰ *Leviston* (1984), [65 NSR \(2d\) 358](#), [1984] NSJ No 7 (FamCt)

³²¹ *Brown*, [2011 NSSC 148](#) at para 15; *Morrison*, [2017 NSSC 163](#), para. 23

³²² *Roose*, [2010 NSSC 180](#); *Poirier*, [2013 NSSC 314](#), paras. 47-49

³²³ *Patriquen v. Stephen*, [2010 NSSC 248](#) at para 19.

³²⁴ See *Edwards v. Watt* (1993), [123 NSR \(2d\) 210](#), [1993] NSJ No 622 (FamCt) at paras 20-22, and the caselaw reviewed therein.

- child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and
- the specific amounts of child support owed will vary based upon the income of the payor parent.³²⁵

The objectives of child support orders are also reflected in statutes and regulations:³²⁶

- to establish a fair standard of support for children ensuring they continue to benefit from the financial means of both spouses post-separation;
- to reduce conflict between spouses by making the calculation of child support more objective;
- to improve the efficiency of the legal process by providing guidance in setting the levels of child support and encouraging settlement; and
- to ensure consistent treatment of spouses and children in similar circumstances.

Under the *Divorce Act* and the [Parenting and Support Act](#), child support takes priority over spousal support.³²⁷

In extraordinary circumstances, costs ordered against a payee spouse in the litigation of child support may be set off against child support, if there will be no adverse impact upon the child.³²⁸

7. Retroactive child support

Courts are authorized to award retroactive child support under the *Divorce Act* or the [Parenting and Support Act](#).³²⁹ A retroactive award is not an exceptional remedy.³³⁰ However, the quantum of the award must be tailored to fit the circumstance of the case.³³¹

It first must be recalled that child support is the right of the child, and parents have an obligation to support their children according to their income. This right of the child survives the breakdown of the relationship of the child's parents. It is the child who loses out when one of his/her parents fails to pay any or the correct amount of child support.³³²

In *Michel v Graydon*, [2020 SCC 24](#) and *Colucci v Colucci*, [2021 SCC 24](#) the Supreme Court of Canada has clarified that a parent cannot bring an original application for retroactive support under the *Divorce Act* if the child was independent and over the

³²⁵ *DBS v SRG*, [2006 SCC 37](#) at para 38

³²⁶ [Section 1](#) of the *Federal Child Support Guidelines*, SOR/97-175, made under [Section 29.1](#) of the *Divorce Act*

³²⁷ [Section 15.3](#) of the *Divorce Act*; [Section 3A](#) of the [Parenting and Support Act](#)

³²⁸ *Barkhouse v Wile*, [2014 NSCA 11](#)

³²⁹ The leading case(s) is: *DBS v SRG*, [2006 SCC 37](#)

³³⁰ *DBS v SRG*, [2006 SCC 37](#) at para 97

³³¹ *DBS v SRG*, [2006 SCC 37](#) at para 128

³³² *DBS v SRG*, [2006 SCC 37](#) at para 118 & 123, read together

age of 19 at the time the application was made. However, a parent may bring an application to vary support for an adult child under the *Divorce Act*, as long as the adult child remains financially dependent. Either an original application for support of an adult child or an application to vary an existing child support order, can be made under the *Parenting and Support Act*.

As noted in *Colucci, supra*, to succeed in a retroactive claim, the applicant must show a past change in circumstances, usually a change in the payor parent's income;

1. There is a presumption that the retroactive date is the date when the other parent was informed of the change in circumstances. Generally, the retroactive date can be up to three years prior to the other parent learning of an application to vary child support;
2. If the other parent was not informed of the change, the retroactive date is the date that they were formally informed of an application to vary child support;
3. If it is unfair to use the presumed retroactive date, the court may choose to apply a different retroactive date. When determining the appropriate retroactive date, the four *D.B.S.* factors are considered (discussed below).
4. If the court determines that a retroactive adjustment is appropriate and a retroactive date is determined, the retroactive amount is determined by referring to the Child Support Guidelines.

The decision of *DBS v SRG*, [2006 SCC 37](#) identified four factors a court will consider when ruling on child support retroactivity, namely: ³³³

- (1) the reasonableness of the payee's excuse for failing to make a timely application;
- (2) conduct of the payor, including any objectively "blameworthy conduct";
- (3) the past and present circumstances & standard of living of the child (not of the parent);
- (4) hardship that may accrue to the payor (may be given little weight considering (2) above).

Regarding the date of commencement of the award, a retroactive award is generally payable from the date the payee gave effective notice to the payor and should in any case not date back more than three years prior to the date when formal notice was provided.³³⁴ A gradual repayment schedule may mitigate any hardship caused to the payor of a retroactive award.³³⁵

It is important to note that *DBS v SRG*, [2006 SCC 37](#) is cited more than 400 times. Each case may have nuances depending on the factual context.

³³³ *DBS v SRG*, [2006 SCC 37](#) at para 101-116

³³⁴ *DBS v SRG*, [2006 SCC 37](#) at para 97

³³⁵ *BM v ALG*, [2014 NSSC 443](#)

(a) Pre-existing order for child support

Where there is a pre-existing order or agreement, but the amount has been inadequate “for some time” a recipient parent may claim retroactive child support. This claim challenges the certainty the payor had come to accept. The payor understood that, until varied, the order or agreement was legally binding. The majority cautioned that payors must accept that agreements or orders are not permanent. Even without ongoing disclosure, parents must appreciate that the quantum of an order reflects circumstances at a particular time. When those circumstances change, quantum, too, should change. The majority clearly stated: “The certainty offered by a Court order does not absolve parents of their responsibility to continually ensure that their children receive the appropriate amount of support.”³³⁶

(b) Prior agreement to pay child support

Where parents have a prior agreement regarding child support, there is a similar potential for a retroactive award. If parents have negotiated an agreement that departs from the [Guidelines](#), adhering to that agreement should not create the same expectation that this satisfies the legal obligation to pay child support. Like orders, agreements may be varied where “circumstances have changed (or were never as they first appeared) and the actual support obligations of the payor parent have not been met”.³³⁷

(c) No existing child support payment

Where there is no existing payment of child support, circumstances are very different:

“... absent special circumstances (e.g., hardship or *ad hoc* sharing of expenses with the custodial parent), it becomes unreasonable for the non-custodial parent to believe (s)he was acquitting him/herself of his/her obligations towards his/her children. The non-custodial parent’s interest in certainty is generally not very compelling here.”

“... the legislatures left it open for Courts to enforce obligations that predate the order itself.”

“So long as the Court is only enforcing an obligation that existed at the relevant time, and is therefore not making a retroactive order in the true sense, I see no reason why Courts should be denied the option of making this sort of award.”³³⁸

The Court also identified three factors for consideration when asked to award retroactive support, namely:

³³⁶ *DBS v SRG*, [2006 SCC 37](#) at para 62-74

³³⁷ *DBS v SRG*, [2006 SCC 37](#) at para 75-79

³³⁸ *DBS v SRG*, [2006 SCC 37](#) at para 80-83

- (a) is there a reasonable excuse for why support was not sought earlier;
- (b) what has been the conduct of the payor parent; and
- (c) what are the circumstances of the child.³³⁹

(d) Reasonable excuse for delay

Justification may be found in fears of a vindictive response, an absence of financial or emotional resources to bring the application or inadequate legal advice.³⁴⁰ A parent's arbitrary choice not to apply generally will not be a reasonable excuse – more is required³⁴¹.

The absence of justification increases the onus on a parent receiving child support to be diligent in ensuring the child's right to support is met on a timely basis: "Recipient parents must act promptly and responsibly in monitoring the amount of child support paid".³⁴²

Where the delay is justified (particularly where the justification lies in the actions of the payor), it may be appropriate to override the certainty of the existing arrangements and make a retroactive award.³⁴³

If there is no justification, it may be appropriate (to ensure fairness to payors) that there be no retroactive award. For payors, there is some protection in promptly advising recipients about income changes without pressure or intimidation.

(e) Payor conduct

The payor's conduct can serve to shift the balance away from certainty and toward flexibility in retroactive support claims if the conduct is blameworthy.

The majority proposed that blameworthy conduct would be viewed expansively characterizing blameworthy conduct as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support."³⁴⁴

Blameworthy conduct included hiding income increases, intimidating or dissuading the recipient from applying for child support and misleading the recipient into believing that child support obligations are being met when they are not.³⁴⁵

³³⁹ *DBS v SRG*, [2006 SCC 37](#) at para 94-113

³⁴⁰ *DBS v SRG*, [2006 SCC 37](#) at para 101

³⁴¹ See for instance *Suen v. Dunn* [2018 N.S.J. No. 34](#) where the recipient argued that she delayed in seeking retroactive support because she was (1) busy setting up a new business; (2) busy getting her daughter ready for graduation; and (3) busy preparing her daughter for university.

³⁴² *DBS v SRG*, [2006 SCC 37](#) at para 103

³⁴³ *DBS v SRG*, [2006 SCC 37](#) at para 101

³⁴⁴ *DBS v SRG*, [2006 SCC 37](#) at para 106

³⁴⁵ *DBS v SRG*, [2006 SCC 37](#) at para 106

The threshold for blameworthy conduct is low: the passive and conscious avoidance of the obligation to pay support at the appropriate level is blameworthy. The key is “conscious” avoidance. If the payor reasonably believed that the obligation is being met, the conduct may not be blameworthy.³⁴⁶

Appropriate conduct can reduce a payor’s exposure to a retroactive award. Payments that exceed an ordered or agreed upon amount may indirectly satisfy the child’s entitlement; however, payors should be careful of appearing to exercise control over the support.³⁴⁷

(f) The child’s circumstances

The determination whether to enforce child support retroactively can be influenced by considering the hardship the child experienced when the obligation was not met.³⁴⁸ This includes considering the child’s circumstances at the time when the obligation existed and at the time the application is made.

If the family’s resources were sufficient to shelter the child from any hardship, this will undermine the retroactive claim. Trial judges “should [not] delve into the past to remedy all old familial injustices through child support awards”.³⁴⁹ In this context, it is irrelevant whether a recipient parent has been forced to make additional sacrifices, in determining whether to enforce the child support obligation retroactively.

(g) Payor hardship

In considering whether the payor would experience hardship³⁵⁰ because of a retroactive award, Courts should consider the impact of the award on children in second families. Awards should be crafted to minimize hardship, though hardship may be unavoidable. There is less concern about hardship where the retroactive claim arises from the payor’s blameworthy conduct.

Generally, it will be easier to show a retroactive award causes undue hardship than a prospective award.³⁵¹ The situations that give rise to undue hardship applications in the context of retroactive claims will likely differ from those raised at prospective applications.

(h) Amount of retroactive award

Fixing the amount of a retroactive award means determining a starting date and fixing the shortfall between what was paid and what ought to have been paid. Of the possible

³⁴⁶ *DBS v SRG*, [2006 SCC 37](#) at para 108

³⁴⁷ *DBS v SRG*, [2006 SCC 37](#) at para 109

³⁴⁸ *DBS v SRG*, [2006 SCC 37](#) at para 113

³⁴⁹ *DBS v SRG*, [2006 SCC 37](#) at para 113

³⁵⁰ *DBS v SRG*, [2006 SCC 37](#) at para 115

³⁵¹ *DBS v SRG*, [2006 SCC 37](#) at para 129

starting dates (date of court application, date of formal notice, date of effective notice and date when support ought to have increased), the majority chose the date of effective notice as the date from which claims should generally be calculated. Relying on court-based dates (the date of court application or the date of formal notice) compels parties to adopt an adversarial approach to resolving their disputes and should be avoided.³⁵²

“Effective notice” is “any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated.”³⁵³ Legal steps are not required. Speaking up is not enough. The recipient parent must take steps to move the matter forward.

(i) Guidance in the *Guidelines*

[Section 25\(1\)\(a\)](#) of the *Guidelines* offers a rough guide for retroactive awards: “it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.”³⁵⁴ A payor’s blameworthy conduct may adjust a start date, moving the presumptive date to the time when the circumstances changed materially.³⁵⁵

The shortfall is to be calculated using the *Guidelines* and adjusting their application as is appropriate, having regard to undue hardship claims and the Courts’ discretion in cases of a child over the age of majority, where the payor’s annual income exceeds \$150,000.00 or where a child is in shared custody.

8. Child Support *Guidelines*³⁵⁶

When “spouse(s)” or “parent(s)” are referred to below that includes “spouses” under the federal *Guidelines* and “parents and guardians” under the provincial *Guidelines*.

The Child Support *Guidelines* are regulations, and subject to change. The Federal *Guidelines* were last amended on December 31, 2011, and the Provincial *Guidelines* on June 7, 2007.

(a) Determining the amount of support

[Section 15.1](#) of the *Divorce Act* and [sections 10 and 11](#) of the *Parenting and Support Act* empower the Court to order the payment of child support in accordance with the applicable *Guidelines*.

³⁵² *DBS v SRG*, [2006 SCC 37](#) at para 120

³⁵³ *DBS v SRG*, [2006 SCC 37](#) at para 121

³⁵⁴ *DBS v SRG*, [2006 SCC 37](#) at para 123

³⁵⁵ *DBS v SRG*, [2006 SCC 37](#) at para 124

³⁵⁶ [Federal Child Support Guidelines, SOR/97-175](#), made under Section 29.1 of the *Divorce Act*; *Child Maintenance Guidelines* made under [Section 55](#) of the *Parenting and Support Act*, [NS Reg 53/98](#)

The [Guidelines](#) are presumptive and the Court may not depart from them, unless it is otherwise entitled to do so as provided for by the Act or the [Guidelines](#).

One circumstance in which the Court may depart from the [Guidelines](#) is if it is satisfied that **special provisions** in an order, judgment or written agreement respecting the spouses' financial obligations or the property division or transfer, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child and that the [Guidelines](#)' application would result in an inequitable award given those special provisions.³⁵⁷

When an agreement is made during or in contemplation of a divorce proceeding the parties are commonly settling child support, spousal support and effecting a property division. There are often trade-offs. The non-custodial spouse may settle assets on the custodial parent in lieu of a larger amount of child support or may undertake to pay certain child related expenses directly, thereby reducing the custodial parent's need for monthly child support. If the arrangement is out of the ordinary or unusual, plainly for the benefit of the child and reduces the need for support, this is a "special provision" allowing departure from the **Guideline** amount.³⁵⁸

The other circumstance is where there is a finding of "undue hardship", examined below. Additional rules apply to payors with an income over \$150,000 (discussed below).³⁵⁹

³⁵⁷ Section 15.1(5) of the [Divorce Act](#)

³⁵⁸ *MacKay v. Bucher*, [2001 NSCA 120](#), para 38; *Manuele v. O'Connell*, [2012 NSSC 271](#), paras. 7-11

³⁵⁹ [Guidelines](#), Section 4

(b) The table amount

It is presumed, under [subsection 3\(1\)](#) of the **Guidelines**, that the amount set out in the table, plus any additional amounts for special or extraordinary expenses ([section 7](#)), is the appropriate amount of support for children under the age of majority.

Each province or territory has a table that outlines a monthly amount of child support for the number of children in the household and the parent's level of income. The table that applies is that of the province or territory in which the payor spouse ordinarily resides.

If the payor spouse lives outside Canada, regard should be had to the table for the province or territory in which the custodial spouse resides.

Child Support for Children Over the Age of Majority

This is a “messy” area of the law and there is no one clear approach. For children the **age of majority or older**,³⁶⁰ the appropriate amount is either the amount shown in the **Guidelines** (the table amount and add-ons under [section 7](#)) or, if the Court considers this inappropriate, an amount the Court considers appropriate having regard to the condition, means, needs or other circumstances of the child and each parent's financial ability to contribute to the child's support.

In broad strokes, the court must determine how much an adult child needs to maintain a reasonable lifestyle, and how much the child can reasonably contribute from his or her own resources, potentially including student loans. The shortfall can then be compared to the [Guidelines](#) amount to determine if that amount is inappropriate. If inappropriate, the court can apportion the shortfall between the parties according to their respective incomes.³⁶¹

If a child attends a post-secondary institution in a different location from the primary residence with the custodial parent, the custodial parent may still receive child support on the understanding that the custodial parent is maintaining a residence for the child to return to during the summer and over holiday periods.³⁶²

1) Entitlement

A *child of the marriage* under s. 2 of the *Divorce Act* must be under parental charge. “Charge” is an economic term and withdrawal is performed by the child (*Thompson v Ducharme*, [2004 MBCA 42](#)).

To determine if an adult child is a “child of the marriage”, courts consider the eight (8) *Farden* factors (*Farden v Farden* [\(1993\) 48 RFL \(3d\) 60](#) (BCSC)).

³⁶⁰ *Guidelines*, [Section 3\(2\)](#)

³⁶¹ *Rebenchuk*, [2007 MBCA 22](#), para 34; *Selig v. Smith*, [2008 NSCA 54](#)

³⁶² *Lu v. Sun*, [2005 NSCA 112](#); *Lane*, [2016 NSSC 81](#), *Miller*, [2019 NSSC 28](#).

2) Table Amount not “inappropriate”

If the table amount is not “inappropriate”, the approach is the same as if the child was under the age of majority: table amount plus section 7 expenses (s. 3(2)(a); *Lu v Sun, supra*; *Gillis v Gillis*, [2013 NSSC 251](#)).

The court must undertake an analysis to determine if the approach under s. 3(2)(a) is inappropriate, as per s. 3(2)(b). “Inappropriate” means “unsuitable” (*Francis v Baker*, [\[1999\] 3 SCR 250](#) (SCC)). In general terms, the closer the circumstances are like a child under the age of majority, the less likely to be “inappropriate”. Where a child has moved out and is living on their own, the more likely to be “inappropriate” (*Rebenchuck, supra*; *Lee v Lee*, [2009 NSSC 121](#)). If a child has significant earnings, the table amounts are more likely to be “inappropriate” (*Rebenchuk, supra at 32*).

3) Table Amount “inappropriate”

If the table amount is inappropriate, the court is to consider and decide what amount is appropriate, considering the condition, needs, means and other circumstances of the child, and each spouse’s financial ability to contribute. This generally results in an award that is less than the monthly table amount plus s. 7’s and may only be a proportionate sharing of university expenses with no monthly child support otherwise payable. Where monthly child support is ordered (either full or reduced), this is typically only during those times when the child is living at home.

The Nova Scotia Court of Appeal has weighed in regarding the approach to adult child support including post-secondary educational and living expenses in *Lu v Sun*, [2005 NSCA 112](#). The full table amount was ordered while the child was home for the summer, and half the table amount while the child was in school, after accounting for the cost to maintain a home for the child, plus proportionate section 7 university related expenses. *Lu v Sun* is not being strictly followed. In recent Nova Scotia cases, adult child support was dealt with as follows:

- Table amount during summer while children are home and 50% of table amount during months at university, prorated over twelve months to equal a monthly amount payable. Section 7 expenses were covered by RESP and trust funds and as such were not needed. (*Miller v Miller*, [2019 NSSC 28](#))
- Table amount during times when children are home for more than 2 weeks, plus a proportionate sharing of university expenses. Reviews detailed expense budgets and reduces them for reasonableness and tax credits (*Mastin v Mastin*, [2019 NSSC 248](#)). (Approach #2)
- Table amount awarded for full year (child living away at university) plus proportionate sharing of university expenses (parties agreed to determination under s. 3(2)(a)) (*Johnson v Johnson*, [2019 NSSC 222](#)).
- An amount chosen for monthly support, based on the guidelines, only for the part of the year the child is home. It was noted that the mother had no household

expense for her while she was not home, but the cost of university was a significant expense (*Gandy v Gandy*, [2015 NSSC 300](#)).

- An amount is chosen for monthly support which is (\$300 less/month than table) based on an analysis of the table amount + proportionate sharing and then reduced after reviewing all of the circumstances (means, needs and ability to pay of all of the parties) (*Gillis v Gillis*, [2013 NSSC 251](#)).
- No table child support, just proportionate sharing of university expenses (*Lee v Lee*, [2009 NSSC 121](#)).

In many of these cases, the child's expense budget was the main consideration. Typically, the expense budget includes living expenses as well as tuition, textbooks and other fees.

More than one degree/diploma: Parents are often obligated to fund a second degree for the child, especially (but not necessarily) if they have the means to do so and they would have supported the child if they remained together. Cases that support entitlement for child support beyond the first degree include:

- Support payable for Master's degree, but not the time between completion of Master's programme and finishing her thesis, because there was not enough evidence about what was going on during that period and why she was dependent on her parents. Support not payable for certificate programme she took following her Master's degree, at age 27 after purchasing a home. (*Kim v Kim*, [2019 ONSC 4685](#)).
- Support payable for first and second undergraduate degrees and two months transitional time after obtaining part time employment for one child. Support payable for one undergraduate degree and a following two-week program, plus two months transitional time after obtaining part time employment for the second child. (*Luv Yao*, [2019 BCSC 652](#)).
- Support payable for law degree (in UK), given the parents, had they remained together, would have provided the child with some support for her second degree (*MABA v FA*, [2011 MBQB 245](#)).

Breaks in Education: Where there is a break in attending a post-secondary institution, the question is whether the child continued to be a "child of the marriage" under s. 2(1) of the *Divorce Act*. Generally, child support is not payable while the child is not attending school, but the Manitoba Court of Appeal noted in *Rebenchuk* that (para 57) "Most courts are quite tolerant of breaks in studies and require the non-custodial parent to pay support upon re-enrollment" (emphasis mine).

Child's Contribution to Expenses: Generally, where there is a contribution from the child, this is taken into account when determining the amount of support payable. The court "must determine how much the adult child needs to maintain a reasonable lifestyle, and how much the child can reasonably contribute from his or her own resources. The shortfall can then be compared to the Guidelines amount to determine if the guidelines

are inappropriate” (*Rebenchuk, supra* at para 34). The case law generally supports the notion that a child may be required to contribute if they are able to do so.

However, where the parents are extremely wealthy, the child may not be required to contribute, even where he or she has the ability to do so (see *Shaw v Arndt*, [2016 BCCA 78](#); *WPN v BJN*, [2005 BCCA 7](#)).

Conversely, where the child has enough resources to fund his/her education without assistance from parents, no support may be ordered (see *KNH v JPB*, [2019 ABQB 511](#), where the child had enough through RESP’s to fund his education; *Miller v Miller* [2019 NSSC 28](#), where the child’s resources were likely to be sufficient).

(c) Special or extraordinary expenses

The [Guidelines](#) provide that certain special or extraordinary expenses (sometimes called “**add-ons**”) will be shared between spouses in proportion to their income, net of any tax benefits.³⁶³

All the expenses must meet the test in the preamble to this section, which states that a court “**may**” provide for an amount to cover these expenses, “taking into account the necessity of the expense in relation to the child’s best interests and the reasonableness of the expense in relation to the means of the spouses, those of the child and to the family’s spending pattern prior to separation.”³⁶⁴ Some of these expenses must also be “extraordinary”.

It is therefore preferable to proceed as follows:

- (1) First, consider whether the expense is necessary as it relates to the children's best interests;
- (2) Second, consider whether the expense is reasonable in relation to the means of the spouses and the children, and to the pattern of spending that existed for this family prior to the separation;
- (3) Third, determine whether or not the expense is extraordinary, if the language of the [Guidelines](#) uses this expression (*i.e.*, education and extra-curricular expenses).³⁶⁵

These expenses include:

- childcare expenses incurred because of the custodial parent’s employment, illness, disability or education or training for employment;
- The portion of medical or dental insurance premiums attributable to the child;

³⁶³ *Guidelines*, Section 7

³⁶⁴ *Guidelines*, [Section 7\(1\)](#)

³⁶⁵ *Gordinier-Regan v. Regan*, [2011 NSSC 297](#), at para 19

- Health-related expenses which exceed insurance reimbursement by at least \$100 annually per illness or event, including orthodontic treatment, professional counselling, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- Extraordinary expenses for primary or secondary school education or for any educational programs that meet the child’s needs;
- Expenses for post-secondary education’; and
- **Extraordinary** expenses for extra-curricular activities.³⁶⁶

It is important to note that not all these add-on expenses must meet the test of being extra-ordinary (the others are presumably “special” but not “extraordinary”).

A theoretical challenge for the court with respect to educational programs and extra-curricular activities is to decide whether the cost is “included” in the Guideline amount (fixed with reference to the payor’s income) or are the expenses “extraordinary” and therefore not included.

In an effect to clarify such matters, on May 1, 2006, Section 7 of the [Guidelines](#) was amended to add a definition of the word “extraordinary” ([Section 7\(1.1\)](#)). Judicial interpretation had been divided up to that point on the meaning of this term, with one approach applying a more subjective test to determine whether an expense is extraordinary and the other approach using a more objective measurement. The definition provides a more subjective definition of extraordinary than that provided by a purely objective approach.

Extraordinary expenses are those that **exceed** those that the spouse requesting the amount can reasonably cover, considering that spouse’s income and the amount that the spouse would receive under the applicable table or the court has otherwise determined is appropriate.³⁶⁷

The court may also find the expenses to be “extraordinary” taking into account

- (i) the amount of the expense in relation to the income (including support) of the spouse requesting the amount;
- (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.³⁶⁸

³⁶⁶ *Guidelines*, Section 7(1)

³⁶⁷ *Guidelines*, [Section 7\(1.1\)\(a\)](#)

³⁶⁸ *Guidelines*, Section 7(1.1)(b)

Prior to this amendment to the [Guidelines](#), Nova Scotia decisions defined extra-curricular activities and the extraordinary expenses in a limited fashion.³⁶⁹ The amendments to the [Guidelines](#) may have offered clarity but probably did not signal a shift in values.³⁷⁰

Individual expenses may be “extraordinary”, or the aggregate of such expenses may be “extraordinary”, even if each individual expense is not.³⁷¹ It is not uncommon to see a mixed result respecting expenses alleged to be special or extraordinary.³⁷²

(d) Split and shared custody

The **Guidelines** also deal with both split custody and shared custody situations.³⁷³

“Split custody” arises when each spouse has custody of at least one child. If there is split custody, the amount of child support is the difference between the amount that each spouse would pay the other under the **Guidelines**. This is a strict set-off approach that is mandated by the **Guidelines** and is not discretionary.

“Shared custody” or “shared parenting” occurs when both spouses have the child in their care not less than 40% of the time through-out the year. If there is shared custody, the amount of child support must be determined by considering the **Guideline** amount, the increased cost of shared custody, and the condition, means, needs or other circumstances of each spouse and the child.

The Supreme Court of Canada has addressed child support in a shared parenting arrangement.³⁷⁴ The child divided his time equally between his parents. The majority found that an increase in the time that a child spends in the custody of a payor parent does not automatically trigger a decrease in child support. Once the 40% threshold is met, the court must then determine the amount of child support by considering the three factors listed in [s. 9](#), while emphasizing flexibility and fairness.

The same principles apply to shared custody under both provincial and federal guidelines.³⁷⁵ The factual record must be adequate if the court is to rule on [Section 9](#) principles.³⁷⁶ Unless there are “exceptional circumstances”, which have never really been identified, a shared parenting order applying Section 9 and an undue hardship order applying Section 10 are mutually exclusive.³⁷⁷

³⁶⁹ e.g., *Raftus*, [1998 NSCA 75](#), 166 NSR (2d) 179

³⁷⁰ e.g., *DMCT v LKS*, [2008 NSCA 61](#): analysis of issue at para 20-34; leave to appeal further refused: [2008] SCCA No 457 compared with the analysis in *Raftus*.

³⁷¹ *Simpson v. Trowsdale*, [2007 PESCTD 3](#), at para 27

³⁷² e.g., *Fraser v. Campbell*, [2015 NSSC 28](#), at paras 30-42

³⁷³ *Guidelines*, [Section 8](#) & 9

³⁷⁴ *Contino v. Leonelli-Contino*, [2005 SCC 63](#)

³⁷⁵ *Woodford v MacDonald*, [2014 NSCA 31](#), at para 12

³⁷⁶ For an inadequate record leading to reversal on appeal see *Woodford v MacDonald*, [2014 NSCA 31](#)

³⁷⁷ *RAB v. CWR*, [2016 NSFC 14](#) at para. 11-12, citing *Contino v. Leonelli-Contino*, [2005 SCC 63](#), para. 72

Shared parenting arrangements also impact access to tax credits and government benefits such as the eligible dependent credit and the child tax credit. If a shared parenting arrangement is in place, the parties will each receive 50% of his or her entitlement to the child tax benefit. However, Revenue Canada can go behind the face of an order that provides for shared parenting if one parent practically has a child less than 40% of the time and this can impact access to government benefits.³⁷⁸

³⁷⁸ *Théodore v. Canada*, [2018] T.C.J. No. 11

(e) Undue hardship

A court has, under Section 10 of the [Guidelines](#), discretion to award a sum different from the table amount and add-ons, if **either** spouse pleads that the amount would cause “undue hardship”. These claims are hard to establish.

Circumstances which fall within this provision include a spouse who has responsibility for an unusually high level of debt incurred to support the spouses and their children prior to separation or to earn a living; unusually high access costs; or a legal obligation to support another person or other child.³⁷⁹

If a person’s circumstances are among those in Section 10, the next step is to compare the standards of living in the two households, which comparison may include the financial contribution of other persons in the household.

The court must deny the claim if, in the court’s opinion, the household of the person claiming undue hardship would have a higher standard of living, after the payment of support, considering the number of people in the household.³⁸⁰ Schedule II of the [Guidelines](#) provides a test that the court may use for comparing the household standards.³⁸¹

The plea of undue hardship is a two-stage process as described above. Section 10 (2)(a) to (e) of the [Guidelines](#) lists circumstances which are to be considered in evaluating whether there is undue hardship. Only when such circumstances are found to exist does the second step become relevant; that is, comparison of household standards of living.³⁸² The circumstances in 10 (2)(a) to (e) are not exhaustive.³⁸³

In a claim for undue hardship, the payor’s own lifestyle choices are considered in determining whether a claim may succeed. As stated in *Westhaver v. Swinemar*³⁸⁴, the payor’s “claim for undue hardship was a “feeble attempt to shift blame and to rationalize his own poor lifestyle and business decisions”.

(f) Determining income

To properly apply the [Guidelines](#)’ Tables, it is necessary to first determine a spouse’s annual income. If a payor earns \$150,000 or less, the [Guidelines](#) are presumptive: the Court must apply the table amounts.

The simplest determination of a spouse’s annual income has regard to the sources of income set out under the heading “Total Income” in the T1 General Form, as adjusted in

³⁷⁹ Section 10(2) of the *Guidelines*

³⁸⁰ Section 10(3) of the *Guidelines*

³⁸¹ Section 10(4) of the *Guidelines*

³⁸² *Van Gool*, [1998] BCJ No 2513 (CA), at para 45

³⁸³ See *Gaetz*, 2001 NSCA 57

³⁸⁴ 2017 NSCA 16 (citing from the trial decision), para. 41.

accordance with Schedule III of the [Guidelines](#). This requires the lawyer to consider the spouse's income tax return and inquire with respect to all categories of income shown in the T1 form, even if the previous year's return does not show income in a certain category.

Under section 4 of the [Guidelines](#), there are two options for calculating child support where the income of a payor parent exceeds **\$150,000 per year**.

First, the Court may consider the amount calculated in accordance with [s. 3](#) of the **Guidelines** (table amount and add-ons); after this calculation, if the judge considers the amount so calculated to be "inappropriate", she must make an award that is the total of:

1. at least the Table amount for the first \$150,000;
2. in respect of the balance of the spouse's income the amount the Court considers appropriate having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute; and,
3. the amount determined under [s. 7](#) (add-ons).

The individual claiming the table amount is inappropriate has the onus of establishing why this is the case.³⁸⁵

"Inappropriate" does not mean "inadequate". It means unsuitable having regard to the condition, means, and needs of the parties, sometimes also based on a children's budget³⁸⁶. The Court has stressed the need for fairness and flexibility on a case-by-case analysis. If the table amount is "inappropriate", a greater or lesser amount than the table amount can be awarded. Children should expect a "fair additional amount" after the first \$150,000 table amount. However, the closer the payor's additional income is to \$150,000 the more likely it is that the table amount will be ordered. [Section 4](#) should not be used to redistribute wealth to provide spousal support.³⁸⁷

Where the spouse is an employee, Schedule III requires employee spouses to deduct certain employment expenses. Schedule III must be read very carefully. These deductions are specific and all are shown with references to paragraph 8 of the [Income Tax Act](#). [Section 8](#) of the [Income Tax Act](#) must be read with this Schedule to determine if any of the deductions are applicable.

If a payor earns less than the minimum threshold defined by the Guidelines (\$10,819), there will be no requirement to pay child support.

Sometimes spouses argue that overtime work should not be included in calculating income for the purposes of determining support. However, Courts have found that non-

³⁸⁵ See *Francis v. Baker*, [1999] 3 SCR 250

³⁸⁶ *Francis v. Baker*, [1999] 3 SCR 250, para. 45.

³⁸⁷ See *Francis v. Baker*, [1999] 3 SCR 250

recurring income (such as from working significant overtime) may be a valid predictor of current and future income and include the same in its determination of income.³⁸⁸ There must be some evidence that overtime work continues to be available.³⁸⁹ Similarly, windfall amounts received (such as from a class action settlement), may also be included in a payor's income for the purposes of determining support.³⁹⁰

Where a spouse receives income in the form of dividends it is important to analyse whether the dividends should be "grossed-up" to account for the preferred tax treatment of dividends compared to employment income.³⁹¹ Similarly, reported taxable capital gains are replaced by the actual amount of the gain realized in excess of the spouse's actual capital loss in that year.

Where a spouse's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees or payments of some other form made to or on behalf of a person with whom the spouse does not deal at arm's length, the amount paid must be included in the spouse's income. This inclusion occurs unless the spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.

Determination of Income of Business Owners

When a payor derives income because he or she is a shareholder of a corporate entity, a court will analyze whether there is more income available to the payor that the payor is choosing not to take.

The court may **impute income** to a payor as a result of the **Guidelines**.³⁹² (The Nova Scotia Court of Appeal has also suggested that [Section 15.2\(4\)](#) of the *Divorce Act* provides a preferable legal basis for imputing income.)³⁹³

Section 18 of the *Federal Child Support Guidelines* has been used to impute income to a spouse beyond the income that appears on his or her personal tax returns by considering the performance of companies in which s/he is a shareholder/director. Courts have considered the company's income, expenses (such as personal expenses of the shareholder) and deductions to justify increases to the payor's income, as well as retained earnings of the company.

Section 18 states:

(1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as

³⁸⁸ *Odendahl v. Brule*, [1999] OJ No 1324 (CJGD); Poirier, [\[2016\] N.S.J. No. 530](#) at paras 25-26

³⁸⁹ *White*, [2015 NSCA 52](#); Penney v. Simmons, [\[2016\] N.S.J. No. 409](#).

³⁹⁰ *Woodford v. Horne*, [\[2015\] N.S.J. No. 316](#), paras 25-30.

³⁹¹ *Hamilton*, [2010 NSSC 198](#)

³⁹² Section 19 of the *Guidelines*; see, for example, *Toney v Spencer*, [2014 NSFC 19](#) at paras 32-37

³⁹³ *Richards*, [2012 NSCA 7](#)

determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

Section 18 of the *Child Support Guidelines* does not require that the spouse be a controlling shareholder. In the decision of **Jenkins v. Jenkins**, [2012 NSSC 117](#) (CanLII) the following emergent themes are summarized:

1. Courts will access the pre-tax corporate income for support purposes.
2. The onus of proof falls upon the director, officer, or shareholder to show that the pre-tax corporate income is not available for support purposes. Evidence of legitimate business needs must be led before a court can conclude that the corporation requires its pre-tax income.
3. Minority shareholders are not necessarily exempt from having pre-tax corporate income imputed to them for support purposes. The courts may grant the right to at least examine the financial statement of the corporation, even if the party is only a minority shareholder.
4. Personal benefits paid on behalf of a shareholder, officer, or director by a corporation will be considered in the calculation of income
5. Negative inferences are correctly drawn when there is a lack of disclosure and a lack of relevant evidence before the court.

In most businesses, decisions are made regarding the amount to be taken from a business's profit or income and the amount that will be retained to build up assets or reduce debt. The shareholder bears the burden of proving that retained earnings are required by the company for its operation. There is a complimentary understanding, however, that corporations do require some measure of retained earnings to maintain the company's future health.

This is a complicated area of the law. It is important to consider whether an expert accountant should be retained to assess the amount of income available to a business owner to pay support.³⁹⁴

³⁹⁴ See for instance, *Breed*, [\[2012\] N.S.J. No. 114](#).

Imputation of Income

Income may be also be imputed to a payor, for example, if:

- a spouse is under-employed or unemployed, other than where this is [reasonably³⁹⁵] required by a child’s needs or the spouse’s education or health needs;³⁹⁶
- the spouse is exempt from paying federal or provincial income tax;
- the spouse lives in a country with an effective tax rate that is significantly lower than that of Canada;
- it appears income has been diverted affecting the level of child support that would otherwise be determined;
- the spouse’s property is not reasonably utilized to generate income; the spouse has failed to provide income information when under a legal obligation to do so;
- the spouse unreasonably deducts expenses from income;
- the spouse derives a significant portion of income from dividends, capital gains or other sources of income that are taxed at lower tax rates than employment or business income;
- the spouse is a beneficiary under a trust;³⁹⁷
- the spouse retires voluntarily;³⁹⁸
- the spouse has a pattern of high earnings and good prospects, but recent unemployment;³⁹⁹

Imputation of income is discretionary, but the amount imputed must not be arbitrary, and must have a solid evidentiary foundation.⁴⁰⁰ The principles summarized in the case law largely track those in Section 19 of the **Guidelines** but are authoritatively described in the appeal decisions.⁴⁰¹

(g) Disclosure of information

Sections 21 through 25 of the **Guidelines** deal with the requirements to provide information about income, and the consequences of a failure to comply with disclosure requirements or a failure to comply with a court order.

³⁹⁵ *Montgomery*, [2000 NSCA 2](#) at para 36

³⁹⁶ Unemployment or underemployment need not be “intentional” or “recklessly” caused: *Montgomery*, [2000 NSCA 2](#) at para 35

³⁹⁷ Section 19 of the **Guidelines**. See *Parsons*, [2012 NSSC 239](#) at paras 32-33; *Dalton v Clements*, [2016 NSSC 38](#).

³⁹⁸ *Oderkirk*, [2014 NSSC 37](#)

³⁹⁹ *White*, [2016 NSSC 290](#), para. 14-15

⁴⁰⁰ *White*, [2015 NSCA 52](#) at paras 17-31

⁴⁰¹ e.g., *Smith v. Helppi*, [2011 NSCA 65](#), para. 12; *White*, [2015 NSCA 52](#), para. 17-31

The consequences of a failure to comply with the disclosure requirements include the spouse being non-suited or having a contempt order made against them. Lack of disclosure may also cause the court to grant retroactive support to a date preceding the application.⁴⁰²

There is an ongoing obligation to provide income information on an annual basis. The income information that the **Guidelines** require is the same income information as is listed in the forms under the *Civil Procedure Rules*.

(h) Variation

Applications may be brought to vary a child support order under the **Divorce Act**.⁴⁰³

A judge must be satisfied that a change in circumstance has occurred since the making of the child support order or the last variation order. On a variation application, the court must apply the [Guidelines](#).

Section 14 of the [Guidelines](#)⁴⁰⁴ provides that a change in circumstance giving rise to the making of a variation order in respect of child support may be established by the following:

- (a) where support is determined under the [Guidelines](#), any change in circumstances that would result in a different amount of child support (i.e. a change in payor's level of income);
- (b) for orders pre-dating the coming into force of the **Guidelines**; and,
- (c) for orders not based on the tables, any change in the condition, means, needs or other circumstances of either spouse or child.

The **Divorce Act** also provides for inter-provincial variation, through a process of provisional variation and confirmation/refusal hearings before judges in the two provinces.⁴⁰⁵ The **Interjurisdictional Support Orders Act**, SNS 2002, c 9 provides for a similar process for provincial child support orders.

In the case of a variation order with respect to a child support order pursuant to the [Parenting and Support Act](#) section 37 provides that the Court shall apply the **Guidelines** previously provided for in [Section 10](#). (Section 10 provides that when determining the amount of support to be paid for a dependent child, the Court shall do so in accordance with the [Guidelines](#).)

⁴⁰² *Kyte v Clarke*, [2014 NSSC 133](#)

⁴⁰³ Section 17 of the **Divorce Act**

⁴⁰⁴ Section 14 of the Nova Scotia **Guidelines** is identical to section 14 of the federal **Guidelines**, except the effective date for application to old orders is August 31, 1998, as opposed to May 1, 1997 (when the respective regulations were proclaimed).

⁴⁰⁵ Section 19 of the **Divorce Act**. See for example the application process in *Ruck*, [2016 NSSC 45](#); *Lee v. Hebert*, [\[2017\] N.S.J. No. 514](#)

VIII. SPOUSAL SUPPORT

1. Married spouses

In the case of spousal support orders, objectives are found in [section 15.2](#) of the [Divorce Act](#):

- (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) insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period.⁴⁰⁶

The legislation does not specifically require that the court must first find entitlement to spousal support before determining quantum, though this practice is followed in applications.

In making an order for spousal support the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including:

1. the length of time the spouses cohabited;
2. the functions performed by each spouse during cohabitation; and,
3. any order, agreement or arrangement relating to support of either spouse.⁴⁰⁷

The philosophy of the **Divorce Act** has been addressed by the Supreme Court of Canada in two cases, **Moge**⁴⁰⁸ and **Bracklow**.⁴⁰⁹

In **Moge**⁴¹⁰ the Court stated that in most marriages one party tends to suffer economic disadvantage from the marriage or its breakdown and this person is most often the wife. This is because of the traditional division of labour within the institution of marriage. The Court held that spousal support can be awarded on a **compensatory** basis to place the parties in a position as close as possible to that of the household before the breakdown. The longer the marriage, the greater the presumption for equal standards of living afterward.

⁴⁰⁶ Section 15.2(6) of the [Divorce Act](#)

⁴⁰⁷ [Section 15.2\(4\)](#) of the [Divorce Act](#)

⁴⁰⁸ [\[1992\] 3 SCR 813](#)

⁴⁰⁹ [\[1999\] 1 SCR 420](#)

⁴¹⁰ [\[1992\] 3 SCR 813](#)

In *Bracklow*,⁴¹¹ the Supreme Court of Canada considered spousal support rights where there was a shorter-term marriage, but the wife became disabled. These facts still gave rise to a **non-compensatory** basis for spousal support. The Court also found in that case that a **contractual** basis for support may be available; as a result, compensatory, non-compensatory, and contractual bases for a support obligation are all available under the **Divorce Act**.

The principles governing spousal support **entitlement** in this province are easily summarized.⁴¹²

The starting point of any entitlement analysis is that marriage is a "joint endeavour". The default presumption of is a socioeconomic partnership of mutuality and interdependence. Absent indications to the contrary, marriages are generally premised on obligations and expectations of mutual and co-equal support. When a marriage breaks down, however, the presumption of mutual support that existed during the marriage no longer applies. The overarching principle favours an "equitable sharing" of the economic consequences of marriage or marriage breakdown. It is not a question of choosing either one model of spousal support or another. Rather, it is a matter of applying the relevant factors and striking the balance that best achieves justice in the case.

Compensatory support should be awarded where it would be just to compensate a spouse for his or her contribution to the marriage or for sacrifices made or hardships suffered because of the marriage. Examples of circumstances that may lead to an award of compensatory support might include, if a spouse's education, career development or earning potential have been impeded because of the marriage, or the spouse has contributed financially either directly or in-directly to assist the other spouse in his or her education or career development.⁴¹³

Often, the most significant economic consequence of marriage or marital breakdown arises from the birth of children. Traditionally, this would often result in the wife cutting back on participating in the workforce to care for the children, potentially jeopardizing her ability to ensure her own income security and independent economic well-being. In such situations, compensatory support may be a way to offset such economic disadvantage. Great disparity in standards of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. The longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

⁴¹¹ [\[1999\] 1 SCR 420](#)

⁴¹² See *Gates*, [2016 NSSC 49](#), para. 63, for the principles that follow, embedded citations omitted. For another useful and recent summary, see *Fewer*, [2016 NSSC 244](#), para. 16-23, but *Gates* was approved of by the Nova Scotia Court of Appeal in *MacDonald*, [2017 NSCA 18](#), para. 53

⁴¹³ e.g., *Shurson*, [2008 NSSC 264](#), para. 13

On the other hand, **non-compensatory support** is grounded in the "basic social obligation" or "mutual obligation" model of marriage, which stresses that marriage creates interdependencies that cannot be easily unravelled. These interdependencies create expectations and obligations that the law then recognizes and enforces. It holds that a mutual obligation of support may arise even after the marriage breakdown and places a burden of support for the partner in need, the one who cannot attain post-marital self-sufficiency, on the former spouse rather than on the state. Non-compensatory support acknowledges that even if a spouse has not foregone any career opportunities or has not otherwise been disadvantaged by the marriage, the court is required to consider that spouse's actual ability to fend for himself or herself and the effort made to do so, including efforts after the marital breakdown. Non-compensatory support focusses on the "needs" and "means" of the parties. It recognizes that spouses may have an obligation to meet or to contribute to the needs of their former spouses where they have the capacity to pay, even in the absence of a contractual or compensatory foundation for the obligation.

Finally, **contractual support** is premised on any support agreement between the spouses, whether express or implied. The support obligation, whether compensatory and/or non-compensatory, can be varied by the parties by contract. Such an agreement may either create or negate an obligation for support, on the facts of the parties' agreement.

Fixing **quantum** of support is discretionary, but the court must consider the factors in s. 15.2(4) of the **Divorce Act**, and the objectives in s. 15.2(6), reproduced above. Regarding the latter objectives, all four must be born in mind simultaneously. Regarding the former (the factors):

- "condition" includes such things as their ages, health, employability, obligations, dependants and overall situation in life;
- "means" includes all financial resources, capital and income, as well as earning capacity, and may consider capital acquired after the marital breakup, and/or imputed income;
- "needs" is a flexible concept that is not the same as a subsistence level of income.

The goal is an order that is equitable having regard to all the relevant circumstances.⁴¹⁴

Finally, respecting **duration**, in many cases involving lengthy marriages, courts have imposed indefinite orders for support. Indefinite support is often appropriate after a long-term marriage, as the dependent spouse has often reached an age which economic self-sufficiency is difficult. As a result, marriage may give rise to an indefinite, even lifelong spousal support obligation.

⁴¹⁴ *Fisher*, [2001 NSCA 18](#), at para. 82

Married spouses can also bring an application for spousal support under the [Parenting and Support Act](#), which rights are examined in the following section.

2. Common-law partners and domestic partners

The *Parenting and Support Act*⁴¹⁵ has the same broad powers to award spousal support for (married) spouses,⁴¹⁶ common-law partners⁴¹⁷ and domestic partners.⁴¹⁸

In determining the entitlement to and amount of spousal support, a court shall consider the following factors:

- the division of function in their relationship;
- the express or tacit agreement of the spouses that one will maintain the other;
- the terms of a marriage contract or separation agreement between the spouses;
- the custodial and parenting arrangements made with respect to the children of the relationship;
- the obligations of each spouse towards the children;
- the physical or mental disability of either spouse;
- the inability of a spouse to obtain gainful employment;
- the contribution of the spouse to the education or career potential of the other;
- the reasonable needs of the spouse with a right to support;
- the reasonable needs of the spouse obliged to pay support;
- the separate property of each spouse;
- the ability to pay of the spouse who is obliged to pay support having regard to that spouse's obligation to pay child support in accordance with the [Guidelines](#); and
- the ability of the spouse with the right to support to contribute to the spouse's own maintenance.⁴¹⁹

However, a spouse has an obligation to assume responsibility for her own support, unless, considering the ages of the spouses, the duration of the relationship, the nature of the needs of the entitled spouse and the origin of those needs, it would be unreasonable to require the supported spouse to assume responsibility for her support and it would be reasonable to require the other spouse to continue to bear this responsibility.⁴²⁰

⁴¹⁵ [Section 3](#).

⁴¹⁶ As defined in [Section 2\(m\)](#) of the *Parenting and Support Act*; however, see also footnote 15 above.

⁴¹⁷ As defined in [Section 2\(m\)\(v\)](#) of the *Parenting and Support Act*; requiring two years' of conjugal cohabitation unless, as per 2(m)(vi) the parties have cohabited and have a child together..

⁴¹⁸ [Section 54\(2\)\(f\)](#) of the *Vital Statistics Act*

⁴¹⁹ [Section 4](#) of the *Parenting and Support Act*

⁴²⁰ [Section 5](#) of the *Parenting and Support Act*

3. Setting aside a separation agreement governing spousal support

The parties may agree to specific terms governing ongoing spousal support. The terms of the Agreement will be applied at future variation hearings if they generally reflect the objectives of spousal support in the applicable legislation. Even if self-sufficiency has not been obtained by the date of later review, the parties should expect those terms of settlement to be applied or at least “given considerable weight” in the determination of the application.⁴²¹

A party may apply to set aside a separation agreement, including one governing division of property⁴²² and/or spousal support.⁴²³ The desirability of settling matters and upholding written agreements, however, mitigates against setting aside agreements.⁴²⁴ An agreement governing the property of married spouses or registered domestic partners may be set aside under statute if it is “unconscionable, unduly harsh on one party or fraudulent”.⁴²⁵

Simply put, if there were any circumstances of oppression, pressure or other vulnerabilities, and one parties exploited such vulnerabilities during the negotiation process, resulting in a separation agreement that deviated substantially from the [Divorce Act](#), the agreement need not be enforced.⁴²⁶

There is a two-stage test that must be applied, as follows:

- (1) the court first examines the circumstances that led to the separation agreement to determine whether oppression, pressure or vulnerabilities tainted the integrity of the negotiation; and
- (2) the court then assesses whether the parties, “find themselves down the road of their post-divorce life in circumstances not contemplated”.

At the first stage of analysis,⁴²⁷ there are three qualifying considerations, namely:

- (a) “unconscionability” does not necessarily have the same meaning in a family law context as it has in the common law of contract;
- (b) there is no “presumed” imbalance of power in the relationship or a vulnerability on the part of one party, nor is there a presumption that the apparently stronger party took advantage of any vulnerability on the part of the other; and

⁴²¹ *Strecko*, [2014 NSCA 66](#) at paras 19-24; see also

⁴²² *Rick v. Brandsema*, [2009 SCC 10](#); see also [Section 29](#) of the [Matrimonial Property Act](#)

⁴²³ *Miglin*, [\[2003\] 1 SCR 303](#)

⁴²⁴ *Chapman* (1996), [155 NSR \(2d\) 19](#), [1996] NSJ No 394 (SC) at paras 9-12

⁴²⁵ [Section 29](#) of the [Matrimonial Property Act](#); see, for example, *Zimmer* (1989), [90 NSR \(2d\) 243](#), [1989] NSJ No 420 (SCTD)

⁴²⁶ *Rick v. Brandsema*, [\[2009\] 1 SCR 295](#) at paras 81-83;

⁴²⁷ What follows is a summary taken from *Miglin*, [\[2003\] 1 SCR 303](#) at paras 80-86

- (c) the mere presence of vulnerability will not, in and of itself, justify judicial intervention, as professional assistance will often overcome any systemic imbalances between the parties.

At the second stage of the analysis, 428 the court:

- (1) determines whether the agreement substantially complies with the objectives of the [Divorce Act](#), “thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown”; only a “significant departure” from those objectives will warrant intervention;
- (2) considers those objectives to include, as well as the spousal support considerations in [s. 15.2](#) of the [Divorce Act](#), finality, certainty, and the invitation in the **Act** for parties to determine their own affairs”; and
- (3) must examine the agreement, “in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves”.

The party seeking to set aside the spousal support terms of an agreement must “clearly show” that, in light of the new circumstances, the terms of the Agreement no longer reflect the parties’ intentions at the time of execution and the objectives of the Act; as a result, these new circumstances, “were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned”.⁴²⁹

The same principles guide a court when assessing the **property division** aspects of an agreement⁴³⁰ or marriage agreement.⁴³¹

The essential questions the court must ask with respect to a marriage agreement addressing property division are as follows:

- (1) Whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the agreement was formed;
- (2) whether at that time (*i.e.*, at formation of agreement) the parties made adequate arrangements in response to these anticipated circumstances (separation);
- (3) Whether the marriage agreement operates **unfairly**, determined by applying the agreement, assessing and awarding those financial entitlements provided to each spouse under the agreement, as well as other sources, including spousal and child support;

⁴²⁸ *Miglin*, [\[2003\] 1 SCR 303](#) at paras 87-91

⁴²⁹ *Miglin*, [\[2003\] 1 SCR 303](#) at paras 80-91

⁴³⁰ *Rick v. Brandsema*, [\[2009\] 1 SCR 295](#) at para 39; see for example see for example *Andrist*, [2010 NSSC 285](#) (CanLII) where a separation agreement was set aside

⁴³¹ *Hartshorne*, [2004 SCC 22](#)

- (4) consider the factors listed in the provincial statute governing property division and decide as to whether the contract operates **unfairly** and whether a different apportionment should be made.
- (5) At the latter stage, consideration must be given to how the parties' personal and financial circumstances evolved over time.⁴³²

As a rule, lawyers must know that there is a duty to make full and honest disclosure of all relevant financial information in negotiations for the division of assets, when negotiating a separation agreement.⁴³³

4. Pensions and Income Generated from Divided Assets: Avoiding double-dipping/double-recovery

If property (including pensions) has been divided and a spouse is also ordered to pay spousal support while working, what happens when the payor retires or becomes unemployed?

When is “double-dipping” or “double-recovery” permissible; that is, a payee receiving both a portion of a payor’s pension (as property) and support from the payor’s share of their own pension (as income in stream)? The Court must consider, when analyzing a payor’s income, if the income stems from assets that have already been divided with the payee.

Spousal support may continue beyond the retirement date of the pension-holding spouse, but need, ability to pay, **and** “double recovery” must all be considered.⁴³⁴ To avoid double recovery, courts focus on the portion of the payor’s income and assets which have **not** been a part of the property division if the payee spouse proves a continuing need for support.⁴³⁵

As noted in the *Spousal Support Advisory Guidelines: The Revised User's Guide*:

Where a pension is divided at source when it is paid out, as is the case under British Columbia or Nova Scotia legislation, then the problems of *Boston* can usually be avoided, e.g. *Trewern v. Trewern*, [2009] B.C.J. No. 343, [2009 BCSC 236](#) (CanLII). In these cases, both spouses simply include the pension payments in their income and the previously divided portions of the pension effectively cancel each other out.⁴³⁶

If there has been a pension split providing a lump sum payment to the payee, the payee must use the assets received to create a ‘pension’ to provide for future support.

⁴³² *Hartshorne*, [2004 SCC 22](#)

⁴³³ *Rick v. Brandsema*, [\[2009\] 1 SCR 295](#) at para 5

⁴³⁴ This principle, and those that follow, are taken from *Boston*, [\[2001\] 2 SCR 413](#)

⁴³⁵ *White*, [2016 NSCA 82](#)

⁴³⁶ As cited in *MacLean*, [2017 NSSC 263](#) at para. 33

Failure to make a reasonable attempt to produce an income from equalized assets may result in the imputation of income to the payee based on actuarial evidence.

Double recovery cannot always be avoided, and a pension previously divided can also be viewed as a “maintenance asset”, where the payor has the ability to pay, and the payee has made a reasonable effort to use assets. Double recovery may also be permitted in support orders and agreements based on need rather than as compensation.⁴³⁷

⁴³⁷ The *Boston* decision has been applied in Nova Scotia in multiple cases including: *MacLeod*, [2017 NSSC 237](#); *Slater*, [2003 NSSF 4](#) (upheld [2004 NSCA 8](#)), and *Coombs* ([2001](#)), [199 NSR \(2d\) 285 \(SC\)](#)

5. Spousal Support Advisory Guidelines

“Spousal Support Advisory Guidelines”⁴³⁸ have been developed and disseminated by the Federal Department of Justice, to assist parties in quantifying a spousal support claim. They do not address entitlement, only quantum. They are not “law” and not mandatory (unlike the child support guidelines) but are advisory.⁴³⁹

They have, however, been described by appellate courts as a “useful tool”⁴⁴⁰ and may be used by trial judges as a resource against which the judge’s conclusion may be “checked”.⁴⁴¹ They may assist parties in reaching a resolution on quantum for the purpose of a separation agreement or to settle a court application.⁴⁴² If the advisory guidelines are argued before a trial judge, the judge should address rather than depart without comment from the guideline range, in a way “no different than a trial court distinguishing a significant authority relied upon by a party”.⁴⁴³

Two main formulae are used to calculate the quantum of spousal support under the Spousal Support Advisory Guidelines: (1) the with child formulae (*i.e.*, child support is being paid); and (2) the without child formula (*i.e.*, there are no children of the marriage). A low, mid and high range of potential support is quantified when the Spousal Support Advisory Guidelines are applied.

Software has been created (DivorceMate and Child View, most notably) to create these calculations. The key factors that are considered in rendering a quantification of spousal support include the following: the income of the payor; the income of the recipient; the length of the relationship; the age of the parties.

The Spousal Support Advisory Guidelines⁴⁴⁴ identify several circumstances that may warrant a different interpretation of the quantum triggered by the Spousal Support Advisory Guidelines including the following:

1. If the payor’s income is more than \$350,000⁴⁴⁵;
2. Illness and/or disability;
3. If the payor resides in a different jurisdiction and cannot receive a taxable benefit from deducting support payments and/or income may need to be imputed because of exchange rates⁴⁴⁶;
4. Special needs of a child;

⁴³⁸ Information on the [Spousal Support Advisory Guidelines](http://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html) may be found at <http://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html> (accessed 16 March 2018)

⁴³⁹ See [Strecko, 2014 NSCA 66](#) at para 50; [MacDonald, 2017 NSCA 18](#), para. 28-29

⁴⁴⁰ [Yemchuk, \[2005\] BCJ No 1748](#) (CA), para 64

⁴⁴¹ As the lower court judge did in [Pettigrew, 2006 NSCA 98](#) at para 16

⁴⁴² They may be found online at <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/toc-tdm.html>

⁴⁴³ [Fisher \(2008\), 88 OR \(3d\) 241 \(CA\)](#) at para 103

⁴⁴⁴ See the [Spousal Support Advisory Guidelines: The Revised User’s Guide](#)

⁴⁴⁵ See for instance [Volcko, 2015 NSCA 11](#)

⁴⁴⁶ [Saunders, 2011 NSCA 81](#), applied in [Thompson v St. Croix, 2014 NSSC 275](#) at paras 97-129

5. The impact of a division of property on the needs of either party;
6. Prior support obligations; and
7. Allocation of debt payments in cases where parties' have negative equity.

Options for structuring payments (compress or extend payment or provide for a lump sum) are also noted for consideration under the Spousal Support Advisory Guidelines.

6. Tax consequences

Chapter S1-F3-C3 deals with tax deductibility of periodic payments made to a spouse or former spouse, paid either under a written separation agreement or Court Order, and the fact that the recipient must declare such payments as income.⁴⁴⁷ Lump sum payments, generally, have no tax effects.

Tax calculations are required by the Court in proceedings. Counsel must provide such calculations to the Court and be prepared to argue **quantum**, taking tax implications into account. The court has greatly assisted litigants and lawyers by "*Practice Tips*" addressing this issue.⁴⁴⁸

Legal fees incurred for the purposes of seeking child or spousal support are tax deductible to the support recipient.⁴⁴⁹

7. Retroactive Spousal Support

Kerr v. Baranow, [2011 SCC 10](#) (CanLII) provides the starting point for the analysis to be applied in determining retroactive spousal support at paragraph 201 where Justice Cromwell stated [emphasis added]:

While D.B.S. was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support.

In calculating retroactive spousal support, the SSAGs have been used as a yardstick to determine of what would have been paid if an order had been in place. In the recent

⁴⁴⁷ See CRA [Income Tax Folio S1-F3-C3](#) (accessed 28 April 2016)

⁴⁴⁸ *Family Law Practice Tips*, No. 4, 5, 6, 7 & 11: http://courts.ns.ca/Bar_Information/bar_home.htm#FamLawTips

⁴⁴⁹ *Peraud*, [2011 NSSC 80](#) (CanLII); see <https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/deductions-credits-expenses/line-232-other-deductions/line-232-legal-fees.html>

decision of *Pothier v Pothier*, [2017 NSSC 230](#) the Court used the SSAGs to assist in crafting a net lump sum retroactive spousal support award of \$104,445.00 (see paragraphs 227-250). While not determinative, in the case of *Carter*, [2015 NSSC 273](#) the amount of retroactive spousal support ordered was in keeping with the ranges articulated by the recipient. The underlying analysis for the retroactive claim in *Carter*, *supra*, was the needs and means of the parties.

In rendering a quantification of retroactive support, the court must consider the underlying objectives of a spousal support as delineated in s. 15 of the *Divorce Act*. When one party enjoys a significant surplus to the detriment of the other, can be corrected retroactively. The Court must also consider whether the claim is compensatory, non-compensatory or both (See the Nova Scotia Court of Appeal decision of *MacDonald v. MacDonald*, [2017 NSCA 18](#)).

8. Variations of spousal support

Spousal support orders may be varied on application.⁴⁵⁰ Such an application is not the same as hearing an application for an initial support order.⁴⁵¹ The court is entitled to start from the assumption that the initial order is correct; it is the change in circumstances that warrants review.⁴⁵² The jurisdiction of the court to hear a variation application cannot be ousted by a mere “finality clause” in a separation agreement, even if incorporated into a Corollary Relief Order.⁴⁵³

Where the spousal support variation is of an order granted under the *Divorce Act*, the court must first be satisfied that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage and that this change has occurred since making the original order or an earlier variation order.⁴⁵⁴

When considering a variation application, the court is to examine the “change in circumstances” put forward in the evidence by the applicant, determine whether the change is “material”, and, if so, vary the order only to consider the established change.

In deciding whether the conditions for variation exist, the change must be a “material” change of circumstances. This means a change, such that, if known at the time of the initial order, would likely have resulted in different terms.⁴⁵⁵

⁴⁵⁰ *Divorce Act*, s. 17(4.1) and *Parenting and Support Act*, s. 37(1); however, see also footnote 15 above.

⁴⁵¹ i.e., under [Section 15.2](#) of the *Divorce Act*: see *LMP v LS*, [2011 SCC 64](#); *RP v RC*, [2011 SCC 65](#).

⁴⁵² *RP v. RC*, [2011 SCC 65](#); para. 25

⁴⁵³ *Breed*, [2016 NSSC 42](#), para. 27, citing *LMP v. LS*, [2011 SCC 64](#), para. 41, respecting “finality clauses”.

⁴⁵⁴ [Section 17\(4.1\)](#) of the *Divorce Act*

⁴⁵⁵ *Breed*, [2016 NSSC 42](#), para. 30-34

The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.⁴⁵⁶ The mere passage of time and desire of the payor to save for his own impending retirement are insufficient to amount to a material change in circumstances.⁴⁵⁷ Remarriage of the payee spouse may be a material change in circumstances, but variation or termination of spousal support may still be premature.⁴⁵⁸ Failure of a spouse to attempt to achieve self-sufficiency may be a material change in circumstances.⁴⁵⁹ Post-separation increases in a payor's income may or may not be a valid basis to warrant a variation.⁴⁶⁰

Where a change meets this threshold test, the court must then consider what variation should be awarded in light of the objectives for support; conduct that could not have been considered in making the original order shall not be considered in making a variation order.⁴⁶¹ There are conflicting decisions on whether or not the *Spousal Support Advisory Guidelines* can or should be applied on variation, if they were not applied in the initial order.⁴⁶²

In both the ***Divorce Act*** and the ***Parenting and Support Act***, if a court orders child support and then awards less spousal support in order to give priority to the child support, the termination or reduction of the child support constitutes a change in circumstances that allows a variation of the quantum of spousal support.

Where a court puts a termination date on support there are strict limits on the ability to seek a variation.⁴⁶³

Variation can only be granted if the court is satisfied that a variation is necessary to relieve economic hardship arising from a change in circumstances that is related to the marriage, and that the changed circumstances, had they existed at the time of making the support order or variation order, would likely have resulted in a different order.⁴⁶⁴

The ***Parenting and Support Act*** permits a variation of a spousal support order if there has been a “change in circumstances since the making of the order or the last variation order”.⁴⁶⁵

Statutory considerations weighed in the initial order may be re-weighed if the applicant establishes that there has been a change in circumstances.⁴⁶⁶

⁴⁵⁶ *Willick*, [1994] 3 SCR 670 at para 21

⁴⁵⁷ *Rondeau*, 2011 NSCA 5 at para 15.

⁴⁵⁸ *Anderson*, 2014 NSSC 7

⁴⁵⁹ *Breed*, 2016 NSSC 42

⁴⁶⁰ *Kohan*, 2016 ABCA 125, at paragraph 38

⁴⁶¹ Sections 17(7) & (6) of the ***Divorce Act***

⁴⁶² *Breed*, 2016 NSSC 42, para. 75-79; *MacDonald*, 2016 NSSC 290, para. 56

⁴⁶³ Section 17(10) of the ***Divorce Act***

⁴⁶⁴ Section 17(10) of the ***Divorce Act***

⁴⁶⁵ Section 37 of the ***Parenting and Support Act***.

⁴⁶⁶ *SRC v DC*, 2013 NSFC 21 at paras 39-41

Inter-provincial variation procedures are available for spouses living in different provinces.⁴⁶⁷ The Legislature has confirmed its intention to follow a clear, two-step procedure, each party putting its position forward before a court in their own province, without notice to the other party.⁴⁶⁸ If the party in the other province attorns to jurisdiction here and submits evidence, they must be made available for cross-examination.⁴⁶⁹

9. Review of Spousal Support

Courts are increasingly ordering reviews of spousal support orders at certain time points. Similarly, parties are agreeing to review clauses being included in separation agreements. It is important to be mindful that the test on a spousal support review is different from the test on a variation.

Because the ability to review a spousal support emanates from a term in an earlier agreement or order, there is no requirement that a material change in circumstances needs to be established. Instead, the inquiry takes place as if it is a fresh application that requires a fresh look at all factors relevant to support, including whether entitlement exists.⁴⁷⁰ It is important to consider whether the parameters of a review clause should be narrowed or clearly defined.

10. Security for Support

It is important to consider how child and spousal support obligations will be secured in the event of sickness or death of the payor. Adequate life insurance, disability insurance or even critical illness insurance may need to be in place to secure prospective payments.

The *Divorce Act* (section 15.2(1)) and *Parenting and Support Act* (section 3) provides the legislative authority to warrant an order that security must be in place for support. In some cases, the court will order that the payor must cooperate to have insurance placed on his or her life, such as submit to medical testing.⁴⁷¹ It is important to contemplate whether a new spouse may be named as a beneficiary of a policy.

It is also important to consider whether a payor's estate will have the authority to vary or terminate spousal support in the event of the payor's death if the spousal support claim is to be secured by the payor's estate and whether the estate may be insolvent on death.

⁴⁶⁷ [Interjurisdictional Support Orders Act](#), SNS 2002, c 2, and [Waterman](#), 2014 NSCA 110.

⁴⁶⁸ While this procedure was found to be a breach of the principles of natural justice in [Waterman](#), 2014 NSCA 110, para 63-108, the *Interjurisdictional Support Orders Act* was amended by SNS 2015, c 9, to achieve this.

⁴⁶⁹ [Waterman](#), 2016 NSSC 1

⁴⁷⁰ [Leskun](#), 2006 SCC 25; [Toth](#), 2016 BCCA 50

⁴⁷¹ [Calvy v. Calvy](#), 2012 NBCA 47; [Beattie v. Ladouceur](#), [2002] O.J. No. 5501 (S.C.J.) (QL)

In the recent decision of *Moore v. Sweet*, [2018 SCC 52](#), the life insured, and owner of a policy, had orally agreed with his former spouse that he would retain her as the beneficiary of his life insurance policy, if she paid the premiums. She did so, paying approximately \$7,000 in premiums after separation. He broke his promise to her and appointed his new common-law spouse as the irrevocable beneficiary. The policy paid out \$250,000. At death, the estate was insolvent. Under the law of unjust enrichment/constructive trust, the Supreme Court of Canada concluded that it would be unjust for the new spouse to retain the insurance proceeds.

11. Support for parents⁴⁷²

A person over the age of majority can be ordered to pay support for a dependent parent. More than one child may pay support for a dependent parent. In making such an order, the court must consider the reasonable needs of the dependent parent, the ability of the dependent parent to contribute to her own support and the reasonable needs and ability to pay of the child obliged to pay support.

⁴⁷² See Sections 15 to [17](#) of the [Parenting and Support Act](#).

IX. INTERIM PROCEEDINGS

1. Parenting

The Supreme Court (Family Division) and the Supreme Court may make interim orders respecting parenting time and decision making.⁴⁷³ The court may make such an order for definite or indefinite period of time or until the happening of a specified event, and may impose such other terms, conditions or restrictions in connection with the order that the court thinks is just and fit.

The Family Court and the Supreme Court (Family Division) also have jurisdiction to award interim custody or access under the [Parenting and Support Act](#).⁴⁷⁴

The paramount consideration in an interim parenting application is the best interests of the child. The court's focus is on short-term care pending the final resolution of custody. The issue is what temporary living arrangement will be the least disruptive, most supportive and most protective of the child.⁴⁷⁵

As a working rule, the court will maintain the *status quo*⁴⁷⁶ unless cogent evidence is adduced to show that it should not be followed. There are two reasons for this:

- first, maintaining the existing custody arrangement will, likely, minimize the disruptive effect of a family dissolution upon children; and
- secondly, since an interim proceeding is not a full hearing on the merits, the court will not lightly risk changing custody if the current arrangement is adequate.

The *status quo* is not necessarily the place where the child resides at the time of the interim application. A party cannot establish a *status quo* by a unilateral post-separation.⁴⁷⁷ The real questions are: what temporary living arrangements are the least disruptive, most supportive and most protective for the child; and what are the living arrangements with which the child is most familiar? This requires consideration of factors such as the following:⁴⁷⁸

1. Where and with whom is the child residing at this time?

⁴⁷³ [Section 16\(7\)](#) of the [Divorce Act](#)

⁴⁷⁴ Jurisdiction is often exercised, for example, in *LSW v IEW*, [1989] NSJ No 492 (FamCt); and *Stone*, [1995] NSJ No 586 (FamCt). However, the statutory jurisdiction to grant interim custody or access order is not express: compare [s. 18](#) regarding custody and access with [s. 3](#) & 9 regarding support.

⁴⁷⁵ *Marshall*, [1998 CanLII 3191 \(NS CA\)](#), page 8

⁴⁷⁶ See *Hewitt v. McGrath*, [2010 NSSC 275](#); *Matthews*, [2017 NSSC 335](#)

⁴⁷⁷ *Pinkham*, [2015 NSSC 289](#)

⁴⁷⁸ Listed in *Webber* (1989), [90 NSR \(2d\) 55](#) (Fam.Ct), page 59; adopted in *Marshall*, [1998 CanLII 3191 \(NS CA\)](#), page 8; recently cited in *R.R. v. S.R.*, [2015 NSSC 206](#), para. 7

2. Where and with whom has the child been residing in the immediate past? If the residence of the child is different than in #1, why and what were the considerations for the change in residence?
3. The short-term needs of the child including:
 - (a) age, educational and/or preschool needs;
 - (b) basic needs and any special needs;
 - (c) the relationship of the child with the competing parties;
 - (d) the daily routine of the child.
4. Is the current residence of the child a suitable temporary residence for the child, taking into consideration the short-term needs of the child and:
 - (a) the person(s) with whom the child would be residing;
 - (b) the physical surrounding including the type of living and sleeping arrangements, closeness to the immediate community and health;
 - (c) proximity to the preschool or school facility at which the child usually attends;
 - (d) availability of access to the child by the noncustodial parent and/or family members.
5. Is the child in danger of physical, emotional or psychological harm if left temporarily in the care of the present custodian and in the present home?

However, the courts will not blindly seek to maintain the *status quo*.⁴⁷⁹

In cases of emergency, interim orders can be granted on an **ex parte** (without notice to the other party) basis. There must be an emergency or extraordinary circumstance to grant an **ex parte** order, notice of the order must be made to other party after the **ex parte** order is granted, and the matter must be brought back for hearing expeditiously.⁴⁸⁰

2. Interim support

The court has the authority to award interim child and spousal support under the **Divorce Act**⁴⁸¹ where parties are married or for child support where a person stands **in loco parentis**, and under the **Parenting and Support Act**⁴⁸² where the parties are spouses, parents, common-law partners or domestic partners.

⁴⁷⁹ See, for a result contrary to the *status quo*: *Burke* (1980), 38 NSR (2d) 251 (SC); *Pye* (1992), [112 NSR \(2d\) 109](#) (SC)

⁴⁸⁰ *Lohnes* (1982), [30 RFL \(2d\) 360](#) (NSCA); *Quigley v. Willmore*, [2008 NSSC 353](#), [2008] N.S.J. No. 550; See also [Civil Procedure Rules](#) 28 & 59.53.

⁴⁸¹ [Sections 15.1\(2\)](#) [child support] and 15.2(2) [spousal support] of the [Divorce Act](#)

⁴⁸² [Sections 3](#) & 9 of the [Parenting and Support Act](#)

The purpose of interim support is to provide for the needs of a spouse or partner and children existing at the time of the relationship dissolution. The need is immediate. Interim support orders have been characterized as a way to provide a reasonably acceptable solution until trial.⁴⁸³

With respect to spousal support, the approach with respect to interim orders is somewhat different than final orders. In an application for interim spousal support the court does not conduct an in-depth examination of all aspects of the marriage relationship and the circumstances of the parties. Instead, it is a question of determining the financial needs of the applicant spouse and the ability or means of the other spouse to meet those needs.⁴⁸⁴ The terms of an interim order may not be reflected in the final order.⁴⁸⁵

In any interim application for support involving children, the primary consideration is to provide proper support for the children pending resolution of all issues before the court, even if properly maintaining the children creates financial hardship on the spouses.⁴⁸⁶

The interim order ought to:

- (a) permit a reasonable standard of living for the dependent spouse relative to the contributing spouse;
- (b) permit, if not ensure, the preservation of matrimonial assets;
- (c) preserve the *status quo* insofar as possible; and
- (d) encourage the dependent spouse to consider in realistic terms how best to arrange [his or her] affairs to achieve economic self-sufficiency when a final settlement is made.⁴⁸⁷

Emergency Protection Orders granted under the ***Domestic Violence Intervention Act*** can also deal with interim financial issues by granting control over items such as cheque books and bank cards. (See the section below on **Domestic Violence**.)

3. Exclusive possession of the matrimonial home as interim relief

In appropriate circumstances, the court can award interim exclusive possession of the matrimonial home to a married spouse.⁴⁸⁸

Before the court can make an order for exclusive possession, it must be of the opinion that other provision for shelter is not adequate in the circumstances or that it is in the

⁴⁸³ *Wile* (1997), [36 RFL \(4th\) 329](#) (NSFamCt)

⁴⁸⁴ *Stein*, [2001 CanLII 2447](#), [2001] NSJ No 550 (SCFD) at para 23; *Breed*, [2012 NSSC 83](#) starting at para. 28

⁴⁸⁵ *Legg*, [2010 NSSC 326](#); see also *Ferrier*, [2017 NSSC 299](#), [2017] N.S.J. No. 447

⁴⁸⁶ *Clancey* (1989), [91 NSR \(2d\) 171](#) (CA)

⁴⁸⁷ *McCrate*, [2016 NSSC 6](#), [2016] N.S.J. No. 50, para. 107; *Mitchell*, [\[1993\] NSJ No 504](#) (SC) at para 21

⁴⁸⁸ [Section 11\(1\)\(a\)](#) of the [Matrimonial Property Act](#)

best interests of a child to make such an order.⁴⁸⁹ Unless one of those two conditions is met, the court may not grant interim exclusive possession of the matrimonial home.⁴⁹⁰

The outcome of an interim parenting application may have a significant bearing on an application for interim exclusive possession. If a custodial parent is to maintain the *status quo* by maintaining the child's environment, the parent often must also have possession of the matrimonial home. The two orders are therefore often sought and granted in tandem.⁴⁹¹

The test for exclusive possession, if not grounded upon the child's best interests, turns on a balance of convenience, with possession going to that party who is least able to make other adequate provisions for shelter.

[Section 7](#) of the ***Parenting and Support Act***, grants authority to the court to make an order regarding the use of a family residence (which is the residence that is owned or leased by at least one parent).

Emergency Protection Orders granted under the **[Domestic Violence Intervention Act](#)** can also deal with interim exclusive possession of a residence, which does not have to be a matrimonial home. The ***Domestic Violence Intervention Act*** has broad application to spouses, common-law partners, domestic partners, common-law couples and same-sex couples. (See the section below on **Domestic violence**.)

[Section 19](#) of the ***Matrimonial Property Act*** gives the Court authority to make any interim motion it "considers necessary". Alone or in combination with [Section 19](#), a "preservation order" in relation to the matrimonial home or other property may also be granted under the ***Civil Procedure Rules***. Preservation orders are commonly sought on an *ex parte* basis to prevent the disposition of assets by a spouse.⁴⁹²

4. Appeal or variation of interim orders

Appeals of interim orders are rare. Generally a court will not reverse an earlier interim order in the absence of a significant change in circumstances that had occurred since the first application.⁴⁹³

The Court of Appeal will not reverse an interim order unless wrong principles of law have been applied, material evidence disregarded, or a patent injustice would result.⁴⁹⁴

⁴⁸⁹ [Section 11\(4\)](#) of the ***Matrimonial Property Act***

⁴⁹⁰ *Legg*, [2010 NSSC 326](#)

⁴⁹¹ *e.g.*, *Choma* (1990), [102 NSR \(2d\) 324](#) (SC)

⁴⁹² *Armoyan*, [2014 NSSC 30](#), using [Civil Procedure Rules](#) 42 & 28.

⁴⁹³ *Foley* (1993), [124 NSR \(2d\) 198](#) (SC)

⁴⁹⁴ *Hickey* (1994), [128 NSR \(2d\) 321](#), [1994] NSJ No 52 (CA)

X. ENFORCEMENT OF SUPPORT ORDERS

The **Maintenance Enforcement Program** (“MEP”) was established January 1996, when the [Maintenance Enforcement Act](#)⁴⁹⁵ came into force.

The Act provides for an office of the Director of Maintenance Enforcement and the appointment of Enforcement Officers to assist the Director with the enforcement of all support orders enrolled with the Program.

Prior to January 1996, support enforcement was handled through the Family Court or the Supreme Court and enforcement always involved a court application.

The **Maintenance Enforcement Act** creates a separate administrative agency that operates independent of the court system and vests responsibility for the collection and enforcement of support payments with the Director of Maintenance Enforcement.

There are three major components to the MEP, (1) automatic enrolment, (2) a central payment processing unit; (3) recalculation(3) administrative enforcement.

1. MEP: Automatic enrolment

All support orders issued by the Family and Supreme Courts, granted under the **Parenting and Support Act** or under the **Divorce Act**, are automatically forwarded to the Director’s office for enrolment within five working days after the order has been issued.

The MEP’s Central Enrolment Unit is responsible for enrolling all support orders and dealing with the registration of reciprocal support orders. Once the order is enrolled with the MEP, the file is sent to an Enforcement Officer in one of the regional offices to monitor and take enforcement action where necessary.

A Separation Agreement cannot be enrolled with the Program unless it is registered with the Family Court or Family Division first.

While initially all support orders are automatically enrolled with the MEP, parties can opt out after enrolment by providing the Director with written notice. This written notice must be given by both parties. If either party wishes to later withdraw the support order from the Program, they can do so by sending a written request to the Director. However, the Director can exercise discretion as to whether to permit a party to withdraw the order and this decision will vary on the circumstances of any case.

Sometimes parties choose to specify in Consent Orders that they wish to opt out of the MEP. If the parties opt out or withdraw the support order at any time, they have the

⁴⁹⁵ [SNS 1994-95, c6](#), referred to as the [Maintenance Enforcement Act](#)

option of requesting the Director re-enrol the order at a later stage. The Director reserves discretion as to whether to re-enrol the order.

2. MEP: Payment Processing Unit

The Central Payment Processing Unit is responsible for receiving all support payments and forwarding them to the appropriate recipient (the person entitled to receive support under a support order). Payment is usually made by way of cheque or money order. The Program does not accept cash.

3. MEP: Administrative enforcement

Enforcement Officers located throughout the province are responsible for monitoring and enforcing support payments when the payor (person obliged to pay support under a support Order) falls into arrears. Enforcement may be as simple as a phone call to the payor to make voluntary payment arrangements or as severe as revocation of the payor's driving privileges.

The [Maintenance Enforcement Act](#) gives the Director (and through delegation, the Enforcement Officers) a range of enforcement powers including:

- garnishment of income sources such as income tax refunds, Health Services Tax credits, Worker's Compensation Board benefits, bank accounts and pensions;
- demand to any source for financial information concerning the payor and/or his current spouse;
- registration of Maintenance Order against land;
- examination of payor in aid of execution;
- seizure and sale of personal and real property; and
- suspension and revocation of motor vehicle privileges.

Apart from these administrative enforcement actions, the Director can also initiate various court applications to bring both the payor and a non-complying income source (garnishee) to court to seek various remedies that are available through the legislation (for example, incarceration or imposition of a fine).

4. MEP: Other issues

It is open to a superior court, when considering the effect of bankruptcy upon unpaid joint matrimonial debts, to deem those debts to be "child support" or "spousal support", in order that the debt may survive bankruptcy.⁴⁹⁶

⁴⁹⁶ *St-Jules*, [2012 NSCA 97](#) at paras 46-51

If a party files a variation application seeking to lower or terminate support, they may also seek to suspend enforcement of arrears and/or the existing court order pending a consideration by the Court as to whether the existing order should in fact be varied.⁴⁹⁷

Costs related to obtaining child or spousal support can be enforced by the MEP if the order clearly states that the costs relate to child or spousal support.

To ensure that a support provision in an order is enforceable by the Maintenance Enforcement Program, it should clearly state all the following:

- the payment is support;
- one party is to pay the other party;
- the date of commencement;
- the dates payments are due;
- the quantum of support;
- the quantum of any costs ordered, apportioned to the ruling on support;
- any applicable conditions of eligibility and/or terminating event;
- whether the support obligations may be revived once it ends;
- the statute under which support is ordered.

If the quantum of support does not appear on the face of the support order, the MEP may not enforce the order.

Automatic Recalculation Program

The MEP Automatic Recalculation Program, rolled out in 2014, recalculates the table amount of child support where a court order or registered agreement allows for this to happen. The recalculation happens once a year at the time of the anniversary of the court order. The Program recalculates certain child support orders based on updated income information provided by the parent paying support.

Only orders that have a section in them saying that they are a part of this Program can be considered for recalculation. There are other requirements for using this Program as well, like what the payor's income source is. The Program allows parents to update the table amount of child support without having to file a court application, pay a filing fee or negotiate with each other.

In cases where income calculation is more complex or in shared parenting cases, this program may not be appropriate. Instead, parties will need to file a Variation Application and procure a new order if support needs to be changed.

⁴⁹⁷ [Maintenance Enforcement Act, s. 39\(4\)](#); *Branton v. LeFrense*, [2012 NSSC 206](#), para 20.

For a “Section 7” (extraordinary child support expenses) provision to be enforceable by the MEP, the provision should state all the following clearly:

- one party (the payor) shall pay the other party (the recipient);
- the type of expense(s) (e.g., child care) the payor is required to cover;
- the precise amount or quantum payable;
- the date of the (first) payment and when each payment thereafter is due (if any);
- for whom the expense is payable;
- the termination date or conditions for termination of payment of the expense, if any.

The MEP may not enforce order provisions such as, “the parties are equally responsible for” or “the parties shall share equally”, as there is no express provision in the Order for one party to pay the other. Effective April 1, 2014, on new enrolled cases (only), in which the order does not state an amount that is payable, the MEP will not enforce “receipt based expenses” (provisions in which payments are dependent upon receipts being filed).

XI. DOMESTIC VIOLENCE

1. The [Domestic Violence Intervention Act](#)

On April 1, 2003, the [Domestic Violence Intervention Act](#) was proclaimed in force.⁴⁹⁸ This Act creates a system for granting orders to victims of domestic violence in an expedited manner by justices of the peace.

“**Domestic violence**” means:

- a) an assault (the intentional application of force that causes the victim to fear his or her safety, but does not include acts of self-defence);
- b) a threatened or actual act or omission that causes a reasonable fear of bodily harm or damage to property;
- c) forced physical confinement,
- d) sexual assault, exploitation or molestation or the threat thereof, or,

⁴⁹⁸ [SNS 2001, c 29](#)

- e) a series of acts that collectively causes the victim to fear for his or her safety, including following, contacting, communicating with, observing or recording any person.⁴⁹⁹

It is important to note that domestic violence may be found whether or not a criminal charge is laid, dismissed, withdrawn, or if a conviction has been or could be obtained.

A **victim** is defined as a person who is at least 16 years old and has been subjected to domestic violence (as defined above) by another person who has or is cohabiting with the victim in a conjugal relationship or is a parent with the victim.⁵⁰⁰ As a result of this definition, the Act clearly applies to married spouses, common-law partners and same-sex partners, regardless of whether the couple has entered into a domestic partnership declaration.

A justice of the peace may make an **Emergency Protection Order (EPO)** to ensure the immediate protection of a victim.⁵⁰¹ The legislation, however, is intended for “true emergencies”.⁵⁰²

To make such an order the justice of the peace must believe that domestic violence has occurred and that the order should be made immediately. The justice of the peace must consider the nature and history of the domestic violence, the existence of immediate danger to people or property and the best interests of the victim and any children in his or her care. The standard of proof for an **EPO** is a balance of probabilities.⁵⁰³

The regulations⁵⁰⁴ mandate that the hearing of the application before the justice of the peace must be concluded within 24 hours of the application being made and must be over the telephone and recorded (which recording must be available at the review by a Justice of the Supreme Court).

An **EPO** can last for up to 30 days⁵⁰⁵ and must be forwarded within two days of being granted to a justice of the Supreme Court, who must review the **EPO** within seven days.⁵⁰⁶ The regulations also require that a copy of the **EPO** be forwarded to the police, who are then required to provide the victim, the respondent and the Prothonotary with copies of the **EPO**. The regulations provide for substituted service on the respondent where it is impracticable for the police officer to effect personal service.

⁴⁹⁹ [Section 5\(1\) of the *Domestic Violence Intervention Act*](#)

⁵⁰⁰ [Section 2\(g\) of the *Domestic Violence Intervention Act*](#)

⁵⁰¹ [Section 6 of the *Domestic Violence Intervention Act*](#)

⁵⁰² *S(MC) v S(RA)*, 2004 NSSC 60, 222 NSR (2d) 115

⁵⁰³ [Section 6 of the *Domestic Violence Intervention Act*](#)

⁵⁰⁴ [Domestic Violence Intervention Act Regulations, NS Reg 75/2003](#)

⁵⁰⁵ [Section 8\(2\) of the *Domestic Violence Intervention Act*](#)

⁵⁰⁶ [Section 2\(g\) of the *Domestic Violence Intervention Act*](#)

Where the court is not satisfied that there was sufficient evidence before the justice of the peace to support the **EPO**, a hearing of the matter occurs.⁵⁰⁷ Once the respondent has been served with the **EPO**, either party can apply to have the order varied, including an extension of the life of the order by an additional 30 days from the expiration date of the original **EPO**.⁵⁰⁸

People other than the victim have standing to bring the application before the justice of the peace.⁵⁰⁹ The court has broad discretion to have private hearings and to prevent public access to the court file.⁵¹⁰ The initial hearing by the justice of the peace is **ex parte** over the telephone.⁵¹¹

2. Relief under the Domestic Violence Intervention Act

An **EPO** can grant broad temporary relief for victims of domestic violence, including but not limited to the following:⁵¹²

- a) Temporary care and custody of a child of the victim, which order prevails over an order for custody or access/parenting made under the [Divorce Act](#) or the [Parenting and Support Act](#), but does not prevail over any order made under the [Children and Family Services Act](#);
- b) Exclusive occupation of the residence to the victim;
- c) Directing a police officer to remove a respondent from the residence or accompanying the respondent to remove his personal belongings from the residence;
- d) Temporary possession of or control over personal property including, a car, chequebook, bank card, health services card, supplementary medical insurance cards, identification documents, keys, utility or household accounts or other personal effects;
- e) An order restraining the respondent from communicating with the victim or any other specified person (e.g., the children), from attending at any place identified generally or specifically in the **EPO** (e.g., the victim's place of work, residence, children's school), from taking, converting, damaging or otherwise dealing with property and from committing any further acts of domestic violence against the victim;
- f) An order requiring peace officers to seize any weapons and any documents authorizing the respondent to own, possess or control a weapon that is seized.

3. Criminal proceedings

⁵⁰⁷ [Section 11\(3\)](#) of the [Domestic Violence Intervention Act](#)

⁵⁰⁸ [Section 12](#) of the [Domestic Violence Intervention Act](#); see, for example, *T(TL) v (TR)* (2003), 219 NSR (2d) 388 (SC)

⁵⁰⁹ [Section 7](#) of the [Domestic Violence Intervention Act](#); see also the *Regulations*, s. 3, designating others.

⁵¹⁰ [Section 13](#) of the [Domestic Violence Intervention Act](#)

⁵¹¹ *Regulations*, Section 4

⁵¹² [Section 8](#) of the [Domestic Violence Intervention Act](#)

The [Domestic Violence Intervention Act](#) does not replace or alter the Crown's ability to pursue criminal charges against a perpetrator of domestic violence. Charges can be laid for physical assaults or death threats, and peace bonds can be sought.

4. Civil proceedings

The **Domestic Violence Intervention Act** does not replace or alter a victim's ability to pursue tort claims, such as for assault and battery, false imprisonment or claims under the [Divorce Act](#), [Parenting and Support Act](#) and the [Matrimonial Property Act](#), where a victim qualifies under the statute for relief.

5. Child protection provisions

An **EPO** does not prevail over an order for custody or access made under the [Children and Family Services Act](#). It is also important to note that section 22(2)(i) of that Act provides that a child may be in need of protective services if "the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or toward a parent or guardian of the child and the child's parent or guardian does not provide, or refuses to obtain services or treatment to remedy or alleviate the harm". The duty to report child abuse is not altered by the existence of the [Domestic Violence Intervention Act](#).⁵¹³

⁵¹³ [Section 16](#) of the [Domestic Violence Intervention Act](#)

6. Domestic Violence Court: Sydney and Halifax

The Nova Scotia Domestic Violence Court pilot was developed first in Sydney in 2012. The goal was to stop the cycle of domestic abuse and make the court experience better for victims and families.

The court sits once per week in each location and is a voluntary diversion from the provincial court system. Once an individual is charged with an offence that is eligible for a community-based system that fits the domestic violence criteria and arraigned in provincial court, the accused will learn about the domestic violence court program from the legal aid/duty counsel or their own private counsel.

In order to be eligible to go through the domestic violence court, the accused must plead guilty to the offence he or she is charged.

An individual program is created for the offender that is conducted by police and community corrections. There may be educational and therapeutic elements. Once the program is completed, the offender is sentenced by the judge, taking into consideration his or her participation in the program.

The victim does not have to consent to the accused entering this diversion court system, and may have an active voice in the process if he or she wishes.

The Halifax Domestic Violence Court was officially opened on February 28, 2018.

XII. ADOPTION

The [Children and Family Services Act](#) addresses adoptions,⁵¹⁴ which are entirely a creature of statute (*i.e.*, adoption is unknown to the common law).⁵¹⁵

Adoption legally terminates the relationship between the birth parents and the child, retroactively effective as of the child's date of birth.⁵¹⁶

This effectively shifts the parentage, in the eyes of the law, from the natural parents to the adoptive parent or parents: it is as if the child had been born to the adopting parent or parents.⁵¹⁷

In the Regional Municipalities of Halifax and Cape Breton, adoptions are heard in the Supreme Court (Family Division). In the balance of the province, adoptions are heard in the Supreme Court.

Jurisdiction is normally based on the residence of the adopting parents but there are other grounds for jurisdiction, such as residence of adoptee, domicile of adoptive parent or adoptee, or children in the care of a child protection agency. *Civil Procedure Rule 61* governs adoption.

1. Types of adoption

Adoptions are generally classified as either an agency placement, private-relative, or step-parent adoption.

Agency placements

Children placed with adopting parents by a child placing agency are children who have been placed in the permanent care and custody of the Minister of Community Services, or children voluntarily placed by their parent(s) for adoption. When a child has been placed in the permanent care of the Minister of Community Services, the only consent that is required is that of the Minister. Biological fathers that do not fall within the definition of "parent" in s. 67 of the CFSA are not entitled to notice nor is their consent required.⁵¹⁸

The birth parent(s) may request a specific family be considered or participate in choosing a family from a list of pre-approved families waiting to adopt.

⁵¹⁴ [Sections 67 to 87](#) of the [Children and Family Services Act](#)

⁵¹⁵ *Halsbury's Law of England*, 4th ed. reissue, Vol 5(3) (London: Butterworths, 2001), page 241, para 501.

⁵¹⁶ [Section 80 to 82](#) of the [Children and Family Services Act](#)

⁵¹⁷ *Children's Aid Society of Halifax v. LW* (1987), [80 NSR \(2d\) 139](#) (Fam. Ct.)

⁵¹⁸ *Nova Scotia (Minister of Community Services) v. Nova Scotia (Attorney General)*, [2017] N.S.J. No. 333

The right of a birth parent to place a child with a non-relative under Section 68(A) of the CFSA has been qualified: a birth parent can designate a non-relative to be an adoptive parent of the child; however, the non-relative must be approved for adoption by a child-placing agency

There is a minimum 15-day waiting period from birth to when a child is placed with an adopting family, to provide the birth parent with time to consider his or her decision to place their child for adoption. The child is often placed in the temporary care and custody of the agency, with the parent(s) consent, until the 15-day period has elapsed.

The adoption process is technical. Adoptive parents must incur certain extra expenses such as the cost of an adoption home study. Legal assistance is not normally required until the preparation of court documents. The birth parent(s)/legal guardian are also required to participate in Options Counselling before giving consent, and to provide social and medical history information for the child. The birth parent(s)/legal guardian should have legal counsel before signing a consent for adoption.

Private placements

Private placement describes adoption placements other than through an agency.

One of the common private “placements” is stepparent adoptions. For example, an unmarried woman gives birth to a child, subsequently marries and wants her husband (not the biological father of the child) to adopt the child, or a divorced person with custody of a child of the former marriage remarries and wants the new spouse to adopt the child.

While stepparent adoption and placement with a designated person through an agency remain options, placing a child for adoption **directly** with a non-relative is prohibited.⁵¹⁹

Third party applications

Adoption may also be initiated by persons (e.g., non-relatives of a child) who have had continuous custody of a child for more than two years. Such adoptions may require dispensing with parental consent as a first step in the adoption process.

A person who has care and custody of a child pursuant to an order made under the *Parenting and Support Act* or an enactment of another jurisdiction providing care and custody/guardianship may apply to the court to adopt.

Third-party adoptions require an approved adoption home study, consents to the adoption or consents dispensed with, options counseling with the birth parent(s), and a

⁵¹⁹ See the *CFS Regulations*, [Section 4\(2\)](#) & (3) for the definition of family member, and section 70 of the *CFS Act* for the prohibition and penalty.

medical and social history for the child. Few adoptions are sought in these circumstances.

Adult Adoption

In Nova Scotia, once an individual is over the age of majority (19), he or she can choose to be adopted by another party if that other party is willing to do so (and is also an adult!). Perhaps surprisingly, the process is relatively straightforward.

Adult adoptions are most common when completed by a step-parent who has been a parental figure in the adult child's life for some time, by a foster family who was unable to complete an adoption, or by a family member or other adult who has assumed the primary caregiving role of a child but was unable to obtain consents to complete an adoption when the adult child was under the age of majority. However, these are not the only circumstances that bring rise to adult adoption.

In essence, adult adoption enables the adult child to choose his or her legal family. The consent of the biological parents is not required. Instead, only the consent of the adult child and their spouse (if married) is necessary to complete the adoption process. The adoptive parents commence the application with the court and from there, the adoption is booked for a court appearance (usually quite quickly). All parties should have independent legal advice.

Other adoption issues

Home studies are required by the Minister of Community Services for all agency adoptions and third-party adoptions. A home study is not required for uncontested stepparent adoptions or private relative adoptions.

It is only if a party with an interest adverse to the granting of an adoption order (such as a non-custodial parent) appears at the adoption hearing to oppose the granting of an adoption order that a trial of the issue is conducted.

2. Consent to an adoption

The following people must consent to a non-agency adoption:⁵²⁰

- the adoptee (if 12 years of age or older);
- adoptee's spouse if married (a married person cannot be adopted without the consent of his or her spouse);
- The adoptee's parent (persons under the age of 19 years old cannot be adopted without the written consent of his or her parents).

⁵²⁰ Section 74 of the [*Children and Family Services Act*](#)

“Parent” is defined as any of the following people, but does not include a foster parent:

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- the mother;
- the father if either married to or in a common law relationship with the mother;
- an individual having custody of the child;
- an individual who, during the twelve months before proceedings for adoption were commenced, stood in *loco parentis* to the child;⁵²²
- a person who, under a written agreement or court order, is required to provide support for the child or has a right of access to the child and has, at any time during the two years before adoption proceedings were commenced, provided support or exercised a right of access;
- an individual who has acknowledged parentage of the child and who has an application before a court respecting custody, support or access for the child at the time proceedings for adoption are commenced or has provided support for or has exercised access to the child at any time during the two years before proceedings for adoption are commenced.

The Supreme Court’s *parens patriae* powers may not be used to broaden this definition,⁵²³ or to allow applications for standing by prospective third parties to circumvent the definition.⁵²⁴

If a child has been placed in the permanent care and custody of a child protection agency or has been surrendered to such an agency for being placed for adoption under an adoption agreement, parental consent is not required. In that case, the child protection agency is the only party to consent, unless the child has achieved 12 years of age.⁵²⁵

3. Dispensing with parental consent

The court does have the power to dispense with parental consent.⁵²⁶ The overriding consideration is the best interests of the person to be adopted. The statutory grounds include that the person is dead, is unable to consent due to a disability, is missing or cannot be found, has had no contact with the child or has failed, where able, to provide financial support for two years immediately before the adoption.⁵²⁷

⁵²¹ Section 67 of the [Children and Family Services Act](#)

⁵²² “*in loco parentis*” is defined in the [Children and Family Services Regulations](#), [section 65](#)

⁵²³ *Re DT* (1992), [113 NSR \(2d\) 74](#) (CA)

⁵²⁴ *D v Nova Scotia (Community Services)*, [2015 NSSC 74](#) at paras 79-87

⁵²⁵ Section 74(1) & (8) of the [Children and Family Services Act](#)

⁵²⁶ Section 75 of the [Children and Family Services Act](#)

⁵²⁷ Section 75(4) and [3\(3\)](#) of the [Children and Family Services Act](#)

A host of factors are described in case law to guide the court in this determination.⁵²⁸ These factors are most often applied in the context of stepparent adoption with either an involved or uninvolved biological parent.

The essence of the test for a stepparent adoption is whether, on the balance, the child will gain and not lose by being permanently cut off from the non-consenting parent. The question the court should ask itself is: Would the child derive a material net gain in welfare if the father or mother were permanently cut off.⁵²⁹

4. Support obligations of birth parent following adoption

While adoption eliminates the legal rights of the birth parent, this does not divest any interest in property that has vested prior to September 4, 1991.⁵³⁰ This may affect the enforcement of child support arrears, as the Act eliminates child support arrears vesting after that date.⁵³¹

5. Custody and access rights of birth parent following adoption

A birth parent does not retain the ability to seek an order for custody of or access to a child after an adoption, except as a legal stranger or “third party” under the [Parenting and Support Act](#)⁵³² or by means of a consensual “openness agreement”.⁵³³

When one year has elapsed from the date of the adoption order, there shall not be *any direct or collateral proceedings* aimed at attacking or setting it aside.⁵³⁴

6. Access to information

A current political and legal issue in adoption is access to information by the child who was adopted or by the birth parent or parents. This issue is closely connected with the traditional view of adoption as being “closed”. The legal and social assumption has been that the relationship with birth parents terminates at adoption and that this is beneficial to the child and necessary to maintain the integrity of the new family.

However, “open” adoptions, with continued contact between the child and the birth parent or parents and the provision of information about the child to the birth parent or parents, are legally and socially becoming more accepted.

⁵²⁸ See the factors in *AK v AE*, [2013 ONSC 5421](#) at para 15, expressly adopted in *R (Re)*, [2014 NSSC 100](#) at para 30

⁵²⁹ *M(JJ) v L(SD)* (1992), [117 NSR \(2d\) 159](#) (CA) at para 40

⁵³⁰ See [Section 83](#) of the [Children and Family Services Act](#), read together with [Sections 80](#) & 81.

⁵³¹ See, for example, *Smith* (2000), [191 NSR \(2d\) 379 \(SC\)](#); varied in part on appeal: [2002 NSCA 78](#)

⁵³² See *G(C) v G(M)* (1995), [137 NSR \(2d\) 161](#) (Fam.Ct)

⁵³³ See Section 78A of the [Children and Family Services Act](#), which creates a non-enforceable contact relationship.

⁵³⁴ Section 84 of the [Children and Family Services Act](#)

The [Adoption Information Act](#)⁵³⁵ governs the disclosure of information with respect to adoptions. It creates a “Passive Adoption Register” to enable the disclosure of non-identifying information that relates to an adoption and to facilitate the reunion of adopted children and their birth parents, siblings or extended family where their names appear on the Register.

7. Adoption by same-sex and common-law couples

In 2001, it was held that the **Children and Family Services Act**, by restricting adoption applications to married couples, discriminates on the basis of marital status (and hence sexual orientation) contrary to section 15 of the **Charter** and is not justified under section 1 of the **Charter**.⁵³⁶ The courts therefore “read in” provisions to permit common-law partners to apply for adoption. Common-law partners were defined as individuals who have cohabited in a conjugal relationship. These rulings have become moot considering recent amendments to the definition of “parent”, which remove the married common-law distinction.⁵³⁷

Until mid-2007, **Regulations** under the [Vital Statistics Act](#) required that the birth of a child in same sex marriage could be registered only to one parent. The other parent would be required to adopt the child to obtain parental status for this purpose.

However, current **Regulations** permit the registration of births to both spouses in same sex marriages, the mother and the person to whom she is married (or who acknowledges an intention to assume the role of parent, making adoption unnecessary).⁵³⁸

⁵³⁵ SNS 1996, c3, referred to as the [Adoption Information Act](#)

⁵³⁶ *Re M(SC)* (2001), [194 NSR \(2d\) 362](#) (SC)

⁵³⁷ SNS 2015, c. 37, ss. 54, 59, 65

⁵³⁸ *O.I.C.* 2007-498 (September 20, 2007), *N.S. Reg.* 390/2007

XIII. CHILD PROTECTION PROCEEDINGS

Matters pertaining to child protection in Nova Scotia are dealt with in the *Children and Family Services Act*, S.N.S. 1990, c. 5

Effective March 1, 2017, significant changes were made to the *Children and Family Services Act* by SNS 2015, c. 37.⁵³⁹

However, as a result of the **Transition** provisions of those amendments, these changes do not apply to cases commenced prior to this date. Section 75 of SNS 2015, c. 37 provides as follows:

75 Any proceeding commenced pursuant to the *Children and Family Services Act* before the day on which this Act came into force and not finally disposed of before that day shall be dealt with and disposed of in accordance with the *Children and Family Services Act* as it read immediately before that day, as though this Act had not come into force.

As proceedings can last twelve to twenty-four months before a court, new practitioners will be dealing with **both** the “old” and “new” provisions until 2019 and must know which “version” of the Act applies to their case. For example, an application to terminate permanent care brought on or after March 1, 2017, even though it is in relation to an “old” order, would be a proceeding commenced after the coming into force date. Lawyer could therefore, for some time, be in court on the same day in two proceedings, each operating under different versions of the statute.

The main changes are as follows:

- (1) New definitions of “need of protective services” were inserted, including expressly for “emotional abuse”, “neglect”, and “sexual abuse”, but also in the substantive tests in Section 22(2), which may significantly change the legal thresholds for state intervention.
- (2) The definition of “parent” (and hence party status) has become more gender neutral.
- (3) The definition of “child” increases the age of young persons addressed by the **Act** for some purposes.
- (4) The investigation powers of social workers have been enhanced.
- (5) The manner in which Mi’kmaq and other Aboriginal children are addressed has changed.
- (6) Interim Orders may now contain more intrusive terms, prior to the Protection Hearing.

⁵³⁹ See O.I.C. 2016-310 (December 23, 2016)

- (7) An entirely new process called “Conferencing” has been added to the **Act** for children not in care but rather home under supervision.
- (8) Maximum time limits for disposition review have been shortened somewhat for school-age children.
- (9) Access after permanent care is now at the Minister’s discretion, rather than by order.

1. [Section 32](#) – Protection Application

The Agency may make an Application to the Court for a finding that a child is in need of protective services without first taking the child into care. The Agency must make an Application to the Court after a child is taken into care under Section 33, unless return of the child under [Section 35](#) occurs first.

(A) STANDING

The parties to the proceeding are those stated in Section 36, namely: the agency, the parents or guardians of the child (as defined in [Section 3\(1\)\(r\)](#)), the child if 16 or over, and third parties added under rules of the court.⁵⁴⁰

(B) PARAMOUNTCY

The Protection Application and Orders made under the ***Children and Family Services Act*** are paramount to those concerning custody and access of the child under private family law legislation, for so long as the protection proceeding may last.⁵⁴¹ In essence, the dispute between the state and parents must be resolved before any Order between the parents may be effective.

(C) DISCLOSURE

The Agency must disclose the allegations, intended evidence and orders sought in any proceeding under [Sections 32](#) through 49. Disclosure must be “full, adequate and timely”, but need not be affected at the criminal law standard.⁵⁴²

⁵⁴⁰ Regarding standing applications brought by non-parties, relevant considerations are discussed in *Minister of Community Services v TB*, [1994] NSJ No 649 (FamCt); *Children’s Aid Society of Halifax v. TC*, [1996] NSJ No 597 (Fam.Ct.); *Children’s Aid Society of Shelburne County v C(I)*, [2001 NSCA 108](#) at paras 51-52; and *Children’s Aid Society of Halifax v TB*, [2001 NSCA 99](#).

⁵⁴¹ *Children’s Aid Society of Halifax v KM*, [\[1980\] NSJ No. 59](#) (Fam.Ct.) at paras 23-4

⁵⁴² *e.g.*, as discussed in *R v Stinchcombe*, [\[1991\] 3 SCR 326](#); see *Nova Scotia (Minister of Community Services) v. DJM*, [2002 NSCA 103](#) at paras 36, 42 and 47

There is no obligation on the Agency to provide “up front” the entirety of its file in relation to the subject matter of a proceeding.⁵⁴³ However, motions for disclosure are available.⁵⁴⁴

In practice, agencies undertake extensive voluntary disclosure, such as routine and timely disclosure of recordings and notes. The disclosure obligation is subject to any claim of privilege.

⁵⁴³ *MO v Nova Scotia (Community Services)*, [2015 NSCA 26](#) at para 33

⁵⁴⁴ *e.g.*, by application under Section 38(2) of the *Act* or by motion or application under the court’s rules.

2. Section 33 – Taking into care

(A) GENERAL

A Representative (formerly an “agent”) whose qualifications are defined by Regulation, may take a child into care if he or she has reasonable and probable grounds to believe that the child is in need of protective services, and reasonable and probable grounds to believe that the child’s health or safety is at risk and cannot be protected adequately otherwise than by taking the child into care.⁵⁴⁵

A Notice of Taking into Care must be served “forthwith” upon each person who appears, on the available information, to fit the definition of “parent or guardian” if that parent is known and can be located. The Agency then has legal custody of the child pending a hearing.⁵⁴⁶

(B) REASONABLE AND PROBABLE GROUNDS

Determining “reasonable and probable grounds” is a question of fact depending on the circumstances of each case. The facts must be such as would cause a reasonably careful and prudent person to believe or have an honest or strong belief that the child is in need of protective services.”⁵⁴⁷

(C) CONSTITUTIONAL LIMITS

Taking a child into care interferes with security of the person of the child and parent but may be done without prior approval of a judge. The constitutional threshold for legislation authorizing taking into care without prior judicial authorization is serious harm or risk of serious harm, and an expeditious hearing must be held before a judge.⁵⁴⁸

3. [Section 39](#) – Interim Hearing

(A) INTERIM HEARINGS GENERALLY

The interim hearing must be held within five working days of the taking into care or application (whichever came first), on two days’ notice to the other parties.⁵⁴⁹ The interim hearing must be completed within 30 calendar days of the same event.⁵⁵⁰

The issues at the Interim Hearing are whether or not there are reasonable and probable grounds to believe the child is in need of protective services, and what Interim Order

⁵⁴⁵ [Section 33\(1\)](#) of the *Children and Family Services Act*

⁵⁴⁶ See the combination of [Section 33](#) & 3(1)(r) of the *Children and Family Services Act*

⁵⁴⁷ *Family and Children’s Services of Digby County v DG*, [2000] NSJ No 199 (FamCt) at para 12.

⁵⁴⁸ *Winnipeg Child and Family Services v. KLW*, [\[2000\] 2 SCR 519](#) at para 104.

⁵⁴⁹ [Section 39\(1\)](#) of the *Children and Family Services Act*

⁵⁵⁰ [Section 39\(1\)](#) of the *Children and Family Services Act*

should be granted to protect the child and assure his or her best interests pending completion of the Protection Hearing. The court may also grant interlocutory relief, such as in relation to disclosure of documents, order that the child or parent undergo psychiatric, medical or other examination or assessments, and interim services.⁵⁵¹

If the court is not satisfied that reasonable and probable grounds exist, the court must dismiss the application; if the court is so satisfied, the court may adjourn the application for completion of the Interim Hearing.⁵⁵² The court may revisit the reasonable and probable grounds determination on the adjourned date.⁵⁵³

(B) RISK TO THE CHILD’S HEALTH OR SAFETY

On completion of the Interim Hearing (but not at the first appearance),⁵⁵⁴ Interim Orders for Agency or Third Party care and custody⁵⁵⁵ may only be granted if the court is satisfied there are reasonable and probable grounds to believe there is a substantial risk to the child’s health or safety that cannot be protected adequately by means of an Order to return the child to the parent, with or without agency supervision, and with or without a “no-contact” order respecting any person.⁵⁵⁶

A “substantial risk” – for which only reasonable and probable grounds need exist at this stage – means a real chance of danger apparent on the evidence.⁵⁵⁷ A “variable” assessment of risk of future harm is required, such that risk may be “substantial” either because the nature of the harm is serious and permanent though the likelihood is remote, or less serious and permanent but more likely.⁵⁵⁸

(C) EVIDENCE

The court may consider hearsay evidence at the **Interim Hearing**, if the court is satisfied that the evidence is “credible and trustworthy in the circumstances”.⁵⁵⁹ The evidence must still be such that the court can assess it for credibility and trustworthiness (e.g., there must be information identifying the source unless privileged, and sufficient information about the circumstances in which a statement was made).⁵⁶⁰

In addition, at all stages of a proceeding the “principled exception to the hearsay rule” is available to a judge hearing the matter, and the judge “need not follow stringently” the

⁵⁵¹ [Section 39\(4\)](#) of the *Children and Family Services Act*; *Civil Procedure Rule 60A.14*

⁵⁵² [Section 39\(2\)](#) of the *Children and Family Services Act*

⁵⁵³ *Children’s Aid Society of Halifax v TJD*, [1999] NSJ No 145 (SCFD) at para 6

⁵⁵⁴ [Section 39\(7\)](#) of the *Children and Family Services Act*

⁵⁵⁵ *i.e.*, under [Section 39\(4\)](#)(d) or (e) of the *Children and Family Services Act*

⁵⁵⁶ [Section 39\(7\)](#) of the *Children and Family Services Act*

⁵⁵⁷ [Section 39\(6\)](#) of the *Children and Family Services Act*; see also [Section 22\(1\)](#)

⁵⁵⁸ *G.M. v. Children’s Aid Society of Cape Breton-Victoria*, [2008 NSCA 114](#) at para 37.

⁵⁵⁹ [Section 39\(11\)](#) of the *Children and Family Services Act*

⁵⁶⁰ *Nova Scotia (Community Services) v TS*, [2015 NSSC 65](#)

approach taken to children’s hearsay in criminal matters.⁵⁶¹ A statutory test for the admission of a child’s out of court statements is also provided by statute.⁵⁶²

4. Section 40 – Protection Hearing

(A) PROTECTION HEARING GENERALLY

The Protection Hearing must be completed within 90 days of the filing of the Protection Application.⁵⁶³ A parent may admit the child is in need of protective services.⁵⁶⁴ Evidence relating only to the best interests of the child may not be used to establish that a child is in need of protective services (that is, a child may not be found to be in need of protective services because it is in their best interests to be so found).⁵⁶⁵

At this stage, the definition of “need of protective services” found in [Section 22](#) must be applied by the court. This section provides the threshold for non-voluntary intervention by the state in the life of the child for his or her own protection. The determination must be made as of the date of Protection Hearing,⁵⁶⁶ and court shall, at the conclusion of the hearing, state on the record the findings of fact and evidence upon which findings are made.⁵⁶⁷ The court must dismiss the matter if the child is not in need of protective services.⁵⁶⁸

The option of diversion of the case from before the court into “conferencing” is available for children under agency supervision (but not interim or temporary care of the agency). These provisions were added by SNS 2015, c. 37, effective March 1, 2017. Strict timelines for actions taken within conferencing keep the case from “drifting” when not before the Court. Conferencing may resolve the proceeding, or the case may be returned to the judicial process.

(B) IN NEED OF PROTECTIVE SERVICES

[Section 22\(2\)](#) defines the circumstances in which a child is “in need of protective services”, and thereby defines a threshold which must be crossed to justify non-voluntary state action in the life of the child and family. The Act requires a two-step procedure, with the “protective services” determination coming before the “best interests” determination made at the Disposition Hearing.

⁵⁶¹ *MJB v. Family and Children’s Services of Kings County*, [2008 NSCA 64](#) at para 62; *GA v. Children’s Aid Society of Cape Breton-Victoria*, [2004 NSCA 52](#) at paras 15-16

⁵⁶² [Section 96\(3\)\(b\)](#) of the *Children and Family Services Act*

⁵⁶³ [Section 40\(1\)](#) of the *Children and Family Services Act*

⁵⁶⁴ [Section 40\(2\)](#) of the *Children and Family Services Act*

⁵⁶⁵ [Section 40\(3\)](#) of the *Children and Family Services Act*

⁵⁶⁶ [Section 40\(4\)](#) of the *Children and Family Services Act*

⁵⁶⁷ [Section 40\(4\)](#) of the *Children and Family Services Act*

⁵⁶⁸ [Section 40\(5\)](#) of the *Children and Family Services Act*

All of the subsections of [Section 22\(2\)](#) require some form of parental action or inaction; “why” the parent acted or failed to act as they did is not the question: it is the results for the real, lived experience of the child that is the focus.⁵⁶⁹ Some grounds require proof of matters relating to the acceptance of services or future risk of harm. The meaning of the expression, “substantial risk of harm”, is defined by statute in [Section 22\(1\)](#) and discussed in case law, as noted above under “Interim Hearing” (Section 39(7)).⁵⁷⁰

All determinations under Section 22(2) are made applying the civil burden of proof. There is no “higher” civil burden in child protection matters; the evidence is not scrutinized in a different manner or with any heightened caution or requirement.⁵⁷¹

(C) CONSENT DETERMINATIONS

The vast majority of Protection Hearings proceed by consent. The dominant practice is for a “consent finding” on admitted grounds, with a reservation to the Agency of the right to lead further evidence on the other grounds alleged in the Protection Application, and a reservation to the respondents of a right cross-examination in relation to the evidence before the court.

“Consent findings of protection are an efficient procedural tool which avoid early stage litigation and facilitate a focus on remediating the parenting issues.”⁵⁷² With a consent finding, a later finding may be made at a subsequent disposition or review hearing without error of law or loss of jurisdiction.⁵⁷³ On the other hand, if dismissal is appropriate on the evidence without the Court reaching the “best interests stage” (disposition), a contest at the Protection Hearing is available.

5. [Section 41](#) – Disposition Hearing

(A) DISPOSITION HEARING GENERALLY

The Disposition Hearing – a determination respecting the child’s care, custody, access and services or assessments – must be made within 90 days of the completion of the Protection Hearing.⁵⁷⁴ As described above, “conferencing” is also now available at this stage.

Evidence from earlier in the proceeding flows through to the disposition stage.⁵⁷⁵

⁵⁶⁹ *Nova Scotia (Community Services) v. CKZ*, [2016 NSCA 61](#), para. 47

⁵⁷⁰ See *MJB v. Family and Children’s Services of Kings County*, *supra*, and *GM v. Children’s Aid Society of Cape Breton-Victoria*, *supra*.

⁵⁷¹ *Nova Scotia (Minister of Community Services) v. RS*, [2012 NSSC 80](#) at paras 117-119; *Nova Scotia (Community Services) v. CKZ*, [2016 NSCA 61](#), para. 53

⁵⁷² *Nova Scotia (Minister of Community Services) v BLC*, [2007 NSCA 45](#) at para 32

⁵⁷³ *Nova Scotia (Minister of Community Services) v KABS*, [1999 NSCA 95](#), [1999] NSJ No 216, 50 RFL (4th) 281 see paras 10, 58, and 61.

⁵⁷⁴ [Section 41\(1\)](#) of the *Children and Family Services Act*

⁵⁷⁵ [Section 41\(2\)](#) of the *Children and Family Services Act*

The focus at this stage is on the best interests of the child,⁵⁷⁶ but the *Act* outlines additional considerations or requirements.⁵⁷⁷ Orders may be granted upon terms and conditions.⁵⁷⁸

The court must give reasons for its decision and a summary of the evidence, and consent orders may trigger mandatory inquiries by the court.⁵⁷⁹

Before granting temporary care and custody of a child, the court must consider the factors in [Sections 42\(2\)](#) [*“Services to Promote the Integrity of the Family”*] and 42(3) [*“Family Placement Options”*]. The content of such duties stated in the *Act* are determined by case law.⁵⁸⁰

Before granting an order for permanent care and custody of a child, the court must consider these same provisions and further consider the foreseeability of change.⁵⁸¹

(B) THE AGENCY PLAN

Before granting any disposition order, the court must consider the written “Agency Plan for the Child’s Care”, which must address statutory factors.⁵⁸² A well-written Agency Plan can be a road map for the parties and the court to work to remedy the reasons why the child was found to be in need of protective services. A parent may offer a counter-plan but is not required by the **Act** to do so. He or she should disclose their plan in some detail, if a contested hearing is contemplated and the child’s care needs are heightened or obvious (e.g., therapeutic, medical or treatment).

(C) CONSENT DISPOSITION ORDERS

If a consent order is to be entered into that will remove the child from the custody of his or her parents, either temporarily or permanently, the court must satisfy itself that the Agency has first offered appropriate services, the parties have been able to consult independent legal counsel, the parents understand the nature and consequences of the order, and their agreement is voluntary.⁵⁸³

⁵⁷⁶ [Section 42\(1\)](#) & 3(2) of the *Children and Family Services Act*

⁵⁷⁷ [Section 42\(2\),\(3\)&\(4\)](#) and 45 of the *Children and Family Services Act*

⁵⁷⁸ [Section 43](#) & 44 of the *Children and Family Services Act*

⁵⁷⁹ [Section 41\(4\)](#) & (5) of the *Children and Family Services Act*

⁵⁸⁰ For [Section 42\(2\)](#): *Nova Scotia (Minister of Community Services) v. LLP*, [2003 NSCA 1](#). For [Section 42\(3\)](#): *Children’s Aid Society of Halifax v TB*, [2001 NSCA 99](#)

⁵⁸¹ [Section 42\(4\)](#): see *Nova Scotia (Minister of Community Services) v. SZ* (1999), 179 NSR (2d) 240 (SCFD); upheld on appeal [1999 NSCA 155](#); expressly adopted as authoritative in *Nova Scotia (Minister of Community Services) v. LLP*, *supra*, at paras 29-30.

⁵⁸² For the contents, see [Section 41\(3\)](#) of the *Children and Family Services Act*, and *Civil Procedure Rule 60A.17*

⁵⁸³ See [Section 41\(4\)](#), as well as *Family and Children’s Services of Lunenburg County v. GD*, [1997] NSJ No. 272 (CA), para 35, 39-42; *AS v Nova Scotia (Minister of Community Services)*, [2007 NSCA 82](#) at para 30.

It is certainly a “best practice” for legal counsel to always try to have their instructions in writing, before consenting to an order having the effect of removing, perhaps permanently, a child from the care and custody of a parent or guardian.⁵⁸⁴ Failure to do so heightens the risk of an “ineffective counsel” allegation being brought forward by the parents in an appeal.⁵⁸⁵ Your insurer and Nova Scotia Legal Aid have developed recommended best practices in this regard.⁵⁸⁶

(D) DISPOSITION OPTIONS

Options for disposition include dismissal of the proceeding; placing the child with a parent or guardian under the supervision of the Agency; temporary placement with a third party to allow the parent to remedy the child protection concerns; or placement of the child with the Agency, either temporarily or permanently (see [Section 42\(1\)](#)). The Order selected must be in the best interests of the child, referring the court to the child-focused considerations in [Section 3\(2\)](#).

Supervision Orders may be granted upon specified terms and conditions ([Section 43\(1\)](#)), as may Orders for Temporary Care and Custody ([Section 44\(1\)](#)). An Order for Permanent Care and Custody may be granted, but the power of the Court to order access on permanent care has been removed by SNS 2015, c. 37, for proceedings commenced after the coming into force of those amendments on March 1, 2017. Any one of the Orders available under [Section 42\(1\)](#) may be granted at the Disposition Hearing or at a subsequent Review Hearing held under [Section 46](#).

(E) TIME LIMITS

The court has some discretion to extend the time limit for completing a hearing, but only if this is in the child’s best interests.⁵⁸⁷

However, the power to extend time limits is not available to alter mandatory statutory time limits applicable to the order made at the **conclusion** of the trial.⁵⁸⁸ Furthermore, Supervision Orders may not exceed 12 months of cumulative agency supervision and/or services.⁵⁸⁹

⁵⁸⁴ “Ineffective counsel” when giving consent on behalf of a parent is a ground of appeal in child protection matters, unlike in most civil proceedings: *MW v Nova Scotia (Community Services)*, [2014 NSCA 103](#); *MO v Nova Scotia (Community Services)*, [2015 NSCA 26](#)

⁵⁸⁵ e.g., *MW v Nova Scotia (Community Services)*, [2014 NSCA 103](#); *MO v Nova Scotia (Minister of Community Services)*, [2015 NSCA 26](#); *CC v Nova Scotia (Community Services)*, [2015 NSCA 67](#)

⁵⁸⁶ See <http://www.lians.ca/resources/family-law>

⁵⁸⁷ *Children’s Aid Society and Family Services of Colchester County v HW*, [1996] NSJ No. 511 (CA) at paras 27-30, 33-34, 40; *Children’s Aid Society of Cape Breton-Victoria v AM*, [2005 NSCA 58](#) at paras 28-31

⁵⁸⁸ *Nova Scotia (Minister of Community Services) v. BF*, [2003 NSCA 125](#) at paras 57-58

⁵⁸⁹ [Section 43\(4\)](#) of the *Children and Family Services Act*; *Nova Scotia (Minister of Community Services) v. BF*, *supra*, at para 60. NOTE: As a result, OIC 2016-310, the recent amendments to the Act have been proclaimed into force effective March 1, 2017, EXCEPT SNS 2015, c. 37, Section 33(2). While Bill 112 as passed repealed Section 43(4), this repeal was a drafting error and will not be proclaimed into force.

Orders for Temporary Care and Custody (only) must be reviewed within specified periods of time, and cumulative orders are subject to maxima, both determined with reference to the age of the children.⁵⁹⁰

For proceedings commenced prior to March 1, 2017, if the child or youngest child is under three at commencement of the proceeding, the Order for Temporary Care (only) must be reviewed at least every three months; if that child is three or older but under 12, every six months; if 12 or over, every 12 months.⁵⁹¹ The cumulative period of temporary care must not exceed 12 months for a child under six at commencement, or 18 months for a child six or older but under 12.⁵⁹² Children who are or reach the age of 12 during the protection proceeding are not subject to this limitation upon temporary care orders.⁵⁹³

For proceedings commenced on or after March 1, 2017, all children under 14 years of age at commencement will have a twelve-month maximum for disposition orders and disposition review, and children over 14 but under 16 at commencement will have an 18-month maximum. All non-terminal disposition orders are now subject to a three-month review, not only temporary care orders and without distinction based upon age of the child. If a child has been the subject of a proceeding in the past five years, the cumulative time in temporary care under Section 42(1)(d) of the **Act** cannot exceed 36 months.

Once the “outside” time limit is reached, the determination for the court becomes one of what final or “terminal” order is in the child’s best interests, namely: dismissal or permanent care.⁵⁹⁴

6. Section 46 – Review Hearings

Upon completion of the Disposition Hearing under Section 42, assuming a “terminal” order is not granted, all subsequent hearings are a review of disposition or a Review Hearing.

Such hearings must consider whether or not the child continues to be in need of protective services and, if so, what order should be made in the child’s best interests. The time limits under Section 45 are applicable to set mandatory frequency of review and outside limits for review.

“A review hearing is not an appeal or review of the original finding that the child was in need of protective services, which finding is assumed to have been properly made. On a review, the issue is whether there continues to be a need for a protection order, taking

⁵⁹⁰ [Section 45](#) of the *Children and Family Services Act*

⁵⁹¹ [Section 45\(2\)](#) of the *Children and Family Services Act*

⁵⁹² [Section 45\(1\)](#) of the *Children and Family Services Act*

⁵⁹³ [Section 45\(3\)](#) of the *Children and Family Services Act*

⁵⁹⁴ *Children’s Aid Society of Halifax v TB*, *supra* (CA) at para 26.

into account the changing needs of the child and the child's family. The court must consider whether the circumstances which prompted the original order still exist and whether the child continues to be in need of state protection. In so doing, the court may consider circumstances that have arisen since the time of the first order."⁵⁹⁵

Considerations at this stage are listed in Section 46(4), and Section 46(5) makes clear that the court must make such an order "as is in the child's best interests", referring the court back to the child-focused considerations in [Section 3\(2\)](#).

Section 46(6) is intended to prevent children from "drifting" in temporary care. In particular,

"The Act does not require a court to defer a decision to order permanent care until the maximum statutory time limits have expired. The direction of s. 46(6) of the statute is to the opposite effect."⁵⁹⁶

⁵⁹⁵ *Children's Aid Society of Halifax v CV*, [2005 NSCA 87](#) at para 8; see also *Catholic Children's Aid Society of Metropolitan Toronto v. M(C)*, [\[1994\] 2 SCR 165](#) at para 37.

⁵⁹⁶ *Nova Scotia (Minister of Community Services) v. LLP*, *supra*, at para 31.

7. Section 47 – Access on permanent care – “grandfathered proceedings only”

In proceedings commenced prior to March 1, 2017, an Access Order may be granted despite permanent care and custody of the child being granted to the Agency.⁵⁹⁷ However, the test for such an Order is **not** simply “the best interests of the child” without reference to the particular legislative direction found in Section 47(2) of the Act.⁵⁹⁸

The onus is on the natural parents to establish a special circumstance that would justify continued access. An access order must not impair permanent placement opportunities for children under 12; if no adoption is planned, access is available. These provisions highlight the importance of adoption as the new goal at this stage and the risk that access may pose to adoption.⁵⁹⁹

For children under 12, “some other special circumstance” may give rise to an access order.⁶⁰⁰ However, that special circumstances “must be one that will not impair permanent placement opportunities”. Access which would impair a future permanent placement is, by statute “deemed not to be in the child's best interest. This represents a clear legislative choice to which the judiciary must defer.”⁶⁰¹

The current “common law” rule (used to interpret such statutory provisions) is that there is no inconsistency in principle between a permanent care order and an access order, but access must be the exception and not the rule. The principle of preserving family ties cannot come into play in respect of granting access unless it is in the best interests of the child to do so, having regard to all the other relevant factors. Adoption, if found to be in the best interests of the child, must not be hampered by the existence of a right of access. Access should also not be granted if its exercise would have negative effects on the physical or psychological health of the child.⁶⁰²

Given the life of such legal proceedings, these “grandfathered” cases may continue before the courts for some time. Proceedings commenced on or after March 1, 2017 may **not** result in permanent care with access, as an express prohibition on access has been added to the **Act**:

⁵⁹⁷ [Section 47\(2\)](#) of the *Children and Family Services Act*

⁵⁹⁸ *Children and Family Services of Colchester County v KT*, [2010 NSCA 72](#); leave to SCC refused: [2010] SCCA 451

⁵⁹⁹ *PH v Nova Scotia (Minister of Community Services)*, [2013 NSCA 83](#); *Children and Family Services of Colchester County v KT*, [2010 NSCA 72](#); leave to SCC refused: [2010] SCCA 451; *AJG v Children's Aid Society of Pictou County*, [2007 NSCA 78](#), *Children's Aid Society and Family Services of Colchester County v EZ*, [2007 NSCA 99](#)

⁶⁰⁰ [Section 47\(2\)\(d\)](#) of the *Children and Family Services Act*

⁶⁰¹ *Children and Family Services of Colchester County v KT*, [2010 NSCA 72](#); leave to SCC refused: [2010] SCCA 451

⁶⁰² *New Brunswick (Minister of Health and Community Services) v ML*, [\[1998\] 2 SCR 534](#)

47(2) Where the court makes an order for permanent care and custody, the court shall not make any order for access by a parent, guardian or other person.

8. [Section 48](#) – Termination applications

The [Children and Family Services Act](#) provides a procedure for terminating an Order for Permanent Care and Custody, either by operation of law (the child reaches a certain age, is adopted or marries), or upon application by the agency, a parent, the child or another party.⁶⁰³

“Leave” of the court is required in some circumstances before the application can proceed to a hearing. Identifying the existence of a right to apply without leave requires careful calculation.

Prior to March 1, 2017, there was a 30-day bar to applications during the appeal period, and then a “six month window” with leave, followed by an 18-month window during which a parent could apply “as of right”, but leave was again required after two years had passed from the Order.⁶⁰⁴

However, by SNS 2015, s. 37, which came into force on March 1, 2017, there is an absolute bar to applications during an appeal (which typically lasts about six months from the date of issuance of the order under appeal), as well as for about six-and-a-half months (forty-five days plus five months) if there is no appeal.

There then will be a with-leave opportunity to apply to terminate, from the 45-days-plus-five-months point, until the fully as-of-right window opens six months later, at 45 days plus 11 months. The as-of-right window closes again after 13 months of having been open, by reintroducing a leave requirement at 45 days plus two years.

The original order is presumed to be in the child’s best interests until a change in circumstances is established.⁶⁰⁵ There are time limits for holding such hearings, which must be followed.⁶⁰⁶

The onus for termination is reversed from that applied in the original protection proceeding; that is, the parent must prove there has been a change in circumstances, as a result of which the child is no longer in need of protective services, and it is in the child’s best interests to terminate the order.⁶⁰⁷

9. [Section 49](#) – Appeals

Appeals in child protection matters proceed directly to the Nova Scotia Court of Appeal.

⁶⁰³ [Section 48](#) of the *Children and Family Services Act*

⁶⁰⁴ See *Children’s Aid Society of Shelburne County v. IC*, *supra*, at paras 48-49.

⁶⁰⁵ [Section 48\(10\)](#) and *MD v Children’s Aid Society of Halifax*, [1994] NSJ No 191 (CA at, para 61

⁶⁰⁶ *AM v Nova Scotia (Minister of Community Services)*, [2014 NSCA 97](#)

⁶⁰⁷ *SG v Children’s Aid Society of Cape Breton*, [1996] NSJ No 180 (CA) at paras 13-14; *Nova Scotia (Minister of Community Services) v DLC*, [1997] NSJ No. 78 (CA) at paras 8-9, 17.

There are statutory provisions governing the timing of the filing of the Notice, stay of orders, fresh evidence on appeal, and remedies available. The *Civil Procedure Rules* further specify different forms and procedures for child protection appeals and define the time limit for filing.⁶⁰⁸

The primary role of the Court of Appeal is to correct errors of law made in the court below. With respect to findings of fact, the Court corrects only a “palpable and overriding error,” that is, an error which is clear and affected the result.”⁶⁰⁹

⁶⁰⁸ See Section 49(1) of the *Children and Family Services Act*, and *Civil Procedure Rule* 90.13

⁶⁰⁹ *AS v Nova Scotia (Minister of Community Services)*, [2007 NSCA 82](#) at para 7

XIV. CHILD ABUSE REGISTRY

The [Children and Family Services Act](#) provides for a “Child Abuse Registry”.⁶¹⁰ The Registry is maintained by the Minister of Community Services. A person’s name and other relevant information⁶¹¹ is to be included on the Registry by the Minister if the court finds a child is in need of protective services under specified grounds; if that person is convicted of one of specified offences against the child under the [Criminal Code](#); or if the court makes a finding, on a balance of probabilities, that the person has abused the child in specified ways.

The court’s finding in the latter case is the result of a formal court application, upon notice to the person whose name is intended to be registered.⁶¹²

The **Criminal Code** sections include those which involve sexual interference, exploitation, child pornography, assault and prostitution, as well as failure to provide the necessities of life for a child or abandoning the child. Causing bodily harm or death to a child by criminal negligence, murder, manslaughter or other extreme offences will also result in registration. The list of offences is found in the *Child and Family Services Regulations* made under the Act and are specifically listed at Form 9.⁶¹³

A person whose name is registered may apply to the court, at any time to have her or his name removed. The test for removal is whether or not the court is satisfied the applicant does not pose a risk to children.⁶¹⁴

XV. FAMILY LAW IN AN ABORIGINAL CONTEXT

Generally speaking, provincial family laws regarding custody and parenting, support apply to First Nations people living on reserve. However, there are some very important exceptions that must be noted.

Marriage

Marriages involving a status Indian can be formed and dissolved under the same provincial and federal laws that apply to non-status people. In addition, Canadian courts have recognized First Nations’ customary laws on marriage and divorce: see Jack Woodward, *Native Law in Canada* (Toronto: Carswell, 1989), who cites *Connolly v. Woolrich* (1869), 17 R.J.R.Q. 266, affirming 17 R.J.R.Q. 75 (C.A.); *R. v. Nan-e-quis-aka* (1889), 1 Terr. L.R. 211 (C.A.); and *Manychief v. Poffenroth* (1994), [\[1995\] 3 W.W.R. 210 \(Alta. Q.B.\)](#) on the first point and *Rex v. Williams* [\(1921\), 30 B.C.R. 303](#) (S.C.) on the second.

⁶¹⁰ [Sections 63](#) to 66 of the [Children and Family Services Act](#)

⁶¹¹ Section 47(1) of the *Children and Family Services Regulations*, S.N.S. 1990, c. 5

⁶¹² Section 63(3) of the [Children and Family Services Act](#)

⁶¹³ *Children and Family Services Regulations*, NS Reg 183/91, [Section 63](#)

⁶¹⁴ Section 64(2) of the [Children and Family Services Act](#)

Division of family property

The federal government's exclusive jurisdiction under [section 91\(24\)](#) of the [Constitution Act, 1867](#) over “Indians and lands reserved for Indians” means that provincial statutes such as Nova Scotia's [Matrimonial Property Act](#) do not apply when it comes to dividing ownership or possession of on-reserve matrimonial property: *Derrickson v. Derrickson*, [1986] 1 SCR 285. However, provincial laws related to matrimonial personal property can apply: *Baptiste v. Baptiste*, [1987] B.C.W.L.D. 2356 (B.C.S.C.). As seen in *Derrickson*, there is also the possibility for compensation in lieu of division of property when there is an interest in the reserve land, as this does not conflict with any provisions in the [Indian Act](#). [See *Hepworth v Hepworth* [2012 NSCA 117](#) for compensation in Nova Scotia context].

A legislative gap regarding matrimonial real property on reserve existed for over 25 years until Canada passed *The Family Homes on Reserves or Matrimonial Interests or Rights Act*, [SC 2013, c 20](#), which came into full effect on December 16, 2014. This new law sets out provisions for the enactment of First Nation laws respecting on-reserve matrimonial real property, as well as provisional federal rules.

The provisional federal rules provide spouses and common-law partners living on reserves with rights and protections that will apply in the event of a relationship breakdown, or upon the death of a spouse or common-law partner, unless or until a First Nation establishes its own matrimonial property law. Pursuant to the [Indian Act](#), spouses and common-law partners who are not members of the First Nation are unable to hold any interest or right to reserve land. However, the provisional rules will enable courts to provide non-members with exclusive occupancy in some circumstances, as well as a range of compensatory remedies specific to the family home, and to the division of the value of any matrimonial interest or rights.

Unless a First Nation establishes its own matrimonial real property laws, the provisional federal rules will apply to all First Nations with reserve land, with the exception of First Nations under the [First Nations Land Management Act, SC 1999, c 24](#) (which already includes a requirement for First Nations to pass matrimonial property laws) or First Nations with a comprehensive self-government agreement including land management. The Act will apply until a First Nation develops its own matrimonial property law under this legislation.

Several of the First Nations in Nova Scotia have developed their own matrimonial property laws. Therefore, prior to advising a client on matrimonial property issues who is or was living in a home on reserve, you should inquire at the offices of the First Nations government (Band Council) to determine and obtain copies of the First Nations' matrimonial property law.

Support orders

Child support is available under both the federal [Divorce Act](#) and the Nova Scotia provincial [Parenting and Support Act](#). Both Acts incorporate the Federal Child Support Guidelines, which calculate the amount of child support that must be paid per child

according to the paying parent's income when the child is in a primary care parenting arrangement. The recipient parent's income is relevant only when the child is in a shared parenting arrangement, for considering special and extraordinary expenses that must be paid by the paying parent over and above the basic Table amount, and when a parent is making an undue hardship claim.

The major difference in dealing with registered Indians under the *Indian Act* in relation to child support orders has to do with the application of [s. 19\(1\)\(b\)](#) of the [Guidelines](#), which allows a court to impute such amount of income to a spouse as it considers appropriate, including where the parent or spouse is exempt from paying federal or provincial taxes [s. 19(1)(b)]. This section has been applied to 'gross up' the income of status Indians earning income, which is exempt from income tax to determine the amount of support payable: see *M. (D.A.) v. F.(J.A)*, [2008 NSFC 14](#).

Enforcement of support orders

Under [section 89](#) of the *Indian Act*, registered Indians are exempt from the garnishment or seizure by non-Indians of property located on a reserve. Property includes bank accounts and income located on reserve. In cases where the dispute over support is between two registered Indians, the garnishment of property or income earned by an Indian may be valid: see *Mohawks (Bay of Quinte) v. Maracle*, [2013 ONSC 4733](#), affirmed at [2014 ONCA 565](#) and *McMurter v. McMurter*, [2016 ONSC 1225](#). In cases where the spouse attempting to enforce an order is not a registered Indian, the registered Indian may be exempt from garnishment for property located on a reserve and the creditor spouse may have to look for alternative ways to enforce the support order.

Customary adoption

Customary adoption is an integral part of Aboriginal societies and is common in Aboriginal communities. Customary adoptions have been recognized by the courts. Customary adoptions are also recognized in section 2 of the *Indian Act*, which reads, "In this Act...**child** includes a legally adopted child and a child adopted in accordance with Indian custom". According to the court in *Re Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T.S.C) there are four criteria for recognizing a customary adoption:

- There must be evidence that the custom extended back in time as far as living memory;
- The custom must be reasonable;
- The custom 'must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the person whom it is alleged to affect'; and
- The custom must have continued without interruption until the present.

Child custody and protection – Aboriginal heritage

In cases involving the custody, adoption, apprehension and placement of children, Nova Scotia courts must address the 'best interests' of the child. In determining the best interests of an Aboriginal child, the preamble of the [Children and Family Services Act, SNS 1990, c 5](#), recognizes that the preservation of a child's cultural, racial and linguistic heritage helps to promote the healthy development of the child. Section 3(2)(g) of the Act further requires that courts take into consideration the importance of the child's cultural, racial and linguistic heritage when making an order or determination regarding the best interests of the child. A child's cultural heritage is not, however, determinative of a custodial arrangement. A child can receive meaningful access to his or her culture through custody, parenting time, interaction or contact time. See *H.(D.) v. M.(H)*, [1999] 1 S.C.R. 761.

As of January 1, 2020, the best interest of the child and placement of Indigenous children in the context of child welfare are now subject to national federal standards set out in [An Act respecting First Nations, Inuit and Métis children, youth and families](#), SC 2019, c 24. See below for further details.

Child welfare

As of January 1, 2020, [An Act respecting First Nations, Inuit and Métis children, youth and families](#), SC 2019, c 24 is in force. It is the first federal law on the subject of Indigenous Child and Family Services and the first statute to recognize inherent Indigenous jurisdiction over child and family services as a section 35(1) right in Canada. This means that Indigenous child welfare is an area of concurrent jurisdiction where the province, the federal government laws apply, and there is now also the possibility Indigenous groups may legislate and develop their own dispute resolution mechanisms in the context of child welfare. Currently, the Mi'kmaq of Nova Scotia are not self-governing in child welfare, but this is a goal they are actively working towards at this time.

The Mi'kmaq of Nova Scotia, as status Indians, have their own private agency, established in 1985 pursuant to the *Children and Family Services Act*, SNS 1990, c 5, called the "Mi'kmaq Family and Childrens Services Agency", with delegated authority from the province to provide culturally relevant services for prevention, protection and foster care to the 13 Mi'kmaq reserves in Nova Scotia (see [s. 36\(3\)](#)). It hires its own social workers and applies its own culturally relevant standards, to the extent the law allows. There is a tripartite agreement between Canada (AANDC), Nova Scotia (Department of Community Services) and the First Nations through the 13 Chiefs of the Nova Scotia Bands governing this relationship. Until the Mi'kmaq become self-governing, both the provincial *Children and Family Services Act* and the new federal *An Act respecting First Nations, Inuit and Métis children, youth and families* apply in the context of child welfare matters. In the case of conflict, the federal legislation will be paramount.

The provisions in the new federal law respond to calls in the TRC Final Report for national minimal standards for child and family services delivery for all Indigenous

children and families. This includes First Nation, 'non-status,' Métis, and Inuit children, living on or off reserve. Generally, there are four main areas where the new federal act supplements provincial laws. These are: (1) modifying the principles of Best Interest of the Child that appears in provincial legislation as well as introducing principles relating to cultural continuity and substantive equality; (2) introducing expanded notice and representation requirements for parents, care-givers and Indigenous governments; (3) introducing principles relating to reasonable efforts and prioritization of care and socio-economic condition requirements; and (4) imposing placement priorities for Indigenous children.