

**Ministry of Attorney General
Justice Services Branch
Civil and Family Law Policy Office**

Family Relations Act Review:

Report of Public Consultations

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Family Relations Act Review: Report of Public Consultations

I. Introduction

Why review the Family Relations Act?

When the current *Family Relations Act* came into force in 1979 it brought a major shift in family law in British Columbia. But much has changed and much has been learned in the 30 years since. The Ministry of Attorney General has undertaken a comprehensive review of the act, aiming for a statute that is easy to read and to use, that promotes the wellbeing of children and families, and helps families to resolve disputes quickly, fairly, effectively, and affordably.

Legislation is one essential component of the family justice system; programs and services are another, and are enabled by the legislation. A major review of family justice services and programs in B.C. was completed in 2005 by the Family Justice Reform Working Group, which was asked to explore options for fundamental change. Since then, the ministry has started implementing some of those changes to programs and services. The *Family Relations Act* review builds on this work by considering what changes should now be made to the legislation.

Objectives of the review

The Ministry of Attorney General aims to modernize the *Family Relations Act* to:

- ❑ reflect current social values, as well as family law research and policy developed over the last 25 years;
- ❑ support the use of out-of-court dispute resolution processes;
- ❑ encourage parents, where appropriate, to work together to reduce the effect of conflict on children;
- ❑ minimize the emotional and financial costs of family breakup;
- ❑ respond to the Family Justice Reform Working Group's observations that:
 - the family justice system should be founded on the values of family autonomy, cooperation, and the best interests of children,

“To create a family justice system that promotes the wellbeing of children and families and enables families to resolve disputes quickly, fairly, effectively, and affordably.”
~ministry goal

- processes to resolve family issues should match the nature of the dispute, be proportionate to what is at stake, and be flexible enough to meet the unique requirements of each case, and
 - the family justice system needs better ways to discover children's best interests and to make them a meaningful part of family justice processes;
- clarify the law so that it is more understandable and results are more predictable;
 - consolidate the law pertaining to families in one statute, where possible, and improve the organization of the *Family Relations Act*, and
 - ensure that public resources are used wisely and efficiently.

The consultation process

- In 2007, the ministry developed a series of discussion papers that served as the focus for consultation. In developing the papers, the ministry consulted with an advisory group of experienced lawyers and lawyer-mediators.

The papers summarize current family law here in B.C. and in other parts of Canada and the world, and outline new approaches being tried elsewhere. Each paper poses a series of questions about possible areas of reform. The papers do not present a ministry position. Their aim is to promote discussion so that the reform process can be informed and supported by the wisdom of people with a wide range of experience in the family justice system.

The discussion papers were posted on the ministry's website and the public was invited to respond. Although the consultation period has ended, these papers are still available at:

<http://www.ag.gov.bc.ca/legislation/archive.htm>

- The consultations were conducted in three phases, from February through November 2007, covering the following topics:
 - dividing family property
 - dividing pensions
 - judicial separation
 - parenting after separation
 - children's participation
 - access responsibilities
 - family violence
 - child status (legal parentage)
 - spousal and parental support

- cooperative approaches to resolving disputes
 - time limits and definitions
 - relocating children
- The ministry also held facilitated meetings with the legal community where lawyers shared their insights, observations, and suggestions. This included three meetings with the Law Society of B.C. and 14 meetings with the Canadian Bar Association, B.C. Branch (family law and alternative dispute resolution sections). These consultations took place in Kelowna, Nanaimo, Victoria, and the Lower Mainland between March 2007 and January 2008.
- The Social Planning and Research Council of BC (SPARC BC) received funding from the Law Foundation of B.C. to seek citizen participation in the review. SPARC BC held focus groups around the province to consult with adults and young people who have experience with the family justice system. They also consulted with community organizations, family advocates, and support workers. SPARC BC produced two reports: **The Family Relations Act Reform Project: Final Report**, in March 2008, and **Youth Included!** in May 2008. These reports can be viewed on the SPARC BC website at: <http://www.sparc.bc.ca>
- The Law Courts Education Society, with funding from the Law Foundation of B.C., brought together the ministry, community organizations, lawyers, mediators and other participants from the justice system to discuss reform options on two topics: children's participation and family violence as it affects children's best interests. This forum was held in March 2008 and the report can be viewed at:
http://www.lces.ca/documents/FRA_Forum_Report_Final.pdf

Who responded?

British Columbians who have experienced our family justice system from both inside and out took part in the consultation process and generously gave the benefit of their own perspectives and expertise. Responses to the consultation papers came from both rural and urban communities and from across the province.

Through SPARC BC, a special effort was made to hear the voices of children and youth who have lived through their parents' separation or divorce and have much to say about the family justice system and how it could do a better job for young people in their position.

Some men and women who have used the family justice system spoke from the vantage point of their own experiences. And the real life

experience of many others was reflected in the participation of community organizations that work with families, parents, men, women, Aboriginal families, immigrant families, and victims of family violence.

Professionals who work in the justice system or have an interest in law reform were consulted as well, including, family justice counsellors-- who are employees of the Ministry of Attorney General and work daily with separating spouses--lawyers, judges, mediators, social workers counsellors and academics.

Written submissions were received on all topics from the West Coast Legal Education and Action Fund and from a working group established by the B.C. Branch of the Canadian Bar Association. This working group also created its own survey to seek its members input on certain topics and provided the survey results to the ministry. Other groups, organizations and individuals provided submissions on topics of interest to them.

Consultation limitations

There are some limitations or challenges with interpreting the feedback received:

- ❑ The discussion papers each pose a series of questions, but not all respondents answered all questions so the amount of feedback varies from one topic to another. Some subjects garnered a lot of interest and feedback, and others very little.
- ❑ There may be some overlap in responses because some people participated in more than one consultation activity: for example as part of a group that made a written submission and also as a participant at consultation meeting.
- ❑ In a few topic areas — namely Parenting Apart, Access Responsibilities, Family Violence, and Children's Participation—it is difficult to thoroughly analyze results because some of the questions posed in the discussion papers were reframed in other forums and in the Canadian Bar Association's survey.

The purpose of this Report

This document reports on the results of the public consultation process. It summarizes the feedback received from all sources and should not be interpreted as reflecting a ministry position on the issues discussed.

Feedback is critical to the review and is being carefully and fully considered as the ministry does its policy analysis. Any proposals for

reform of the *Family Relations Act* will be the result of consideration of the feedback received, in light of the review objectives stated above, current research, and the experiences of other jurisdictions.

This report concludes with a summary of the next steps the ministry intends to take toward its goal of modernizing the *Family Relations Act* in support of a fair, effective, and affordable family justice system.

II. Dividing Family Property

The *Family Relations Act* recognizes that in most families both spouses contribute to the family's accumulated wealth—whether that contribution is in the way of cash, homemaking, or child rearing.

The general rule under the *Family Relations Act* is that everything that meets the definition of “family asset” is divided 50/50 between separated spouses. But there are exceptions to the rules that define what assets will be divided, and what share will go to each spouse.

Division of family property is an area that is often hotly contested when spouses separate. The rules and exemptions are complicated and results depend on how the judge balances competing factors in each case. And there are areas where the Act does not provide rules, such as how debts are to be treated. This makes it hard for families to predict what would happen if they went to court, and may discourage people from resolving their disputes over property division on their own.

There was not much feedback on this topic. Most came from lawyers and two lawyers' groups – the Canadian Bar Association *Family Relations Act* Working Group and the New Westminster Family Law Subsection.

Our model for dividing property

B.C.'s model for dividing family property is a “proprietary model.” It is based on an equal sharing of the assets the family owns at breakup. If a separating couple asks the court for a decision, a judge will determine what the family assets are—based primarily on whether they were used for a family purpose—and then will divide those assets equally unless a 50/50 split is considered unfair. The judge also can order the transfer of a business or other assets, if necessary for a fair result. This flexibility allows for exceptional circumstances to be taken into account, but can make it harder to predict outcomes.

Some other parts of Canada use a model that is based on sharing the value of all the assets that the spouses accumulated during the marriage, regardless of whether they were used for a family purpose. The judge's power to order an unequal division is much more limited than in B.C. This is a “compensation model.”

Although lawyers who responded are generally in favour of increasing certainty of outcomes, there is less support for changing B.C.'s basic model for property division. Some respondents believe that such a significant change would undermine public expectations and would

“Great benefit would be derived from law reform that would increase the ease with which matrimonial property can be divided without incurring much expense or time.”

~law professor

unsettle the body of law that has developed around the current model. However, there is some support for limiting judges' powers to order an unequal division of assets.

Defining "family assets"

The *Family Relations Act* defines "family asset" as anything owned by one or both spouses that is ordinarily used for a family purpose, no matter when or how it was acquired.

In most other parts of Canada, the law excludes certain types of property from what is shared. Examples are gifts or inheritances received by one spouse, and property that a spouse owned before the marriage. In some places, excluded property is not divided; in others, excluded property may be divided if fairness requires it.

Most respondents do not support a change to the current definition of family assets because this definition has been interpreted in many cases that give guidance as to its meaning.

However, most do agree that certain property should be excluded from the definition, even if it was used for a family purpose:

- ❑ property acquired before the marriage or after the separation;
- ❑ property acquired by one spouse by gift or inheritance from somebody else; and
- ❑ court awards, such as damages for a personal injury.

Some respondents suggest that excluded property should be subject to division between the spouses only in exceptional circumstances but there should be some flexibility to ensure fairness. (An example given is where family assets are not accessible because they are in another country.)

Some respondents, particularly lawyers, urge that RRSPs be treated the same as pensions: that is, the amount accumulated before the marriage should be excluded from division. Trusts created before marriage are also suggested as a category of excluded property.

Dividing family debts

The *Family Relations Act* says nothing about dividing family debts between separating spouses. If they have more assets than debt, a judge might consider the amount owed on an asset when calculating its value, or in ordering an unequal division. In this way, a sharing of debts can result. But the outcome is unpredictable and there are few solutions for the many families who have more debt than assets.

Most of those who responded agree that the Act should address the issue of family debts, although some worry about adding a new concept to the Act because it can take time before it is fully interpreted and understood. Others favour including in the Act a clear definition of “family debt.”

There is support for including the following considerations in the definition of family debt:

- ❑ whether it was incurred for a family purpose;
- ❑ whether it was incurred to acquire, manage, maintain, operate, or improve a family asset; and
- ❑ when it was incurred and when it was paid off (in relation to the marriage or separation).

As for what a judge should consider when deciding whether an equal sharing of debts would be unfair, the few who addressed this issue say the considerations should be the same as those listed in the Act in relation to division of assets.

Different types of agreements

The *Family Relations Act* talks about four types of agreements spouses can make about sharing their property: marriage agreements; separation agreements; ante nuptial (before marriage) settlements; and post nuptial (after marriage) settlements.

Only a marriage agreement is defined in the Act: it is a written agreement about family property, signed and witnessed, made before or during marriage. Most prenuptial or cohabitation agreements fit this definition.

A separation agreement is not defined but case law has concluded that a separation agreement can be oral or written, as long as it is intended to create a legal relationship.

There is general agreement among those who responded that it is unnecessary to identify various types of spousal agreements. Most agree that a common rule should apply to all, but there is no consensus about what that rule should be.

Respondents are divided on whether, or to what extent, spouses should be able to opt out of the property division rules by making their own agreement.

Currently, even if spouses have made an agreement about how they will share their property, the Act gives the court a lot of leeway to change the terms if one spouse later says it is unfair. In deciding whether a marriage agreement or separation agreement is unfair, a

“The key is to achieve the right balance between flexibility and certainty which strives for a just resolution.”
~professional organization

judge must consider the factors set out in the Act, but the Act does not say what “unfair” means. The fairness test does not apply to ante and post nuptial settlements: judges can change those agreements if they think they should be changed.

In many parts of Canada, a judge’s authority to change an agreement is much more limited—such as when the agreement is found to be “unconscionable” or “fraudulent.”

Some respondents favour the Alberta model, which protects agreements from judicial interference as long as the procedural requirements are met. For example, the agreement must be in writing and both spouses must have independent legal advice (though there is concern for those who cannot afford it).

Others say the Act should identify criteria for assessing substantive fairness as well. That is, are the terms of the agreement fair, even if all the procedural requirements are met?

Another suggestion is that the Act be amended to give judges the power to change a prenuptial or cohabitation agreement if there has been a substantial change in circumstances after the agreement was made: for example, the couple has a baby; one spouse puts aside his or her economic interests for the sake of the family; or substantial time has passed. Also suggested is the addition of a rule that a person may not waive a future right to support in an agreement made at the beginning of a relationship.

Dividing property of unmarried couples

When an unmarried couple separates, the *Family Relations Act* generally does not apply to the division of their property. The 50/50 rule therefore does not apply.

But if they have made a cohabitation or separation agreement, then s.120.1 says the Act *does* apply, even if their agreement says that they don’t want it to. This means each of them has the right to apply to court to change the agreement on the grounds that it is unfair, just as if they had been married—as long as they do it within the time limit. (See time limits for dividing property.)

Attitudes are fairly evenly divided about whether the Act should govern the division of property between unmarried spouses.

Some respondents believe the law should treat couples who marry differently from those who don’t. Many argue that the law should recognize that the decision to marry has consequences, including a presumption that property is shared: if two people choose not to make that commitment, the law should not impose it on them.

“The vast majority of my clients who want a cohabitation agreement want them for the precise purpose of protecting their assets from subsequent claims by their partners, which is precisely what s.120.1 does not allow them to protect against.”

~lawyer

Others favour applying the same law to married and unmarried couples. They say that just because two people do not marry the law should not assume they have decided not to share their property, because many different factors enter into the decision to marry or not. The law, they say, should not create a financial incentive for a decision that should be made for other important reasons. They say that excluding unmarried couples from the property division laws can result in unfairness to a non-owning spouse who contributed to the assets.

The one area of agreement among lawyers who provided feedback was that s.120.1 of the *Family Relations Act* should be changed. The law, they say, should encourage couples to make cohabitation agreements, but this provision discourages them because it means that the Act will apply, whether they want it to or not.

Property division and spousal support

The *Family Relations Act* deals with both property division and spousal support. The Act does not say which issue should be resolved first, but case law has established that property should be divided before a decision is made about whether to order spousal support.

While property division and spousal support are separate issues in law, in practice they can overlap. This overlap allows for flexibility—for example, an unequal split of family assets can give a spouse enough income so that no support order is needed, but flexibility means that outcomes are less predictable. And unfairness can result if a support order is made without proper consideration of the division of assets.

Some respondents think the Act should adopt the rule that has developed in case law and direct a judge to first divide the family assets before deciding whether to order spousal support. Others agree with the case law rule but disagree that it should be added to the Act. They say that doing so will not resolve the real problem—how to address the complex relationship between spousal support, the notion of “economic need”, and division of assets.

Other respondents suggest that judges should have flexibility to deal with property division and spousal support together, or in whatever order makes most sense in a particular case.

Dividing pensions

Pensions are a significant asset in many families, but dividing a pension can raise a number of issues. Some of these issues are quite technical and they can be expensive to sort out.

In 2006 the B.C. Law Institute consulted with lawyers, actuaries and plan administrators and proposed some revisions to the *Family Relations Act* to clarify and modernize the law.

Respondents generally agree that it would be helpful to clarify and simplify the pension division provisions in the Act.

Triggering events

Spouses' rights to a share in family property only arise when one of these "triggering events" occurs:

- ❑ they make a separation agreement, or
- ❑ one of them goes to court for a divorce, judicial separation, annulment, or declaration that there is no prospect of reconciliation.

It can take a long time to arrive at a separation agreement and in the meantime, a spouse has no way to protect his or her rights to family property without starting a lawsuit.

Lawyers generally agree that this should be changed. There is some support for using the date of separation as the only triggering event, but there are concerns that this can sometimes be difficult to establish.

Other suggestions for triggering events include:

- ❑ formal notice filed by a spouse (without starting a lawsuit);
- ❑ a separation of one year;
- ❑ an application to court by a spouse for division of property;
- ❑ the start of negotiations between the spouses, as evidenced by written communication, or the signing of a mediation agreement;
- ❑ the death—after separation—of one spouse; and
- ❑ agreement between the spouses as to the date of the triggering event (before the conclusion of a separation agreement).

Valuation date

When deciding how to divide family property, spouses — or a judge — need to know how much the property is worth. That can change over time, so it is important to know the date on which the value is to be established. This date is known as the valuation date.

The *Family Relations Act* does not say anything about valuation dates so rules have been developed over time by judges. Most often it is the trial date, but sometimes another date is used.

"It is important that the Family Relations Act be easily read and understood by all possible interested parties." — mediator

Generally respondents agree that there needs to be a clear understanding of what the valuation date is, but not everyone agrees that it should be legislated.

Some respondents say there is no need to legislate it because case law has already established that property is not valued until it is divided. But most respondents agree with the former B.C. Law Reform Commission's recommendation that the valuation date should be set out in the Act to lend more certainty. This way, fewer people would need to resort to court to establish valuation dates.

If it is to be legislated, the date needs to be fair. Some say the Act should say that property is valued as at the date of trial, or if there is a separation agreement, at the date of the agreement. Others suggest the date of separation or one year after separation.

With regard to general rules, it is suggested that:

- ❑ spouses should share in any changes in their property's value as of the valuation date;
- ❑ if a spouse's actions result in a significant change in the value of assets beyond market trends, a judge should be able to consider that fact in deciding whether an equal division of the assets would be unfair; and
- ❑ judges need to have the power to use a different valuation date in cases where one spouse has wasted or disposed of assets.

Conflict of laws

If a spouse lives or owns property outside British Columbia, the division of family property can raise questions about jurisdiction (which court has the power to deal with a case), and also about which laws apply—those of B.C., or of the other place where the spouse lives or the property is located.

If there is no agreement, these questions can be expensive to resolve in court. Our *Court Jurisdiction and Proceedings Transfer Act* lists the factors a B.C. judge must consider when deciding whether a B.C. court can deal with such a case, but it is not entirely consistent with the principles of family law. To deal with choice of law issues, judges rely on case law, which can lead to uncertain results.

The Uniform Law Conference of Canada has created a *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act* to provide a more coherent approach to answering these questions. The B.C. Law Institute has recommended that B.C. adopt this uniform Act and several respondents support that. However,

others disagree because no other province or territory has yet adopted it and there are not enough such cases to warrant a new statute.

Opinion as to whether the *Family Relations Act* should deal with jurisdiction and choice of laws issues is evenly divided among those who responded.

Taking care of a child's property

One of the Public Guardian and Trustee's roles is to manage trust funds for children. For example, if a child receives a settlement for injuries suffered in an accident, the Public Guardian and Trustee usually manages the money until the child is 19.

Some provinces have a law specifically authorizing a judge to appoint a parent or other person to manage a child's property. In some places, smaller amounts can be paid directly to a parent or guardian to be managed on behalf of the child, without the need for a court order.

Respondents seem to favour this approach, although the feedback was particularly hard to interpret because the questions posed in the Canadian Bar Association *Family Relations Act* Working Group survey were different from the questions in the ministry's discussion paper.

A large majority suggested that a court order should only be required for sums of \$10,000 or more. And most respondents would require the person receiving the property to account to the child for how it was managed when the child reaches 19.

More to talk about . . .

Respondents were invited to raise other issues relating to division of family property that were not covered in the paper. Some issues raised are:

- the need to remove barriers that a non-owning spouse faces in getting accurate and reliable financial information from the other spouse to prove ownership and valuation of assets. Suggestions include:
 - placing an increased duty on spouses to provide accurate financial information on the existence and value of their assets,
 - providing an automatic right to seek full disclosure without starting a lawsuit, and
 - giving judges discretion to impose consequences for non-disclosure, such as reversing the onus of proof, drawing an adverse inference against the non-disclosing spouse, and ordering full costs to be paid by the non-disclosing spouse;

"In the area of property division, strong disclosure tools and an ability to access financial resources at an early stage are frequently key to achieving a just and speedy settlement."
~professional organization

- ❑ the need for more flexibility to allow for the sale of family assets, at any stage, to fund the property claim; and
- ❑ the need to address the treatment of consent orders, family trusts, and assets such as patents and stocks that have no value at the valuation date but have potential to be valuable.

Common themes in the feedback

Although there is no strong support for major changes to the *Family Relations Act's* basic model of property division, the most common theme in the feedback is that the Act's property division provisions should be clearer to provide more guidance and make it easier for spouses to resolve property disputes without having to engage in long and expensive lawsuits.

Specifically, respondents identify the need to clarify property division provisions in the *Family Relations Act*, including:

- ❑ whether certain types of assets are excluded from the definition of family asset and how these excluded assets are treated;
- ❑ how debts are divided;
- ❑ what role judges should play in varying property agreements;
- ❑ how to deal with property division for unmarried couples;
- ❑ the interplay between spousal support and property division; and
- ❑ what dates should be used as triggering events and as the valuation date.

III. Judicial Separation

Judicial separation is a holdover from the days when divorce was difficult to obtain and people needed another way to get orders for property division and spousal support. Today it is easier to get a divorce and there are other options for people who cannot or do not want to divorce.

For these reasons, orders for judicial separation are not common in B.C. and it has often been suggested that they are no longer needed.

The few who responded to this issue support abolishing judicial separation in British Columbia.

IV. Support for Spouses and Parents^{*}

The *Family Relations Act* provides for the possibility that a spouse may require support after a marriage has ended. The Act imposes financial obligations between spouses and lists the factors to be considered when determining what amount of support, if any, one must pay to another in a particular case. It also obliges adult children to support their parents, in certain circumstances.

There was not a large volume of feedback on this topic. Most feedback came from lawyers, academics, and community organizations, although some members of the public did contribute from their personal experiences. Generally speaking, the lawyers and academics oppose changes to the law in this area. Members of the public are less certain.

Entitlement to spousal support

If spouses don't agree that one of them is entitled to support from the other, a judge may have to decide. The *Family Relations Act* lists factors and objectives for a judge to consider, but is not clear about the basis on which support is to be ordered. Judicial decisions have approached entitlement to support from various perspectives:

- ❑ *compensation* for a spouse who has spent more time caring for the home and family;
- ❑ *financial need*, whether or not caused by the relationship—for example, for a seriously ill spouse; or
- ❑ *contractual obligations* contained in an express or implied agreement between the spouses.

The lawyers who address this issue believe that the current law “works well enough,” is “clear” and “well-considered.” Other comments cautioned against trying to put into the Act all possible factors to be considered. There was some suggestion the law could be clearer about whether spouses have a duty to be financially self-sufficient and for consistency's sake, the *Family Relations Act* might mirror the

*Child support issues are not addressed here: In B.C. the *Federal Child Support Guidelines* are used, which were reviewed by the federal government in 2002.

provisions of the *Divorce Act* since spousal support is treated similarly under both acts.

Deciding the amount of support

One of the reasons why separating spouses often find it so difficult to agree on the amount of spousal support, is that it is difficult to predict in a particular case what amount a judge would order if they were to go to court.

To encourage certainty, it has been suggested that the *Family Relations Act* could direct judges to first consider compensation factors, with other factors to come into play only if the recipient spouse is still in financial need. Most respondents oppose this suggestion, preferring to allow the case law to continue to evolve.

Another approach to greater certainty is the use of Spousal Support Advisory Guidelines, which are used to calculate support, based on variables such as the length of the relationship and income differences. B.C. courts have endorsed these as an important and useful tool. Most respondents say the Guidelines make it easier to agree on amounts, and almost three-quarters say they have actually used the Guidelines.

Although they receive generally favourable reviews, there is not strong support for legislating the Guidelines. Over half feel that they don't fit all circumstances, and therefore their use should not be required by law.

“The Family Relations Act provisions for spousal support work well enough, although the act could be a trifle clearer about the objective of self-sufficiency: should it be a duty or not?”

~lawyer

Changing a spousal support order

Applications to change support orders are common, as people's circumstances change over time. The *Family Relations Act* instructs judges to consider changes in the spouses' "means, capacities and economic circumstances." And if a spouse is not making reasonable efforts towards becoming self-sufficient, a judge may reduce the amount.

Most respondents are satisfied with the case law that has emerged on this subject. There is some concern that making changes to the Act, such as requiring the consideration of the recipient spouse's conduct, may result in a high-degree of surveillance of that spouse. However, some respondents favour greater consideration of self-sufficiency.

Reducing or cancelling arrears

If support payments are not made in full or at all, arrears accumulate. An application to have these arrears cancelled or reduced is, in effect, an application to change a support order, but the *Family Relations Act*

applies a different test. Instead of proving a change in circumstances, the applicant must show it would be “grossly unfair” to refuse the order for cancellation or reduction of the arrears, considering the person’s efforts to pay, the explanation for any delay in applying, and any special circumstances.

There is no consensus among respondents as to whether this part of the Act should be changed. Several respondents feel the current test is adequate. Others suggest that arrears should be reduced or cancelled only on proof of significant, long-lasting reasons for falling behind that were beyond the applicant’s control, as well as proof of the efforts made to comply. Another respondent feels the test should be the same as for any application to change a support order.

Spousal support after a payer dies

Spouses might agree that support will continue after the payer’s death, but it is unclear in the *Family Relations Act* whether a judge can make such an order. Most respondents oppose giving judges such power. Reasons given are:

- ❑ this would allow for a benefit to one person at the expense of the beneficiaries of the estate;
- ❑ the certainty of wills should be protected; and
- ❑ it would promote uncertainty in the law.

Only one respondent supports the idea, saying that judges already make these orders.

Some alternative suggestions were made:

- ❑ change the Act to allow for a support order for a limited time only, after the payer’s death; and
- ❑ allow the court to require a paying spouse to maintain life insurance to cover continuing support obligations.

Parental support

Currently the *Family Relations Act* provides that parents may sue their adult children for parental support if they are unable to financially support themselves. Such parental support laws were developed in an era when many jurisdictions were limiting government’s responsibility to support the poor. Claims for parental support have always been rare, but they may increase, given our aging population and the widening income gap between seniors and other segments of society.

The B.C. Law Institute completed a comprehensive report on parental support in 2007. The Institute suggests repealing the parental support provision in the *Family Relations Act*, saying that it is an outdated concept that is ineffective in meeting the practical needs of poor elderly adults. The report can be viewed at:

<http://www.bcli.org/bclrg/publications/48-report-parental-support-obligation-section-90-family-relations-act>

Respondents almost unanimously agree that the provision allowing parents to claim support from their adult children should be removed from the *Family Relations Act*. Reasons are that it is seldom used, it does not promote family harmony, and that care of the elderly should be the responsibility of the state.

More to talk about . . .

Respondents were invited to raise other issues relating to spousal and parental support that were not covered in the paper. These suggestions were made:

- ❑ duty counsel or Family Justice Counsellors could deliver public education on basic entitlements and responsibilities;
- ❑ there should be public access to computerized programs that would allow people the opportunity to evaluate potential child and spousal support outcomes, given their particular circumstances;
- ❑ at an early case conference (“triage conference”) a judge should be permitted to impose a “without prejudice” support order, to expire on a given date, which could cover immediate financial need until a full hearing can be held;
- ❑ there should be more alternatives to court, including an out-of-court process for changing support orders; and
- ❑ legislative guidance could help judges take into account gender-based dynamics in families, including the impact of responsibility for children on a woman’s economic opportunities and income-earning capacity.

Common themes in the feedback

There was no strong support for major changes to the *Family Relations Act* in the area of support except for one: that the *Family Relations Act* provision making adult children responsible for supporting dependent parents should be repealed.

V. Parenting Apart

This chapter provoked a greater volume of feedback than any other. The majority of the individuals and groups who responded are academics, women's organizations, lawyers, and Family Justice Counsellors.

Words that describe parents' roles

If words have power to shape our thinking, should we change the words—such as “custody” and “access”—that we use to describe parents' roles and responsibilities after separation? Could different words promote healthier resolution of parenting disputes? These ideas have been discussed in B.C. and elsewhere for some time.

Most respondents believe that a change in terminology can support separating couples in establishing good parenting relationships. They suggest that the existing terminology is loaded with issues of power and promotes conflict with its win-lose implications. The majority prefer the term “parental responsibility.”

On the other hand, not everyone sees a need for change. Some say that similar moves in the United Kingdom, Australia, Washington State, and Alberta have not created any real change. Some support the continued use of “custody” and “access” because a change in language will be confusing, particularly for people who already struggle with language and translation issues. As well, these are the terms used in international law and conventions.

The majority of all respondents do agree on the need for detailed definitions of whatever words are used, to help to clarify parents' expectations and to minimize the misunderstandings that fuel conflict.

Child's best interests ~ “paramount” or “only” consideration?

B.C.'s *Family Relations Act* says that when a judge is making decisions about custody, access, and guardianship, the best interests of the child must be the “paramount” consideration. Canada's *Divorce Act* and the family laws of most other provinces and territories say that the child's best interests must be the “only” consideration.

The question of whether to use “paramount” or “only” generated a large volume of response. About three-quarters of respondents prefer to stay with “paramount.”

The words we now use “focus on the interests of the parents rather than the needs and rights of the child.”

~trauma therapist

There is almost unanimous agreement that the Act should also require parents to take into account their children's best interests when making their parenting arrangements after separation.

As to what factors should enter into a consideration of "best interests," most respondents would add these to the current list:

- ❑ history of care of the child;
- ❑ parental involvement in any civil or criminal court proceedings that reflect behaviour that would affect the child's safety or well-being;
- ❑ family violence;
- ❑ the benefits to the child of having a relationship with each adult who wants custody, access, or guardianship (assuming that both parents benefit a child's life and there is no family violence) and the willingness of parents to cooperate.

Aboriginal heritage, the child's culture, religious upbringing, ethnicity, and language were cited as secondary factors to be considered.

There was some concern expressed with expanding the list of factors too much, so as to provide a "shopping list" of issues for opposing parents to fight over.

"Witnessing family violence is a harm to the child and is not always recognized as such."

~lawyer

Family violence as a factor in best interests

This is the question that prompted the most feedback, by far: Should family violence be added to the list of factors that a judge must consider when assessing a child's best interests?

The majority of respondents agree that it should be. These are the themes that emerge in support:

- ❑ research shows that children who witness violence absorb the message that violence is an appropriate way to resolve conflict;
- ❑ family violence has a negative impact on a child's development and on the parent/child relationship;
- ❑ this change would reflect the seriousness of the issue and might raise awareness among parents and the public;
- ❑ a violent spouse cannot be assumed to be a good parent;
- ❑ evidence shows that the extent of domestic abuse is grossly underestimated;
- ❑ women are victims of the most serious abuse: family violence has to be understood in a context of power imbalances; and
- ❑ this change would be consistent with the earlier proposed changes to the *Divorce Act*; with similar changes in other provinces; and

with provisions in the *Child, Family and Community Service Act* about protecting children from violence.

Those who express concerns about including family violence as a factor in the best interest test were mainly lawyers. They made these points:

- ❑ false claims of family violence could result;
- ❑ focus may be diverted from the child and onto the parents, which could promote litigation;
- ❑ judges already consider family violence and their discretion (decision-making authority) should not be restricted;
- ❑ family violence can be adequately addressed through the existing criminal and civil processes;
- ❑ a parent's behaviour is only relevant to the extent that it affects the ability to parent the child; and
- ❑ looking at a history of family violence is a look backwards, when decisions about parenting arrangements should be forward-looking.

Parenting plans

B.C.'s *Family Relations Act* neither encourages nor requires separating parents to make parenting agreements, nor does it suggest what might be included in such agreements. The law in some other places either requires a parenting plan or provides guidelines that parents can use if they wish.

Questions about whether the Act should be changed to include provisions about parenting plans brought a lot of comment.

People who deal regularly with separating families are generally in favour. They say that this would give parents increased power to make decisions about their children and would promote communication between parents. Particularly in the early stages of separation, a parenting plan can reassure children that their relationships with both parents are secure.

Others say parenting plans could help to minimize future conflict by encouraging parents to address issues in advance. Experience with parenting plans in other places has been positive. Generally though, most would make these plans optional, rather than mandatory.

The response was not totally positive, but those who disagree seem mostly to be concerned with *mandatory* parenting plans. They worry about the appropriateness of parenting plans in situations involving family violence and suggest an exemption in these cases.

There is also some concern about whether a focus on cooperative parenting plans will lead to greater imposition of shared parenting

"The US plans used here by family justice counsellors are useful because they give parents an idea of what would be a good care regime for a child of their child's age."
~lawyer

arrangements, which require a high degree of cooperation to be successful. The potential for harmful conflict is pronounced in situations where there is family violence and some respondents are concerned with encouraging cooperative parenting in these cases.

Parenting arrangements by court order

The *Family Relations Act* allows judges to make custody and access orders but doesn't specifically say that a judge may allocate particular responsibilities between the parents.

A large majority favour giving judges the authority to order particular parenting arrangements. However, limitations are suggested. Some say that a judge should make such an order only after parents have submitted a proposed plan, so that they cannot simply hand over to the court all responsibility for decisions about their children. Others say the parent seeking the court order should have to show that cooperation and agreement is impossible (or nearly so) and that the order being asked for is in the child's best interests.

When a judge does make a custody or access order, disputes can arise later if one or both parents don't really understand the order. A majority of respondents favour adding to the Act a requirement that parents be given an explanation of the obligations created by a custody or access order, and the consequences of failing to meet them.

Court-ordered dispute resolution

Another popular question was whether B.C.'s *Family Relations Act* should specifically permit a judge to stipulate in custody or access orders the process—mediation, for example—that parents are to use to resolve problems that may come up. It is becoming more common to see this in family laws elsewhere.

Respondents are generally in favour, but most qualify their support by saying that access to the courts must always be available, if other processes are inappropriate or unsuccessful.

There are concerns about the expense of using non-court processes to resolve disputes. Some opponents warn that a parent could use mediation or other court-ordered process as another obstacle (and expense) to further disadvantage the weaker parent.

*"If the theory is that court is a last resort, people would have been exposed to [other dispute resolution processes] by the time the judge makes an order."
~family justice counsellor*

Common themes in the feedback

Overall, respondents agree that:

- ❑ the “best interest of the child” should be the paramount concern when making parenting arrangements;
- ❑ the list of “best interest” factors should be expanded;
- ❑ parenting plans would be helpful in most cases; and
- ❑ judges should have greater authority to order particular parenting arrangements or dispute-resolution mechanisms.

VI. Meeting Access Responsibilities

This topic generated interesting feedback but did not capture the attention of a broad range of respondents: community organizations, academics, lawyers, Family Justice Counsellors and individuals responded to a range of questions posed, but most questions are addressed by only a handful of respondents. Many of the responses reflect a high level of frustration with the challenges involved in enforcing access provisions.

Access enforcement remedies

Once an order determining custody and access is in place, issues can arise if a parent fails to exercise access or the other parent refuses to grant access according to the court order. This failure to respect parenting orders has a serious impact on children: the parents may remain in protracted conflict that affects the child's emotional well-being, and the child's relationship with the access parent may suffer.

Current remedies

The *Family Relations Act* makes it an offence to interfere with court-ordered access. The remedy is a quasi-criminal prosecution under the *Offence Act*, which is rarely used for a variety of reasons.

Contempt of court proceedings are another way to enforce access orders, but only for those made in B.C. Supreme Court. Many access orders are made in provincial court, where this option is not available.

Respondents are split when asked whether the provincial court should also be able to fine or imprison parents who are in contempt of (that is, disobey) its access orders. Some favour this idea because there should be repercussions for non-compliance and there is a need for a "last resort" in cases of entrenched conflict. Others are concerned that such remedies are not only expensive and difficult, but they are ineffective and can end up punishing the child. For these reasons, contempt proceedings are rarely used in Supreme Court.

Specific remedies

B.C. does not have a detailed system of access enforcement remedies. Some other places have a range of remedial measures such as educational programs or make-up time; and punitive sanctions such as fines, community service orders, imprisonment, and costs.

Again, responses are mixed as to whether the *Family Relations Act* should include more specific remedies for access enforcement.

"Access disputes are among the most frustrating in family law. There is an overwhelming sentiment among the family law bar that access issues cry out for legislative reform."

~professional organization

Some, particularly those who work in the field, say access orders should be enforced with the same level of support and services as are support orders. They stress the need for consequences for non-compliance and for the law to reinforce the importance of ongoing relationships between the child and both parents.

Other respondents are skeptical of the law's ability to force parents to live up to their responsibilities. Some do believe the Provincial Court needs more tools to enforce access, but others say the court is too busy already, so it would take too long to use the court in this way.

Some who oppose strengthening these remedies point out that the problems underlying access difficulties are often rooted in personality disorders, substance abuse, and other circumstances that enforcement remedies cannot address.

Focus group participants almost unanimously reject the option of authorizing a police officer to take and deliver a child to the access parent because of the traumatic effect on the child. On the other hand, many of the same people support adding a provision to the *Family Relations Act*, and to access orders, saying that a police officer will enforce the order.

One respondent is opposed to any access enforcement remedies, saying they are punitive and could hurt the child, either financially or emotionally. Another said that focusing on penalties for denial of access distorts the reality, which is that failure to exercise access is a far more common problem.

Failure to exercise access versus access denial

In some other parts of Canada, the law provides remedies not only for access denial, but also for failure to exercise court-ordered access.

If specific access enforcement remedies are added to the *Family Relations Act*, respondents overwhelmingly agree there should be separate remedies for these two problems. A minority said remedies should be available for access denial only.

Respondents point out that the two situations pose very different issues. It is not in the best interests of a child to force contact with an unwilling parent, though it may be appropriate to order reimbursement of extra expenses incurred by the parent with custody, or counselling for the child.

Possible remedies

Respondents were asked to identify, in order of priority, access enforcement remedies that should be included in the *Family Relations Act*.

The most highly ranked option is “attendance at a program or service if appropriate.” There was little consensus on other options, but the following have some popularity: admonishment (reprimand); mediation; costs; and counselling to be paid for by the non-compliant parent.

In its separate lawyer survey, the Canadian Bar Association Family Relations Act Working Group asked about the effectiveness of a number of remedies. Mediation and counselling are the most highly ranked as “quite effective” for *preventing* disputes. For *resolving* access disputes, the most popular choices are fast-track case conferences, fast-track hearings, and parenting co-ordinators. For *detering* future access disputes, the preferred remedies are “loss of custody,” “make-up time,” and a “bond or surety.”

Excusable breaches

In some places, the law recognizes that denial of access may be excusable in certain circumstances and penalizes only “wrongful” access denial.

There is overwhelming support among respondents for including in the *Family Relations Act* a list of specific circumstances in which denial of access is excusable.

Those who oppose including such a list say it would simply provide excuses for people who wish to withhold access for other reasons.

Commonly agreed upon circumstances that could result in an excusable breach include:

- ❑ the custodial parent reasonably believes the child, or the parent, might be harmed if access is provided;
- ❑ the applicant is impaired at the time;
- ❑ the child is ill; ,
- ❑ the access parent is unreasonably late or has cancelled the visit and has a pattern of failure to exercise access.

If there is a reasonable excuse for denial of an access visit, a minority of respondents feels that the Act should provide a remedy to the access parent—perhaps “make-up” time, or reimbursement of expenses—to keep the focus on ensuring regular parent/child contact.

“Denial of access needs to be taken very seriously as this impedes the ability of the non-custodial parents to have a relationship with the children... Most non-custodial parents want desperately to see their children.”

~advocacy group

Complex Cases

The consultation papers also asked respondents about how to deal with access enforcement in complex cases, specifically access orders for older children and for high-conflict families (whose conflict does not lessen over time) to stop them repeatedly resorting to court for minor disputes.

Although most respondents agree the *Family Relations Act* should address access for older children, there are no specific suggestions. But there are suggestions for high-conflict families. For example, a majority of respondents agree with banning a party from bringing trivial or multiple court applications without a judge's permission.

As well, another type of complex case in need of consideration was brought to the ministry's attention through a letter-writing and ad campaign on "parental alienation".

"Parental alienation"

Parental alienation is described by those who advocate on the topic as occurring when one parent actively undermines a child's relationship with the other parent, usually by regularly and unjustifiably criticizing that other parent.

Some of the feedback suggests that access denial is often a sign of parental alienation—due to one parent's actions, the other parent is unable to maintain a positive relationship with the child. Access enforcement could help these parents remain connected to their children when a parent or child, refuses to abide by the access order.

Most of the letters ask that parental alienation be considered a form of family violence and child abuse in the *Family Relations Act*, with specific remedies.

Parenting co-ordinators

Parenting co-ordinators—who typically are lawyers, social workers, marriage counsellors, or other mental health professionals—are being used more and more in other places to help high conflict families. Their roles include assessment, education, resolution of day-to-day conflict, and recommendations to the court.

A majority of respondents support their use in B.C., some noting that parenting co-ordinators should be involved early in the process. Those opposed caution that victims of violence could be put at risk and that this function could heighten conflict and could be more expensive than going to court.

More to talk about . . .

The ministry asked for the three most pressing issues for access enforcement. This question was not included in the Canadian Bar Association survey. The most pressing issues listed by other respondents are:

- ❑ safety and security of children;
- ❑ consideration of reasons why access might be limited or denied;
- ❑ children's own views;
- ❑ ensuring a child can have a relationship with both parents unless it is not in the child's best interest;
- ❑ impact of a punitive approach to enforcement on the parent/child relationship;
- ❑ alternatives to court; and
- ❑ an efficient and effective process for access enforcement.

Common themes in the feedback

Respondents identify these as the most effective measures for meeting the problems of access enforcement:

- ❑ mediation, parenting co-ordinators, and individual counselling;
- ❑ a list in the Act of acceptable reasons for refusing access;
- ❑ avenues for children to express their own views ("the most effective catalyst for correcting parents' bad behaviour");
- ❑ triage for variation applications—courts would assign priority and resources according to urgency and importance;
- ❑ fines, compensation orders, and costs in Provincial Court;
- ❑ education for parents, particularly for high conflict families;
- ❑ monitored exchange sites; and
- ❑ consistent application of repercussions for lack of compliance with an access order.

VII. Family Violence

This chapter asks questions about how the family justice system might address the issue of violence within families, to help keep children and spouses safer. It prompted a lot of response, especially from community groups.

Defining family violence

The *Family Relations Act* does not currently define “family violence” but it should, according to most respondents.

Support for a definition is based mainly on the prevalence of family violence and its impact on children and other family members. Defining it, respondents say, would acknowledge the problem and would promote clarity and consistency within the family justice system.

Those who favour a definition want to see one that is broad enough to cover more than physical abuse. They would include sexual abuse and psychological abuse in the definition. Most would include financial abuse and some would include neglect and attempts or threats of abuse.

A large majority of all respondents would include in the definition an exception for actions taken in self defence, or in defence of another.

Opponents of defining the term are mostly lawyers whose concerns include limiting the power of judges to decide what family violence is in a particular case. Some express concern that a definition could put too much emphasis on the subject. Others say that defining family violence should be left to the Criminal Code.

Legal presumptions

In some places, family laws limit the role of a violent parent in a child’s life, unless that parent can prove that such a limit is not in the child’s best interests. In other words, there is a rebuttable presumption that custody will not be given to a parent who has committed family violence, or that access (if granted) will have certain terms.

A majority of respondents support a presumption against giving custody to a parent who has been violent. Reasons include:

- ❑ a violent parent is a poor role model and would likely be unable to co-parent appropriately;
- ❑ the child and the other parent need to be protected; and

- ❑ such a presumption might counteract a current trend to give priority to contact with an abusive parent over a child's safety needs.

Some say that many lawyers and mediators don't take violence seriously enough and they encourage women to agree to joint custody, even when it is bad for their children.

The minority who reject this presumption feel it is unnecessary because violence is already taken into account by judges. Another comment is that a presumption is not needed so long as violence is included as a factor to be considered in determining the best interests of the child, along with the history of day-to-day care-giving.

There is less support for a similar presumption relating to access (as opposed to custody). Reasons given by those who do support a presumption against access for a violent parent include a desire to give priority to safety, and recognition that a batterer can use access to children as a means of maintaining control of a former spouse. Some respondents caution that the type of violence and its potential to affect the child must be taken into account, while other respondents say that the type of violence is irrelevant because all violence is unacceptable.

Those who oppose a presumption regarding access give a number of reasons. Some prefer the use of various means to limit or eliminate physical contact between parents who are hostile to one another—such as supervised exchanges—rather than to restrict or prohibit access. Others are concerned that such a presumption could work against victims of violence if an abusive spouse makes false allegations to try to gain an advantage in a custody or access dispute.

False allegations of violence

If one parent falsely accuses the other of abuse, the accused parent can seek remedies through the *Criminal Code*, ask the Supreme Court to find the other parent in contempt of court or order costs, or can use the civil justice system to seek damages.

Over half of the respondents think these remedies are inadequate to address false allegations. They say that these remedies are expensive to pursue and there is no recourse for families whose cases are heard in Provincial Court, where contempt proceedings and actions for damages are not available.

As potential solutions, they suggest:

- ❑ make false allegations or statements an offence under the Act;

I have had child clients who have been hospitalized by a parent and are required, via supervised access, to see (that) parent.
~counsellor

- ❑ give the Provincial Court the power to order costs, fines, or contempt remedies; and
- ❑ allow judges to change custody orders, or order assessments or counselling.

Those who think the current remedies are enough say that the issue of false allegations is an exaggerated problem and denial by actual abusers is much more common. They say research shows that maliciously false allegations are rare, and most false allegations arise out of a real concern or misunderstanding.

These respondents worry that additional penalties for false allegations will create a “chill factor”: victims will be reluctant to bring forward concerns of abuse because they fear punishment if the claims cannot be proven. They say this will put families and children at risk.

Family violence and consensual dispute resolution

Family laws in some places require parents who are contesting custody or access to participate in a consensual dispute resolution process, such as mediation or collaborative law, but they include exemptions or special protocols for cases involving family violence.

This is a hot topic. Almost all respondents think that if B.C. were to implement mandatory mediation there should be some form of exemption for cases where there is family violence.

Women-serving organizations and several others who responded are opposed to mandatory mediation generally but adamantly opposed in cases where there is violence. Their wide range of concerns include these:

- ❑ because violence is often hidden, screening practices will never be able to identify all cases;
- ❑ the safety concerns and power imbalance between an abuser and victim may be difficult or impossible to counter;
- ❑ victims may not be able to speak independently, or negotiate in their own or their children’s best interest;
- ❑ forcing cases involving violence to go to mediation will cause delays and create a barrier to justice;
- ❑ mandatory mediation could provide the abuser with a formalized route to harass and control the victim;
- ❑ women may be pressured in mediation to reach agreements (such as joint custody) that may be unsafe for them or their children; and

“Members of the judiciary and the legal system who are dealing with parties may not have an adequate understanding of the dynamics of abuse and may not recognize violence as it plays out in contested custody and access disputes”
~advocacy group

- mandatory mediation without legal advice could violate women's *Charter* rights.

Some respondents suggest that judicial case conferences (in Supreme Court) provide sufficient opportunity for consensual dispute resolution. This process could be considered for adoption in Provincial Court.

If mandatory mediation is adopted, respondents recommend consistent use of proven risk and safety assessment tools, such as those used in the criminal justice system; a policy to determine when consensual dispute resolution will be offered; and the use of adapted procedures, such as shuttle mediation (where the parties are not in the room together). Further, they suggest screening for violence on an ongoing basis and mandatory training for mediators, covering family dynamics, sexual violence, and criminal harassment.

With effective procedures, some respondents believe a consensual dispute resolution process could offer a better co-ordinated response to family violence than is available through the court.

Orders for protection

A judge may make an order under the *Family Relations Act* that aims to protect family members from a spouse. Restraining orders prevent harassment or prohibit contact. An order for temporary exclusive occupancy of the family home prohibits one spouse from staying in the family home for a period of time, but is only available in Supreme Court.

It is an offence under the *Family Relations Act* to breach a restraining order. Also, the party protected by such an order may make a contempt of court application in Supreme Court if there is a breach.

Across Canada, family violence laws vary, but restraining orders elsewhere cover a wider range of family relationships than in B.C. and judges have authority to make more orders and put more conditions on a spouse than in B.C.

B.C.'s protection orders could be more effective, according to the vast majority of respondents, if they were more widely available. For example, they should be available not just to spouses, but also to unmarried people who are cohabiting, and to unmarried parents who have not lived together. Also, most agree that these orders should not be limited—as they now are—to cases where a person is also applying for some other remedy, such as custody.

Most respondents agree that violence should be one of the factors a judge takes into account when considering an order for exclusive occupancy of a home, although some say judges already do this.

Inconsistent enforcement practices raise serious questions about the usefulness of a civil restraining order.”

~advocacy group

Some think these changes would be enough to protect victims. Others say that the Act should leave violence to the *Criminal Code*. But most respondents think more change is needed. Some point to tragedies such as the Oak Bay family homicide, where restraining orders were in place, as evidence that the system is failing.

The majority of respondents say that the biggest problem with restraining orders is enforcement. They say that confusion about restraining orders results in many victims not receiving the response they need. There is concern that lack of enforcement leads abusers to believe that these orders do not need to be taken seriously; and endangers victims by lulling them into a false sense of security.

To streamline enforcement and make it more effective, respondents suggest coordinating the family justice system and other relevant services, such as police, medical, victim services, and advocacy; using standard police enforcement clauses in orders; imposing a duty on police to enforce them; and clarifying Crown enforcement policy.

Other suggestions about restraining orders include:

- ❑ enabling Provincial Courts to grant the same orders and conditions as the Supreme Court, including exclusive occupancy orders;
- ❑ simplifying the process for obtaining restraining orders so they are accessible and quickly attainable without having to go to court;
- ❑ allowing someone other than the victim—a police officer, for example—to apply;
- ❑ allowing judges to add specific conditions, such as counselling, prohibition on drugs, or restricted access;
- ❑ considering a separate, civil, anti-violence statute like those in other jurisdictions; and
- ❑ developing a “super duper” restraining order that streamlines the process where children are involved.

“Increased coordination among criminal justice, child welfare and family law systems is necessary”
~program coordinator

More to talk about . . .

Many respondents raise issues not covered in the discussion paper, and suggest these needs:

- ❑ better understanding in the family justice system of the effects of family violence, including the increased effects on already disadvantaged groups, such as immigrants who face sponsorship issues or ostracism from family;
- ❑ better information-sharing and co-ordination among criminal, family, and child protection elements of the justice system;

- ❑ supervised access and exchange services; access to free counselling for victims of abuse and their children; and free translation and interpreter services where needed;
- ❑ a simpler legal aid application process;
- ❑ adequate funding to support reform efforts;
- ❑ support for alternative dispute resolution processes as the main thrust of reform, and limits on court intervention to those circumstances where required to reduce risk for a child; and
- ❑ integrated data collection to foster better understanding of the scope of family violence and the factors that underlie it.

Common themes in the feedback

Some of the most pressing issues identified in the area of family violence include:

- ❑ the need for a definition of family violence that is sufficiently broad and consistently applied;
- ❑ better training in the dynamics of family violence and risk assessment for everyone in the family justice system, including judges, lawyers, mediators, and Family Justice Counsellors;
- ❑ higher priority given to the safety of children and other family members; and
- ❑ more effective family-related restraining orders.

VIII. Children's Participation

The outcome of a family law case often makes a big difference in children's lives. Should they have a say? And if so, how should they be heard?

This chapter prompted interesting feedback from a wide range of perspectives. Of note, are the focus groups conducted by SPARC BC involving young people who have experienced their parents' separation and divorce. Important feedback on this topic was also received from the University of Victoria's International Institute for Child Rights and Development.

International law

The United Nations Convention on the Rights of the Child imposes an obligation on signatories to provide a child who is capable of forming his or her own views the opportunity to be heard in judicial proceedings affecting the child—either directly or through a representative.

B.C.'s *Family Relations Act* requires that children's views be considered if a judge considers it appropriate. Most respondents do not believe that this adequately reflects the meaning of the UN Convention.

The International Institute for Child Rights and Development recommends that the *Family Relations Act* include a presumption that children will participate, especially when their best interests are being determined.

Regardless of the mechanism used, respondents are adamant that adequate resources need to be in place to ensure that children can participate effectively.

Child participation in all cases?

Should every custody, access, or guardianship application automatically trigger a process to obtain the views of the child? This is a question that brought a lot of response. Academics say yes. Lawyers are less supportive, focusing mainly on children's participation in court. Some say it should be automatic only for children who have reached a specific age; others say only when one parent requests it. Some are of the view that children should not be involved in a judicial proceeding; and some say it should be up to the judge to decide at a Family Case Conference or Judicial Case Conference.

Hearing children's views could help parents "know what they are doing (to their kids) and how it is affecting things".

~youth participant

Common threads in the feedback are the need for timely, affordable options offered by those with awareness of child development and skilled in age-appropriate interview techniques. Another is the desire to see a broader range of options, particularly on the less intrusive end of the scale, such as brief reports or interviews with children rather than full custody and access reports.

The International Institute for Child Rights and Development stresses the importance of presenting children's views in an unfiltered form—verbatim responses as opposed to an expert's interpretation of a child's views—so that the child's voice is not lost. Others encourage practitioners to contextualize the child's view by considering the family dynamics and the child's best interest.

Legal representation for children

Legal representation for children is another subject of lively discussion. Most respondents favour representation in some form.

A slim majority of lawyers responding believe that the role should be one of "friend of the court" (*amicus curae*), which is different from the role that the family advocate previously conducted (that office has been discontinued in B.C.).

A large majority of family law advocates and support workers who participated in consultation favour a model that uses an independent lawyer or counsellor to meet with a child or youth and present his or her views to the judge.

Most lawyers favour allocating the costs of children's legal representation between the parents, but some respondents note that this will be unaffordable for many families. Some suggest a publicly funded program, with authority for a judge to order parents to pay in cases where that is appropriate.

Mature children's views

The wishes of older children often carry a lot of weight in custody and access cases, but the *Family Relations Act* does not set a threshold age at which a child's views must be given more serious consideration, or should determine the outcome. The consultation process reveals a wide range of views on this issue.

In its survey of lawyers, the Canadian Bar Association asked whether there should ever be a presumption that the child's views will determine custody or access—subject always to proof that the child would not be harmed. A typical comment of those who say No is that a number of factors need to be taken into account, including the

"Interviews with children in long term shared residence arrangements in the UK reveal that children value flexibility rather than formulaic arrangements and they value respect for their views"
~professor

child's age and maturity level. But more weight should be given to the child's views as he or she approaches the 12 to 14 year age range. Some would have the courts consider also the independence and reliability of the child's expressed views.

On the other hand, a large number of respondents say that mature children's views could be determinative in some cases.

This question brings to light some opinions on the usefulness of seeking the views of younger children. Some commented that it might not be worthwhile to seek views of children under eight while others report receiving valuable information from a child of three. (These varying views raise questions about the need for specialized training in child development and interviewing children.)

Less adversarial trial format

The concern that many people feel about involving children in family law cases stems in large part from the adversarial nature of our litigation model. Australia has addressed some of these concerns by introducing a new, less adversarial and less confrontational format for cases involving children. The same judge is assigned to a family case throughout, and various issues can be decided as they arise, instead of waiting until the end of the trial. Most respondents support this type of approach.

Some respondents caution that such a model may be inappropriate in high conflict cases, or where there are allegations of abuse, noting that these are the bulk of cases that end up in court. Some express reservations about the "huge philosophical shift" involved in giving judges an inquisitorial role, as in the Australian model.

Some respondents favour achieving the same result by expanding the use of settlement conferences or family case conferences, as long as there is timely access. One suggestion is that mediators run the conferences, rather than a judge.

Even though three quarters of respondents support a less adversarial trial format, only about half think that such a fundamental change would mean more direct participation by children. Some say that dialogue with children needs to happen in an informal setting; others disagree with any direct involvement of children in the process.

There is general agreement that children's participation should be considered in out-of-court decision-making as well.

"Sometimes the best thing a court can do is call it like they see it and speak some hard truths to parents. That is not something children need to . . . be a party to."

~Lawyer

More to talk about...

The following further issues are raised:

- ❑ children's views must be considered in context, so as not to simply favour the "Disneyland parent;"
- ❑ the cost of litigation and legal representation can be prohibitive;
- ❑ some cases, especially involving high conflict, or allegations of abuse, will always need to go to court;
- ❑ children whose first language is not English, or who face other barriers or special needs, must be given special consideration;
- ❑ child participation must include provision of age appropriate information and prompt communication of decisions to children;
- ❑ better processes are needed to support children's participation, including obtaining their views early and on an ongoing basis until the dispute is settled; notifying children of hearings or other decision-making forums; and allowing them to express their views in different ways, including letters, drawings, or submissions by a representative;
- ❑ children's needs should be given priority through mandatory Parenting After Separation programs for parents and parallel courses for children;
- ❑ child advocates should be used in family proceedings; and
- ❑ protections must be provided to guard against children being blamed by parents or other family members for giving their views.

Common themes in the feedback

The question that asked respondents to rank their top three options for encouraging children's participation was not included in the Canadian Bar Association survey. The top priorities cited by other respondents are:

- ❑ adopting a less adversarial hearing format;
- ❑ amending the *Family Relations Act* to place a duty on anyone making a major decision affecting a child to consider that child's views;
- ❑ adopting parenting co-ordination;
- ❑ developing child-inclusive mediation; and
- ❑ making special provisions in the *Family Relations Act* for the views of mature children.

IX. Relocating Children

In an increasingly mobile society, courts are often asked to decide whether a custodial parent will be allowed to move with a child to a location where the access to the other parent will be affected.

This topic generated few responses, and none from the general public. Most of the responses come from lawyers.

Defining “relocation”

The majority of respondents say the *Family Relations Act* should include a definition of “relocation” to help provide certainty in this area of the law. They all agree that the definition should refer to a move that makes it significantly more difficult for the child to have a meaningful relationship with one parent. Almost half would include a change that interferes with the child’s ability to maintain a meaningful relationship with another adult, or interferes with or increases the cost of exercising access to the child.

Notice of an intended move

Respondents are evenly divided as to whether the *Family Relations Act* should be amended to specifically allow judges to include in an order a requirement that parents notify each other of any intended move.

Those in favour of such a provision do not give reasons. Those opposed cite concerns for the safety of women and children in cases of family violence. Another says that legislative changes are not necessary because these provisions can already be included in an order or agreement.

If such a provision were added to the Act, some suggest a notice period of 30 days and others say at least 60 days. Half say that notice should be in writing, including by email. A notice to move provision should apply not just to custodial parents, but access parents as well, say all who responded to this question.

As to whether such a provision in the Act should be mandatory, or should be up to the judge in each case, about half the respondents say it should be permissive only.

“The problem is that where there is the potential for conflict, the request to move may lead to a change in custody. This bars parents from seeking to move at all and may not be in the child’s best interest.”

~lawyer

Mediation of relocation issues

Those who mediate family issues generally say that relocation disputes are more difficult than other issues to settle.

No respondent supports a legislative change to encourage settlement of these issues, mainly because out-of-court dispute resolution processes are seen to be futile in high conflict cases. Also, there is the possibility of unequal power relationships between the parents.

Making the law more certain

There is no presumption in Canadian law, either in favour of or against a parent who wishes to relocate with a child. Three-quarters of the respondents would put the burden of proof on one parent or the other, mainly to bring certainty to this area of the law. Respondents are divided between the two options presented:

- ❑ the parent who wants to relocate with a child would have the burden of proving that the proposed move is in good faith, after which the burden would shift to the staying parent to prove that the move is not in the best interest of the child; or
- ❑ the parent proposing the move would have the burden of proving that it is in the child's long-term best interests.

One respondent is concerned about the potential to use presumptions against the vulnerable and instead suggests a general standard of deference to decisions by custodial parents.

A majority of respondents agree that the *Family Relations Act* should include a list of factors to be considered in these cases. The main reason given is to create certainty in the law. Those opposed are concerned about conflicting interpretations and the possibility that parents will engineer their circumstances to fit the list.

Respondents offer suggestions for a list of factors to be considered in relocation decisions, including:

- ❑ existing custody and access arrangements and the relationship between the child and each of the parents;
- ❑ the views of the child, and the child's age and maturity;
- ❑ the desirability of maximizing contact between the child and both parents, and whether a move would undermine the child's ability to form or maintain attachments to both parents, including consideration of other possible arrangements--such as phone, email, or extended visits—to ensure a meaningful relationship;
- ❑ the impact on the child of removal from family, schools, and community;
- ❑ the reason for moving, including advantages of the move to the moving parent and child, and the permanence of the proposed move;

- ❑ quality and quantity of time spent with the non-custodial parent, including that parent's historic pattern of commitment to existing arrangements and involvement in the child's life;
- ❑ the effect on the child of any domestic violence;
- ❑ travel time and increased cost of exercising access;
- ❑ whether the staying parent can move closer to the child; and
- ❑ whether the move is in the best interests of the child.

Some judges in Canada will ask a custodial parent who proposes to relocate, whether he or she would move without the child if the request were denied. All who responded to this question say that the *Family Relations Act* should disallow this question.

Respondents suggest two other factors that should not be considered: the misconduct of a parent if the misconduct is not relevant to the parent's ability to care for the child; and the relative cost of living of the two locations.

Cost of keeping contact after a move

Half of the respondents oppose any change to the *Family Relations Act* that would allow a judge to allocate between parents the costs of maintaining contact between the child and the staying parent. They particularly oppose a dollar for dollar reduction in child support, saying this would be contrary to established case law, and the economic reality of the parents must be considered in any allocation of those costs.

The remaining respondents feel it would be helpful if the Act gave the court express authority to distribute the cost of access. One comment is that fewer relocation applications might be brought if there were financial implications for the moving parent.

Removal of a child

Sometimes a parent unilaterally relocates with a child without consulting the other parent and without seeking a court order. The suggestion is made that the *Family Relations Act* could impose consequences such as costs against a parent who does that, if the other parent has maintained a meaningful role in the child's life.

Respondents are almost unanimously in agreement that the *Family Relations Act* should specifically prohibit the wrongful removal of children from B.C.

Common themes of the feedback

Some themes emerge from the responses to this topic. The *Family Relations Act* should:

- ❑ define “relocation” and the definition should refer to a move that impacts the child’s ability to have a meaningful relationship with the staying parent;
- ❑ provide a notice period of at least 30 days if it permits judges to require a notice of intention to move. It should not be mandatory, but should be up to the judge in each case, and should apply to both custodial and access parents. Written notice could be required, including notice by email;
- ❑ contain a presumption to help resolve relocation disputes;
- ❑ include factors to be considered in relocation cases; and
- ❑ include factors that must not be considered in relocation cases, in particular, a custodial parent should not be asked whether he or she would move without the child.

X. Defining Legal Parentage

Legal parentage is an important concept because it establishes a permanent parent/child relationship that is fundamental to a person's identity: it affects family name; nationality; cultural heritage; family relationships; and inheritance rights.

In light of continuing advances in reproductive technology, the challenge today is to develop a scheme for determining legal parentage that works for both natural and assisted reproduction in a way that protects children's best interests and fosters stable family relationships.

This topic generated interesting and thoughtful comments from the legal profession, academics, and non-profit organizations but little feedback from others. Only the questions about a presumption of parenthood for female couples and the possibility of more than two legal parents for a child brought any other responses.

Who is the mother?

In B.C., the woman who gives birth to a child is the legal mother. Should this continue to be the rule in all cases, even if the child was conceived with a donor egg? Most respondents think so, but for various reasons, including:

- ❑ childbirth is a provable event, so this rule provides certainty;
- ❑ it protects surrogate mothers; and
- ❑ such a rule parallels adoption law.

Another suggestion is that the general rule should be that the mother is the woman whose egg was used, because this is easily verified by DNA testing, and in most cases, it's the same woman who carries the child and gives birth.

Who is the other legal parent?

Before the days of DNA testing, the law developed presumptions to determine fatherhood. These presumptions were based on a man's relationship to the child's birth mother.

Now, with assisted reproduction permitting conception with donated sperm, it's more complicated. Today in B.C., a birth to an opposite-sex couple or a female couple may be registered naming the birth mother's spouse—of either sex—as the child's co-parent.

*"We need to
treat children
born to same
sex and
opposite sex
couples
equally."
~professor*

Most respondents support a presumption of parenthood that still is based on a relationship to the birth mother, but all would allow the birth mother's partner to rebut the presumption in some circumstances: for example, if he or she did not consent to the use of assisted reproduction.

Almost all who answered agree that the same presumption of parenthood should apply as well to a child born through assisted reproduction to a female couple. (Many of these respondents say they have personal experience with this issue, or know somebody who has.) They feel that this presumption could help stop discrimination against female couples.

Should the donation of genetic material—egg or sperm—give rise automatically to parental rights and obligations? All who answered this question say No: the intention to parent is essential, they say.

More than two parents?

If a couple uses an egg or sperm from a third person to produce a child, could the child potentially have three legal parents? Everyone who answered this question said Yes, either because it would benefit the child, or because families like this exist now and they should be recognized. The intent or agreement of all the adults involved is considered essential.

Surrogacy

In a surrogacy arrangement, a woman agrees to give birth to a child for another person or couple. The intended parent or parents may or may not contribute genetic material (egg or sperm). The intended parents—opposite or same sex couples—can be registered as legal parents if they obtain a court declaration that they are the child's parents.

They must apply to court after the child's birth and provide the judge with evidence in an affidavit filed by the woman who gave birth to the child (a sworn statement that includes her consent to give up parentage of the child) and by at least one of the intended parents. Since there is no statutory authority in B.C. for making a declaration of parentage in these circumstances, the judge uses inherent authority to make the declaration.

All respondents say that the intended parents should be able to acquire legal parentage, but they differ on how this should be done. While some favour requiring the intended parents to apply to court for a declaration of parentage, more favour using a written agreement

“For lesbian couples and their children, it is hurtful that the existing law only recognizes the biological mother as a legal parent.”
~members of the public

among all participants (for example, intended parents, surrogate mother and donor of egg or sperm).

Most respondents believe the process for acquiring legal parentage should be the same for all intended parents, even if neither is genetically related to the child. One said it should be more difficult where there is no genetic relationship and the process should be more akin to adoption.

Privacy and information

People who were born as a result of donated genetic material may want to know their birth origins, for medical or other reasons. On the other hand, donors may have concerns about their own privacy, if identifying information is disclosed.

Medical information should be provided, according to a majority of respondents to this question. Some would also provide information about ancestry, but none favoured disclosing the donor's identity without that person's consent.

The suggestion was made that B.C. should mandate the collection of non-identifying donor information in a central data bank.

Common themes in the feedback

Some themes emerge from the responses to these questions:

- ❑ a woman who gives birth to a child should continue to be presumed the legal mother; and the presumption of who is the other parent should be based on that person's relationship with the mother;
- ❑ in cases of assisted reproduction, the consent and intent of the adults involved are important issues that need to be addressed;
- ❑ in certain situations it should be possible for a child to have more than two legal parents;
- ❑ the rights and obligations of parenthood should not apply automatically to egg and sperm donors;
- ❑ intended parents of a baby born to a surrogate mother should be able to acquire legal parentage, by written agreement or court application, even if neither of them is genetically related to the child; and
- ❑ donor offspring should have the right to receive health-related information about their donors.

XI. Time Limits and Definitions

The *Family Relations Act* contains some time limits that establish when certain rights and obligations arise, and set deadlines for bringing certain claims.

Questions about whether and how these time limits should be changed brought only a few responses. Almost half of the responses to some of the questions came from members of the public; the rest came from lawyers, academics, and non-profit organizations.

Spousal status of unmarried couples

For the purposes of spousal support obligations, the *Family Relations Act* defines spouses to include people who have lived together in a marriage-like relationship for at least two years, if a claim is made within one year after separation. The definition does not take into account whether the couple actually intended that one would support the other.

Most respondents agree that the length of time they have lived together should continue to be the criterion for spousal status of unmarried couples: one says this is a strong indicator of the status of the relationship. One respondent disagrees and would rather look to whether the couple had agreed to a marriage-like relationship.

Two years is generally supported as the appropriate length of time, although one respondent prefers an incremental approach based on the length of the relationship and whether children are involved.

If the couple has had a child together, should a different test apply? There is no consensus on this issue. Some say it shouldn't make a difference; others say that if an unmarried couple has a child, and a "relationship of some permanence," they should be considered spouses, for the purposes of support obligations; and still others say that if there is a child, there should be a rebuttable presumption of spousal status, even if they never lived together.

Because the spousal definition in the Act also requires that an application for support be brought within one year of separation, there often are disputes about when separation actually occurred.

The majority of respondents on this issue would not change the Act to stipulate indicators of the end of the marriage-like relationship, mainly on the basis that the case law on this point is adequate. A concern is that the list of possible indicators would be "endless" and so would be difficult to codify.

A minority of respondents, however, do support a listing in the *Family Relations Act* of indicators of the end of the relationship. Those indicators, according to one respondent, would include absence of sexual relations; a clear statement by one spouse of an intention to end the relationship; and physical separation to different rooms or residences. Another respondent would mirror the indicators that have been discussed in case law.

Time limits for claiming support

In B.C., a married spouse who divorces has two years to make a claim for spousal support under the *Family Relations Act*, whereas an unmarried spouse has only one year from the date of separation. (There are no time limits under the *Divorce Act*.)

Questions about these time limits prompted more discussion than anything else in this chapter, and the responses are mixed.

Some would eliminate the time limits altogether. Some support the one-year limit for unmarried spouses, but others say a year is too short, because it can take time to realize that a relationship is over or that there is a need for support. Some say it's unfair to impose different time limits on married and unmarried spouses.

The only one who replied to the question about what the limit should be for married spouses supports the current two-years.

When asked what the time limit should be for unmarried spouses, there is more support for two years after separation, than one year. There is also a suggestion of a flexible approach, taking into account factors such as the length of the relationship; whether there are children; and other attempts to resolve the issue.

Time limits for dividing property

The *Family Relations Act* imposes time limits for spouses—after a relationship breaks down—to apply to court for a share of family assets.

Married spouses

Most respondents support a time limit, primarily to allow people to move ahead and plan their lives. Some suggestions for time limits are: the current two-year limit; the earlier of two years after divorce and six years after separation; or six years after separation (with different provisions for pensions). The few who oppose the imposition of time limits say they create undue pressure. There is also a concern over delay in court proceedings.

A two-year time limit applies to applications to court to change an agreement about property division, but an extension may or may not be available, depending on whether it's a marriage agreement or a separation agreement.

Respondents unanimously favour removing these differences, to promote fairness, clarity, and consistency. Some would bring both types of agreements into line by eliminating the judges' authority to extend time limits for both types; and some would do the opposite and extend the authority to all agreements.

Unmarried spouses

Generally speaking, the Act's property division scheme does not apply to unmarried spouses—unless they make an agreement (such as a cohabitation or separation agreement) while they are still considered to be spouses under the Act. That is, before a year has passed from the date of separation. If they then have a dispute about the agreement's property division provisions, they can go to court and ask a judge to apply the Act's property division scheme—but the application has to be brought within that same one-year period.

Half the respondents are critical of this provision of the Act (section 120.1) referring to it as a “catastrophic failure,” a “problem,” and a “trap for the unwary.” They say that it produces the opposite result from what most people want or expect when they make an agreement, which is that the agreement, and not the *Family Relations Act* will govern their arrangements. These critics do not address the issue of time limits.

The other half say that unmarried and married spouses should be treated the same way.

As to what the time limit should be, some favour two years after separation; one says the Act should not apply at all unless there are children; and one says the time limits should be the same for married and unmarried spouses.

Time limits for child support by stepparents

Parents are obliged to support their children. B.C.'s *Family Relations Act* defines “parent” to include a stepparent who is married to a parent of the child or lived with that person in a marriage-like relationship for two years *and* contributed to the child's support for at least one year. This differs from laws in the rest of Canada.

“The consequence virtually all common-law couples hope to effect by not marrying is precisely to escape Parts 5 and 6 of the FRA (property division scheme). I have not yet had a file where my client said to me ‘I’d like to opt-in to the FRA, please.’”
~lawyer

The Act also says that a child support claim against a stepparent cannot be made later than one year after the last contribution by the stepparent.

Respondents generally feel that a definition of parent should include both the intention to parent and the relationship between the stepparent and the child's parent. The majority did not agree with including as a factor the contribution to the child's support for at least a year.

Over half the respondents agree that there should be a time limit for bringing an application for child support against a stepparent, mostly for the sake of certainty. However, there is no agreement on what that time limit should be and suggestions range from one to five years.

Those who disagree with including a time limit for starting child support claims against stepparents point out that B.C. is alone in imposing such a limit and say that stepparents should have the same liability as legal parents for child support.

As for when the time limit should begin, suggestions are: the later of the date of separation or the last contribution to the child's support; the separation date; the last support payment; and the last contact with the child.

Extending time for starting claims

When there is a time limit for making a claim, people sometimes feel compelled to start a court action simply to preserve their right, even though they hope to settle their issues without going to court.

Almost all respondents agree that there should be a way, other than starting a court action, to preserve the right to start a claim under the *Family Relations Act*. The one who is opposed says this would simply add another layer and more delay to the legal system.

Suggestions for how this could be done include:

- ❑ allowing a person to apply to the court for an extension;
- ❑ allowing a person to file and serve a form that would stop time from running; and
- ❑ allowing people to agree in writing to an extension.

Almost half the respondents would put a limit on how long the right to start an action can be extended, mainly for the sake of certainty and to encourage timely resolution. One suggestion is a two year limit and another is one year for all claims except claims for support for the respondent's biological child.

More to talk about . . .

Respondents were invited to raise other issues relating to time limits. Some comments are that:

- certainty, fairness, and timeliness are key elements in the resolution of family disputes;
- firm end dates, and the prospect of litigation will give spouses the needed incentive to settle their disputes; and
- more work needs to be done to address the impact of short limitation periods for support claims by unmarried couples and on the gendered economic realities of women claiming support.

Common themes in the feedback

Some themes emerge from the responses to this topic, including:

- the status quo should be maintained in the following ways:
 - the spousal status of unmarried couples should continue to be based on two years of cohabitation;
 - the Act should not specify indicators of the end of a marriage-like relationship (for the purpose of calculating when the time limit begins to run);
 - there should continue to be a time limit for married spouses to claim a division of property, and on claims against a stepparent for child support, but there is no consensus as to what the limits should be;
- couples who have a child together should be considered spouses, though there is no consensus on other criteria, such as the period of time living together or permanence of the relationship;
- the *Family Relations Act* should be amended so that applications to change an agreement or grant time extensions are treated the same—whether it's a marriage agreement or separation agreement;
- there should be a way, other than starting a court action, to preserve the right to bring a claim under the *Family Relations Act*.

XII. Cooperative Approaches

Most people involved in family law today, from any perspective, agree that most families are better off resolving their issues out of court. And yet the family justice system seems to continue to steer family disputes to court. This topic explored some ideas for changing the *Family Relations Act* to promote other approaches.

The topic elicited relatively few comments. Most responses come from lawyers, mediators, academics, and non-profit organizations.

Giving information to promote cooperation

Information about alternatives to court is available from a variety of sources, but the *Family Relations Act* does not require that people be given this information before they file a claim in court.

Over three-quarters of respondents support such a requirement. The opposing view is that if couples can agree, they will, and it is irresponsible to try to encourage agreement for those who cannot.

The results from the Canadian Bar Association *Family Relations Act* Working Group survey were mixed: some members favour including in the Act a provision like the one in the *Divorce Act* that requires lawyers to advise their clients about negotiation and mediation; others say this would not be useful.

The majority of respondents agree that the required information should include information about mediation. Others suggest requiring information on family law issues; other dispute resolution alternatives and court processes; and the legal and practical effects of going to court, including the impact on children.

As for who should provide this information, two-thirds say that lawyers should do it. One respondent is uncomfortable with lawyers giving information about impacts on children, saying this is better handled by counsellors or mental health professionals. Other suggestions include court registries; judges; and community organizations.

The common thread throughout all the responses on this topic is that the earlier this information is provided, the more useful it will be in encouraging spouses to co-operate in resolving their disputes.

Encouraging agreements

Spouses often are able to resolve their issues by agreement, but—unlike newer laws in some other places—the *Family Relations Act* contains nothing that actively encourages them to do so.

The Family Relations Act should “adopt a philosophy that moves...towards a healthy way of addressing problems as they arise.”

~mediator

Almost all respondents think the Act should specifically encourage people to agree. A small minority disagrees on the basis that this could have a detrimental impact on children and vulnerable women. A respondent recommends early screening for family violence if cooperative approaches are to be encouraged.

One says that if a provision encouraging agreement is to be effective, it would have to block litigation until other avenues have been explored. Another notes that spouses need more than one opportunity to try for an agreement.

Mandatory mediation

Although respondents generally favour including language in the *Family Relations Act* to encourage consensual dispute resolution, only about one-third of respondents would go as far as making this mandatory.

Of the majority, some say that out-of-court dispute resolution processes are useful but not in all cases; some oppose mandatory dispute resolution; and some say legislation is unnecessary because consensual dispute resolution processes are already an integral part of family law practice.

Respondents make a number of suggestions:

- ❑ encourage judges to recommend mediation for particular issues;
- ❑ design a hybrid mediation model that uses a judge as an arbitrator for certain issues that arise within the mediation process;
- ❑ build in multiple opportunities for mediation; and
- ❑ allow judges to decide if and when mediation is appropriate.

If B.C. were to require an attempt at consensual dispute resolution for family disputes, most respondents would impose the requirement at an early stage—either before a person is allowed to begin a court claim or after that but before the first contested step in court. The other respondents would leave the timing up to the judge.

Focus group participants strongly support education and counselling for those experiencing separation and divorce as a way of minimizing conflict and promoting out-of-court resolutions. They support a requirement that couples attend at least one mediation session, with shuttle mediation available in high conflict situations and special arrangements where there has been family violence.

“Dispute resolution that is mandatory is not consensual. Women (who are victims of family violence) may feel pressured to settle and may sacrifice issues of safety and support for fear of being seen as uncooperative or out of worry for their children.”

~advocacy group

More to talk about . . .

Respondents offered other ideas about how the *Family Relations Act* could encourage cooperative approaches to resolving family disputes:

- ❑ family law cases should be heard by a specialized court or by specially trained judges;
- ❑ the Parenting After Separation program should be offered more widely and with enhanced content;
- ❑ parenting co-ordinators, collaborative law and arbitration should be explored; and other professionals, such as counsellors and experts in child development could be engaged in family law disputes;
- ❑ better ways should be found to take into account the views of a child who is involved in a dispute;
- ❑ women need more advice and support services so they won't feel pressured to make arrangements that are not in their or their children's best interests;
- ❑ clarification of provisions of the *Family Relations Act*, such as those dealing with family property, would encourage settlement;
- ❑ proper and timely financial disclosure is often the primary barrier to settling property and support issues and suggestions to address this issue are made;
- ❑ the duties and rights of participants in mediation or other consensual processes need to be clearly set out; and
- ❑ separated families need quick responses to allow them to return to stability, especially regarding finances and access arrangements.

Common themes in the feedback

Some themes emerge from the responses to this topic:

- ❑ the *Family Relations Act* should require that people be given information about mediation at an early stage and should specifically encourage people to try to resolve disputes by agreement, but consensual dispute resolution processes (such as mediation) should not be mandatory;
- ❑ consensual dispute resolution processes should be used at an early stage, either before starting a court claim, or before taking the first contested step in court; and
- ❑ more and better use of cooperative approaches to resolving family disputes is identified as being of primary importance.

XIII. Next Steps

The topics discussed in this report are just some of the areas of the *Family Relations Act* that are being considered for reform. These consultations have raised other issues and ideas that the ministry is also looking into.

The comments, suggestions and recommendations summarized here reflect what the ministry heard in response to its consultation papers. This feedback is being carefully and fully considered as the ministry does its policy analysis and charts a direction for family law reform.

The kind of analysis required to make recommendations for legislative reform takes time. There are many complex issues and strongly held opinions on what the Act should say. It is challenging to strike a balance between the competing opinions, values, needs, and interests that people bring to something as important as family law legislation.

In addition to seeking substantial feedback from individuals and groups, the ministry is:

- conducting research to learn what experts in the field suggest;
- reviewing legislation, programs and services from a number of jurisdictions, both Canadian and international, to determine how other jurisdictions have decided to deal with these issues;
- carefully considering what accompanying program, services and training would be needed to complement or carry out changes to the Act;
- considering the future of justice reform generally, and what that means for family law; and
- considering how proposed reforms will affect other legislation, current practices, and court and judicial capacity, as well as the capacity of current programs and services to manage changes.

Once the full analysis of the feedback and research is assessed against the goals and objectives of the review, the ministry will develop policy options for government's consideration. Any proposals for reform of the *Family Relations Act* will be the result of consideration and balance of all these aspects.

Once the ministry has decided upon a particular policy direction, the legislation must be carefully drafted, to ensure there is no confusion as to its interpretation or meaning. As well, the impacts of any changes on other legislation must be considered to ensure that these are also appropriately amended.

Once the new legislation has been drafted, it is subject to the government's legislative agenda, which is directed by cabinet and is not always announced to the public.

The ministry has invested significant time and energy in this review and is committed to advancing change. Family law affects us all. Family break-up has far-reaching impacts on us as individuals and as a society. The *Family Relations Act* review benefits greatly from the broad range of individuals and organizations who have participated and generously shared their wisdom and expertise.

The ministry thanks all who participated in the consultation process. If you have any questions or comments on the *Family Relations Act* Review or the consultation process you may contact us at:
CFLPO-FRA@gov.bc.ca

Appendices

I. List of consultation participants

Organizations

- ❑ Atira Women's Resource Centre
- ❑ B.C. Ad Hoc Coalition on Custody and Access Reform
- ❑ B.C. Association of Specialized Victim Assistance and Counselling Programs and its Community Coordination for Women's Safety Program
- ❑ B.C. Law Institute
- ❑ Battered Women's Support Services
- ❑ Children Who Witness Violence Program, Phoenix House
- ❑ Family Relations Act Working Group, Canadian Bar Association (B.C. Branch)
- ❑ International Institute for Child Rights and Development, Centre for Global Studies, University of Victoria
- ❑ Nanaimo Men's Resource Centre
- ❑ Northern Women's Center, University of Northern British Columbia
- ❑ Parents' Coalition of British Columbia
- ❑ Social Work Department, University of Northern British Columbia
- ❑ The FREDA Centre
- ❑ Vancouver and Lower Mainland Multicultural Family Support Services Society
- ❑ Vancouver Custody and Access Support and Advocacy Association
- ❑ West Coast Women's Legal Education and Action Fund
- ❑ Women Against Violence Against Women Rape Crisis Centre

Legal organizations: presentations and consultation meetings

- ❑ Canadian Bar Association, Family Law Section Representatives
- ❑ Continuing Legal Education, Children's Participation in Justice Process
- ❑ Continuing Legal Education, Family Law Conference
- ❑ Family Justice Services Annual Conference
- ❑ Family Law Advocates Group
- ❑ Kelowna Family Law Section, Canadian Bar Association (B.C. Branch)
- ❑ Law Society of B.C., Access to Justice Committee

- ❑ Nanaimo Family Law Section, Canadian Bar Association (B.C. Branch)
- ❑ Queerlaw Group, Canadian Bar Association
- ❑ Vancouver and New Westminster Collaborative Law Subsection, Canadian Bar Association (B.C. Branch)
- ❑ Vancouver Family Law Section, Canadian Bar Association (B.C. Branch)
- ❑ Victoria Family Law Section Canadian Bar Association (B.C. Branch)
- ❑ New Westminster Family Law Section, Canadian Bar Association (B.C. Branch)

As well, the Ministry of Attorney General set up a *Family Relations Act Review* Advisory Committee consisting of 11 lawyers and lawyer-mediators, including a representative from the Legal Services Society, which provided feedback on the discussion papers as they were being developed.

Government ministries and public agencies

- ❑ Ministry of Aboriginal Relations and Reconciliation
- ❑ Ministry of Children and Family Development
- ❑ Ministry of Housing and Social Development
- ❑ Office of the Public Guardian and Trustee
- ❑ Victim Services and Crime Prevention Division, Ministry of Public Safety and Solicitor General
- ❑ Vital Statistics Agency

Academics (family law specialists)

- ❑ Professor Gillian Calder, Faculty of Law, University of Victoria
- ❑ Professor Susan B. Boyd, Faculty of Law, University of B.C.
- ❑ Assistant Professor Fiona Kelly, Faculty of Law, University of B.C.

Other respondents

In addition to the above noted groups, numerous individuals participated in consultations, through forums, surveys, web consultations, and by sending letters on specific issues.

It is challenging to know exactly how many people responded, due to the potential for overlap in responses. For example, a person may have participated in a consultation forum or meeting and also sent in a letter. Or two different people may have anonymously responded in two different phases, in which case they may have been counted as one person. Therefore,

with the exception of the forums where participant numbers are confirmed, the below numbers of individual participants are approximate only.

- Family Justice Counsellors, Ministry of Attorney General: over 30 respondents
- Lawyers: Canadian Bar Association Family Relations Act Working Group Survey: over 90 respondents.
- Practitioners and the public: over 110 respondents. This includes individual responses or letters received from social workers, counsellors, mediators, teachers, therapists, lawyers, legal advocates, academics/students, and members of the public on a specific issue of concern.
- Social Planning and Research Council of B.C.: 146 forum participants and 83 responses to their survey. As well, 30 youth participated in the youth consultations.
- Law Courts Education, Children's Participation and Family Violence Forum: 118 participants.

II. Links to other reports

Ministry of Attorney General *Family Relations Act* Review Discussion Papers

<http://www.ag.gov.bc.ca/legislation/archive.htm>

Report of the Family Justice Reform Working Group to the Justice Review Task Force: A New Justice System for Families and Children

http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf

Social Planning and Research Council of British Columbia, Reports: Family Relations Act Reform Project and Youth Included!

<http://www.sparc.bc.ca/our-focus-project-highlights>

Law Courts Education Society, Forum Report: Reforming the Family Relations Act

http://www.lces.ca/documents/FRA_Forum_Report_Final.pdf

British Columbia Law Institute, Report on Parental Support

<http://www.bcli.org/bclrg/publications/48-report-parental-support-obligation-section-90-family-relations-act>