



## Fundamentals of Canadian Family Law

Children's Participation in Justice Processes: Pre-Symposium Conference  
14 September 2017, Calgary

John Paul Boyd  
Canadian Research Institute for Law and the Family

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An introduction to family law in Canada

### Introduction



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### Family law

- The area of law that deals with the rights and obligations flowing from family relationships, their formation and their dissolution
  - Married spouses, unmarried partners
  - Parents, stepparents and children
  - Children, extended family members and interested strangers
- Closely-related areas of law include: wills, estates and successions; adoption, assisted reproduction; child protection



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### Family law

- Governed by unpleasant and imprecise hodgepodge of:
  - Written laws, federal and provincial/territorial
  - Uncodified common law (contracts, conflicts of laws, torts)
  - Case law (decisions of the court interpreting the common law, the statute law, previous court decisions)
  - International treaties of varying force and effect
  - Social conventions and expectations
- Nonetheless, critically important area of law with almost ubiquitous impact

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### Family law disputes

- Arise whenever spouses, partners, parents and others have an important conflict of goals, opinions or preferences that can't be easily reconciled, usually but not always following separation
  - How will children be cared for? How will their time be shared? Who will they live with?
  - How will the children's expenses get paid? How will the household bills get paid?
  - How will property and debt be divided? Who gets to keep the parrot?

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### Family law disputes

- **Care of children:** custody, access, guardianship, parental responsibilities, parenting time, contact
- **Financial support:** child support (maintenance), children's special expenses; spousal support (alimony)
- **Property:** family assets, family property, net family property, matrimonial property, household goods, matrimonial home; excluded property, personal property

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### Dispute resolution

- Some couples attempt to *preempt* disagreements by anticipating subject matter and addressing through agreements
- However, ignorance of consequences of reproduction and relationships is near universal (and discussing such problems in advance seems ill-omened); such agreements are exception rather than the rule
- Deference likely to be extended by the courts not always certain in any event

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### Dispute resolution

- When problems do arise, two basic options:
  - Go to court
    - Litigation
    - Court-attached conciliation, mediation programs
  - Stay out of court
    - Negotiation, collaborative settlement processes
    - Mediation
    - Arbitration
    - Parenting coordination

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### Dispute resolution

- Lots of people resolve their family law problems without ever darkening the doorway of courthouse or lawyer's office
- Souring of public sentiment toward justice system
  - Seen as inaccessible, unfriendly, unsympathetic
  - Decisions often seen as unfair or out of touch
  - Poor communication of clarification, alternate narratives from bench and bar
- Other people in conflict avoid the justice system altogether, heading to private divorce resolution companies

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## Dispute resolution

- However, involvement of lawyers does not mean that litigation is inevitable, lawyers often help to avoid court
  - 2010/2011 civil court survey found that only 1% of divorce files go to trial
  - Survey of participants at 2014 National Family Law Program found that lawyers heavily favour negotiation, mediation as means of resolving family law disputes
  - Some litigate primarily as means of encouraging settlement

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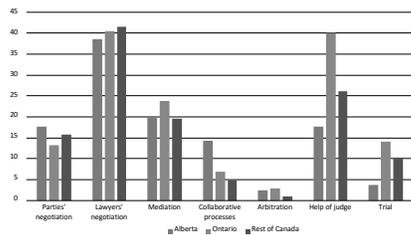
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Proportion of cases resolved wholly or partially using different mechanisms, by mechanism and jurisdiction



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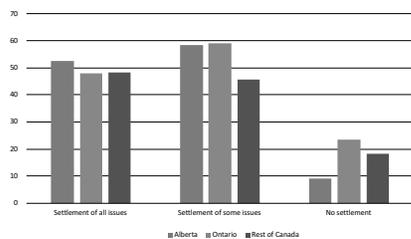
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Proportion of cases referred to mediation resulting in settlement, by whether settled and jurisdiction



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### Dispute resolution

• Study of judges' and lawyers' views of litigants without counsel identified vicious spiral:

1. Litigants have unrealistically high expectations of outcome (75% judges, 90% lawyers)
2. Unrealistic expectations decrease likelihood of settlement (87% judges, 89% lawyers)
3. When litigants get to trial, problems arise from unfamiliarity with rules of court, rules of evidence (100% judges, 85% lawyers)

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### Dispute resolution

4. Results litigants achieve are generally worse than results that would have obtained with counsel (51% judges, 55% lawyers)

• Rates of self-representation growing across Canada, highest in family law disputes, and within those disputes highest in provincial courts

- In 2013 study, 90% of 259 self-represented litigants cited money as reason for self-representation
- Other reasons include dissatisfaction with lawyers' services, belief can do better than lawyer, belief that court will have sympathy

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A demographic snapshot

### Family life in Canada




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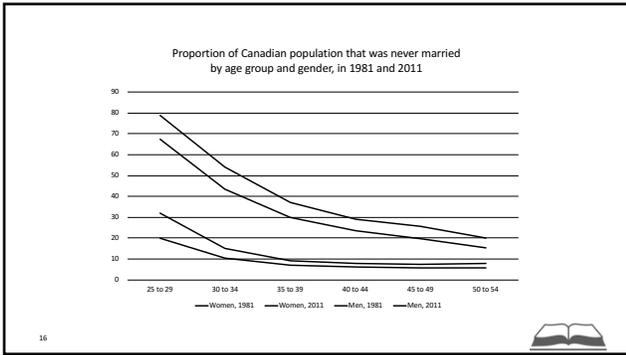
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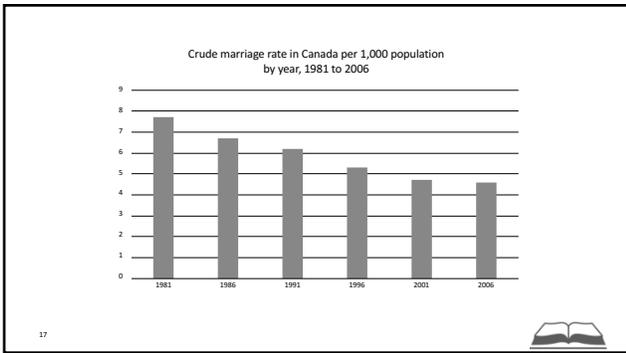
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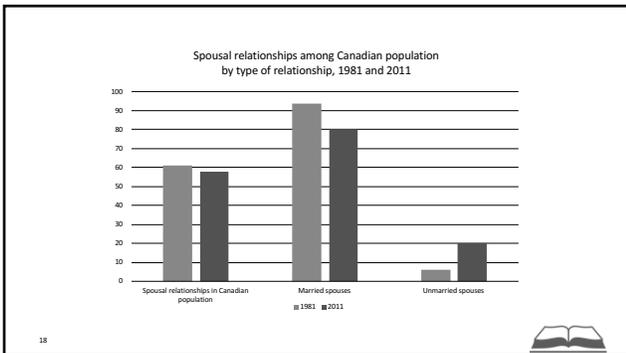
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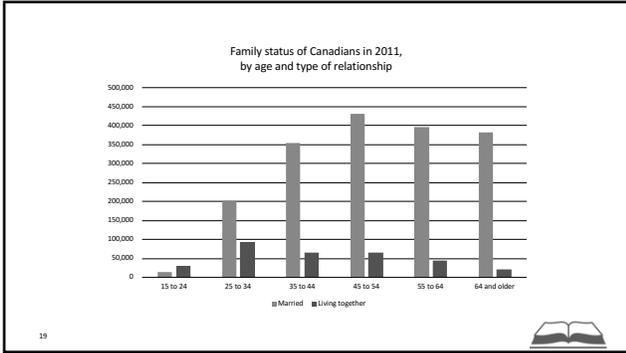
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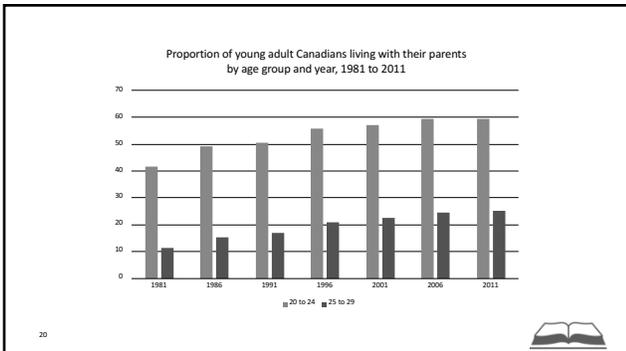
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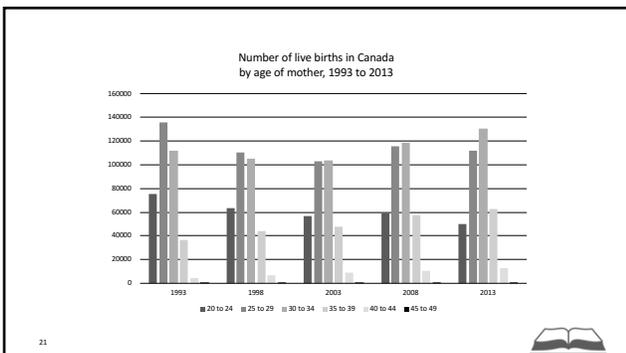
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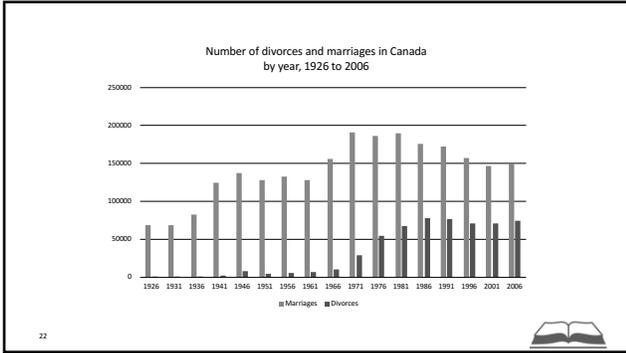
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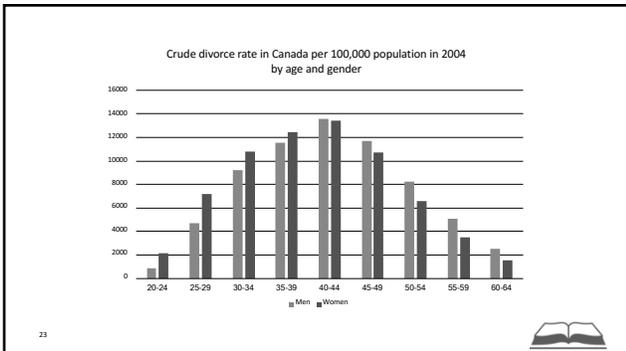
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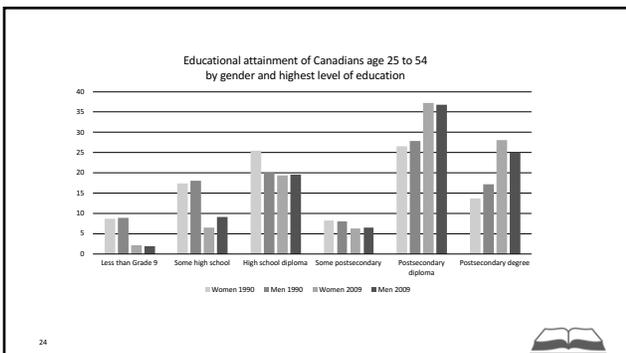
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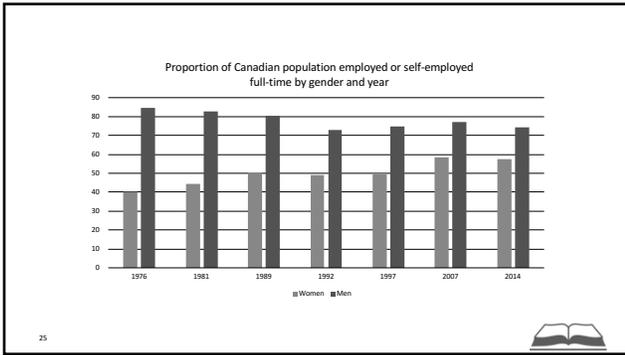
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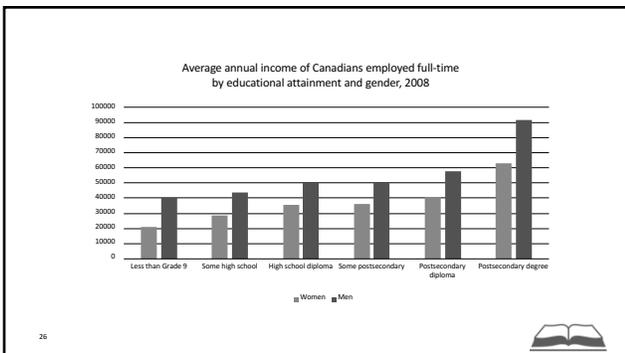
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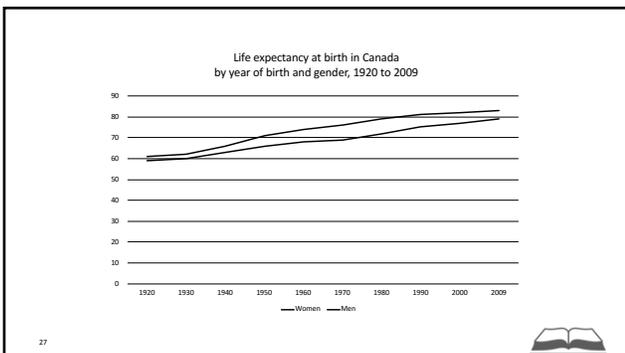
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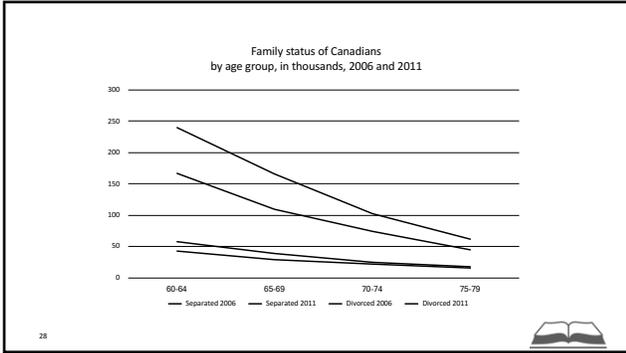
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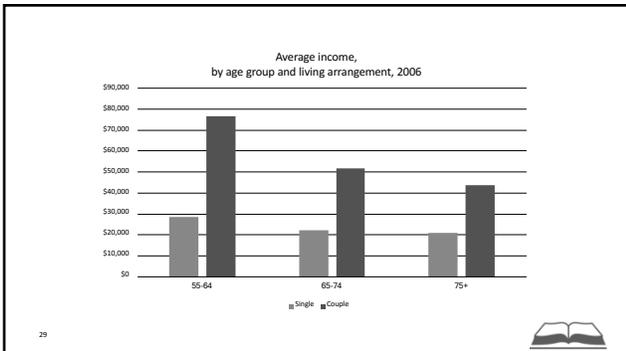
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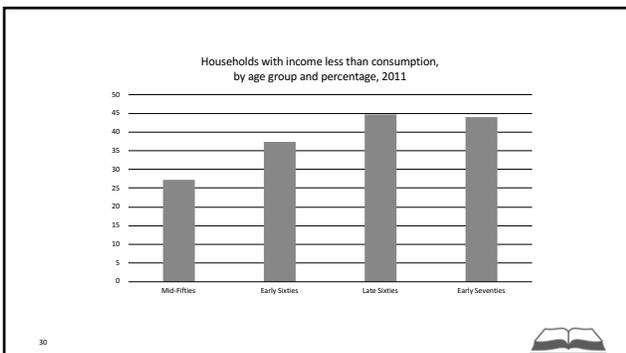
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### Family in the 20<sup>th</sup> Century

- First federal Divorce Act introduced in 1968
- “No-fault” Divorce Act introduced in 1985
- Boomers are first generation to have lived whole adult lives with national divorce legislation in place
  - Marriage no longer terminates only by death
  - Separation and divorce are normal life events, stigma has largely if not wholly evaporated
  - Blended families are no longer scandalous exception to the rule

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### Family in the 20<sup>th</sup> Century

- Status and obligations of unmarried cohabiting couples recognized by provinces in 1970s and 1980s
  - Inconsistencies in handling of spousal support between provinces, some providing, others not
  - Property rights generally not recognized absent coownership, otherwise left with highly unsatisfactory law on unjust enrichment, with remedies based in trust
- Number of unmarried relationships grew by 13.9% from 2006 to 2011, number of married relationships by 3.1%

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### Family in the 20<sup>th</sup> Century

- Matrimonial property rights extended to unmarried cohabitants in some provinces
  - SK in 2001
  - MB in 2004
  - BC in 2011
- Sexual orientation becomes prohibited ground of discrimination, analogous to others in Charter, in mid-nineties

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### Family in the 20<sup>th</sup> Century

- Same-sex marriage legalized in ON in 2002, and in eight other provinces shortly thereafter
- Federal Civil Marriage Act legalized same-sex marriage throughout Canada, introduced in 2005
  - Social consensus favours same-sex marriage
  - Now largely non-issue, especially in urban centres

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### Family in the 21<sup>st</sup> Century

- Marriage is no longer...
  - Permanent
  - Limited to opposite-sex pairs
  - Exclusively for the purposes of reproduction and childrearing
  - The only recognized form of family
  - The only form of family giving rise to legal rights and obligations
- What's next?

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### This is what's next

- Polyamorous families
  - Family law issues focus on relationship formation and dissolution
  - Status issues with social services, employment benefits
- Rapid growth of assisted reproduction technologies/services
  - Multi-parent children
  - Hive/collective parenting, other alternative parenting structures
- Later in life divorce ...and remarriage ...and divorce

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The laws and courts that deal with family law matters

**Legal framework**



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**Family life and family law**

- Family is basic social unit, likely a necessity in agrarian culture
- Rules about marriage, divorce, interference with family part of every written body of law available to us since 2047 BCE
- Roman law spread common foundation throughout empire
- Common law established in England following Norman Conquest in 1066
- Henrician Reformation began process of cleaving judicial and legislative authority from church

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**Legislative authority**

- Constitution Act, 1867 (BNA Act)
  - Powers of federal government, s. 91:
    - Marriage, divorce
  - Powers of provincial governments, s. 92:
    - Solemnization of marriage
    - Property and civil rights
    - Matters of "merely" private nature
- Constitution Act, 1982, including Charter
  - Equality regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, s. 15

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## Legislation

- Federal laws, common throughout Canada
  - Divorce Act
  - Child Support Guidelines
  - Civil Marriage Act
  - Marriage (Prohibited Degrees) Act
  - Family Homes on Reserves and Matrimonial Interests or Rights Act
  - Assisted Human Reproduction Act
  - Criminal Code

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## Legislation

- Provincial/territorial laws, localized in application (example: AB)
  - Family Law Act
  - Adult Interdependent Relationships Act
  - Matrimonial Property Act
  - Marriage Act
  - Dower Act
  - Interjurisdictional Support Orders Act
  - Maintenance Enforcement Act
  - Child, Youth and Family Enhancement Act

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	Federal power	Provincial/Territorial power
Marriage	Who can marry	How they are married
Divorce	Yes	
Custody of children	Yes	Yes, but different names
Access to children	Yes	Yes, but different names
Children's property		Yes
Child protection	Under criminal law	Yes
Child support	Yes	Yes
Spousal support	Yes	Yes
Property division		Yes
Debt allocation		Depends on jurisdiction
Adoption		Yes
Assisted reproduction	Yes	Yes

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### Legislation

- International treaties, binding only among signatory states (executive authority not usually enough to bind, must usually be ratified by legislative branch)
  - Hague convention on child abduction
  - Hague convention on protection of children
  - United Nations convention on rights of child
- Provincial interjurisdictional support orders acts have limited application outside of Canada

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### Judicial authority

- Superior courts, federally appointed, "s. 96 courts"
  - Courts of appeal
  - Trial courts (Supreme Court, Court of Queen's Bench, Superior Court of Justice)
  - Inherent jurisdiction, *parens patriae* jurisdiction
- Provincial courts, provincially appointed
  - Trial courts
  - Limited jurisdiction
- Unified family courts

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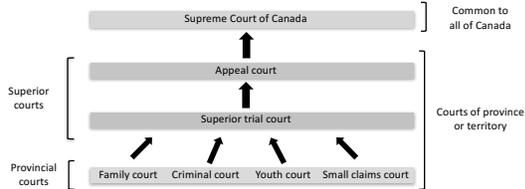
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	Superior trial court	Provincial/Territorial trial court
Divorce	Yes	
Custody of children	Yes	Yes
Access to children	Yes	Yes
Children's property	Yes	
Child protection	Yes, but not common	Yes
Child support	Yes	Yes
Spousal support	Yes	Yes
Property division	Yes	
Debt allocation	Yes	
Protection of persons	Yes	Yes
Protection of property	Yes	
Matrimonial torts	Yes	

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	Superior trial court	Provincial/Territorial trial court
Rules specific to family law	Depends on jurisdiction	Yes
Rules are easy to understand		Yes
Forms are easy to complete		Yes
Fees payable to court	Yes	Usually no
Duty counsel present	Sometimes	Yes
Location	Mainly larger urban centres	Large and small urban centres
Mean-looking sheriffs	Yes	Yes

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**Just a little bit of confusion**

- Two levels of trial court
  - Each with different forms and different rules
  - One of which can deal with everything and the other of which, the one you don't have to pay for, can only deal with some things
- Two sets of laws
  - Both of which deal with some of the same issues, but often in different language
  - Some issues are only dealt with by one but not the others
  - All of which apply in one court, but only some of which apply in the other court

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### A lot more confusion

- Legislation isn't the only source of law in family law disputes...
- Case law:
  - Establishes precedents that subsequent decisions are (usually) obliged to follow
  - Interprets those precedent decisions
  - Interprets and establishes the meaning legislation
  - Establishes theoretical frameworks
  - Articulates tests, factors that *must* be considered when court is making decisions on certain issues

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### A lot more confusion

- Case law is not codified or organized
- Published in no rational order, chronologically as decisions are rendered by court
- Use of terminology inconsistent
- Not always written for easy use of non-lawyers
- Thousands of decisions released each year, in larger provinces

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### A lot more confusion

- Study of family law files in BC in 2013 found that:
  - Family law trials three to four times more likely to involve at least one litigant without counsel (2009: 52.3% of family law trials, 12.1% of non-family civil trials)
  - Lack of familiarity with rules of evidence and governing law almost universal, resulting in:
    - Longer trials (97.8% of judges "frequent" or "occasional")
    - Obscures main issues (93.6%)
    - Requires adjournments (82.2%)

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The care and management of children with parents in two homes

**Parenting after separation**



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**Key concepts**

- Divorce Act
  - Custody (sole, joint, split or shared)
  - Access
- Provincial legislation
  - Custody (sole, joint, split or shared)
  - Guardianship (of the person and/or of the estate of the child)
  - Access (parenting time, contact)

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**Changing attitudes**

- Fathers presumptively entitled to custody children after separation under Roman Law
- Rule prevailed until 1839, law then amended to allow mothers not guilty of adultery to apply for custody of children under age seven
- “Tender years” doctrine evolved from change to law in 1886, presumed that mothers were most naturally suited to care for young children

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### Changing attitudes

- Under 1968 Divorce Act, court required to consider conduct of spouses during marriage in making awards of custody
- 1985 Divorce Act required court to focus on *best interests* of the child and barred from considering conduct – provincial legislation after 1970 generally to same effect

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

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### Changing attitudes

- Maternal preference, preference for sole custody continued to dominate, despite enactment “best interests” test intended to shift focus from gender
- Resentment among fathers denied custody escalated in 1980s and 1990s, resulting in founding of vocal though ill-informed fathers’ rights movements across North America
- Bench and bar increasingly exposed to psychosocial research, interdisciplinary approach likely more responsible for subsequent change in attitude

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### “Standard” parenting orders

- Circa 1990:
  - Child in sole custody of mother
  - Father has access every other weekend
- Circa 2000:
  - Parents have joint custody, mother has primary residence of child
  - Parents have joint guardianship, but parent with primary residence has default authority in the event of disagreement
  - Father has access every other weekend, evenings or overnights once or twice every week

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### “Standard” parenting orders

- Circa 2010:
  - Parents have joint custody, custody may be shared
  - Parents have joint guardianship, with or without default arrangement, potential use of parenting expert to resolve dispute
  - Child’s time likely to be shared, if parents both engaged and living in reasonable proximity to one another, with frequency of exchange depending on child’s age, maturity

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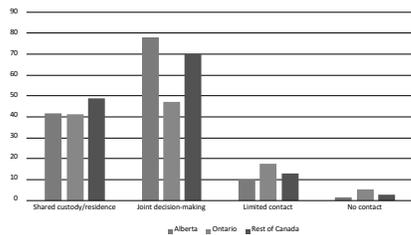
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Lawyers’ resolution of cases involving children, by nature of resolution and jurisdiction



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### Custody

- **Sole custody:** Parent A has child’s primary residence, likely sole decision-making authority, Parent B has access
- **Joint custody:** Parent A has child’s primary residence, parents share decision-making authority, Parent B has access
- **Shared custody:** Parents share child’s residence, share decision-making authority
- **Split custody:** Each parent has primary residence of one of more children, likely share decision-making authority

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Access

- **Liberal and generous access:** Parent B's time with the child is undefined, may be at discretion of Parent A or child; implies either lack of interest or cooperative relationship
- **Defined access :** Parent B has time with child on set schedule
- **Conditional access:** Parent B's time with child is subject to condition being met
- **Supervised access:** Parent B's time with child must occur in the presence of another adult

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Other terms

- **Birdnesting:** Child remains in the family home, parents maintain separate home(s) and move in and out during their time with the child
- **Parallel parenting:** Each parent has sole decision-making authority over defined subjects
- **Physical custody:** Having the child's primary residence
- **Legal custody:** Having decision-making authority, whether sole or joint, with respect to child

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"Any rule of law which diminishes the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the *Divorce Act* for a contextually sensitive inquiry into the needs, means, condition and other circumstances of 'the child' whose best interests the court is charged with determining."

McLachlin, J.  
Gordon v. Goertz, 1996

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**“Custody is not awarded in any sense to punish the parent who is deprived of it. There is no contest between parents to see who most deserves the children nor who was the more responsible for the break-up of the family unit. The fitness of each party as a parent is taken into consideration, but only as one of the many elements that contribute to the decision of what is in the children’s best interests.”**

Spencer, J.  
*Tyabji v. Sandana, 1994*

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### A miscellany of factors

- “Maximum contact” principle
- Past parental conduct relevant to parenting capacity, child’s health and development
- Distance between parents’ homes
- Past pattern of caregiving and status quo
- Nature, extent and duration of conflict between parents
- Proposed parenting plans

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### A miscellany of factors

- Presence, nature and extent of family violence
- Parental capacity, including mental health, personality disorders, substance abuse
- Presence of supports where capacity diminished
- Relationship between siblings, especially if split custody is contemplated
- Child’s current and prospective wellbeing
- Wishes of child

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The Child Support Guidelines and children's special expenses

**Child support**




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**Key concepts**

- Child support
- Special expenses
  - *Necessary* child care
  - Medical, dental insurance premiums, uncovered costs
  - Post-secondary education
- Extraordinary expenses
  - Primary, secondary education
  - Extracurricular activities




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**Basic principles**

- Both parents are responsible for support of child
- Obligation arises at birth, not following separation
- Parent with whom child lives meets obligation in variety of tangible and intangible ways
- Other parent meets obligation through repeating, periodic cash payments, usually monthly
- Other parent not entitled to accounting
- Minor children entitled, *may* be entitled after age of majority




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### Changing approach

- Before 1997, child support assessed by consideration of child's needs and parents' means, sometimes complicated budgeting exercise
  - Typical form of order: "\$150 per month per child"
- Child Support Guidelines introduced as regulation to Divorce Act, child support assessed (mostly) looking up *income of payor* and *number of children supported* in fixed support tables varying by payor's province/territory of residence

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FEDERAL CHILD SUPPORT TABLES/TABLEAUX FÉDÉRALES DE SOUTIEN FINANCIER POUR ENFANTS

Province: Alberta											
No. Of Children/Nombre d'enfants: One/Un					Province: Alberta						
Income/Revenu (\$)	Parental Payment/ Paiement parental (\$)	Of Parent/De Parent (%)	Income/Revenu (\$)	Parental Payment/ Paiement parental (\$)	Of Parent/De Parent (%)	Income/Revenu (\$)	Parental Payment/ Paiement parental (\$)	Of Parent/De Parent (%)	Income/Revenu (\$)		
8000	8990	11.13	8000	8990	11.13	8000	8990	11.13	8000	8990	11.13
8000	8990	11.13	9000	8990	11.13	9000	8990	11.13	9000	8990	11.13
9000	8990	11.13	10000	8990	11.13	10000	8990	11.13	10000	8990	11.13
10000	8990	11.13	11000	8990	11.13	11000	8990	11.13	11000	8990	11.13
12000	8990	11.13	13000	8990	11.13	13000	8990	11.13	13000	8990	11.13
14000	8990	11.13	15000	8990	11.13	15000	8990	11.13	15000	8990	11.13
16000	8990	11.13	17000	8990	11.13	17000	8990	11.13	17000	8990	11.13
18000	8990	11.13	19000	8990	11.13	19000	8990	11.13	19000	8990	11.13
20000	8990	11.13	21000	8990	11.13	21000	8990	11.13	21000	8990	11.13
22000	8990	11.13	23000	8990	11.13	23000	8990	11.13	23000	8990	11.13
24000	8990	11.13	25000	8990	11.13	25000	8990	11.13	25000	8990	11.13
26000	8990	11.13	27000	8990	11.13	27000	8990	11.13	27000	8990	11.13
28000	8990	11.13	29000	8990	11.13	29000	8990	11.13	29000	8990	11.13
30000	8990	11.13	31000	8990	11.13	31000	8990	11.13	31000	8990	11.13
32000	8990	11.13	33000	8990	11.13	33000	8990	11.13	33000	8990	11.13
34000	8990	11.13	35000	8990	11.13	35000	8990	11.13	35000	8990	11.13
36000	8990	11.13	37000	8990	11.13	37000	8990	11.13	37000	8990	11.13
38000	8990	11.13	39000	8990	11.13	39000	8990	11.13	39000	8990	11.13
40000	8990	11.13	41000	8990	11.13	41000	8990	11.13	41000	8990	11.13
42000	8990	11.13	43000	8990	11.13	43000	8990	11.13	43000	8990	11.13
44000	8990	11.13	45000	8990	11.13	45000	8990	11.13	45000	8990	11.13
46000	8990	11.13	47000	8990	11.13	47000	8990	11.13	47000	8990	11.13
48000	8990	11.13	49000	8990	11.13	49000	8990	11.13	49000	8990	11.13
50000	8990	11.13	51000	8990	11.13	51000	8990	11.13	51000	8990	11.13
52000	8990	11.13	53000	8990	11.13	53000	8990	11.13	53000	8990	11.13
54000	8990	11.13	55000	8990	11.13	55000	8990	11.13	55000	8990	11.13
56000	8990	11.13	57000	8990	11.13	57000	8990	11.13	57000	8990	11.13
58000	8990	11.13	59000	8990	11.13	59000	8990	11.13	59000	8990	11.13
60000	8990	11.13	61000	8990	11.13	61000	8990	11.13	61000	8990	11.13
62000	8990	11.13	63000	8990	11.13	63000	8990	11.13	63000	8990	11.13
64000	8990	11.13	65000	8990	11.13	65000	8990	11.13	65000	8990	11.13
66000	8990	11.13	67000	8990	11.13	67000	8990	11.13	67000	8990	11.13
68000	8990	11.13	69000	8990	11.13	69000	8990	11.13	69000	8990	11.13
70000	8990	11.13	71000	8990	11.13	71000	8990	11.13	71000	8990	11.13
72000	8990	11.13	73000	8990	11.13	73000	8990	11.13	73000	8990	11.13
74000	8990	11.13	75000	8990	11.13	75000	8990	11.13	75000	8990	11.13
76000	8990	11.13	77000	8990	11.13	77000	8990	11.13	77000	8990	11.13
78000	8990	11.13	79000	8990	11.13	79000	8990	11.13	79000	8990	11.13
80000	8990	11.13	81000	8990	11.13	81000	8990	11.13	81000	8990	11.13
82000	8990	11.13	83000	8990	11.13	83000	8990	11.13	83000	8990	11.13
84000	8990	11.13	85000	8990	11.13	85000	8990	11.13	85000	8990	11.13
86000	8990	11.13	87000	8990	11.13	87000	8990	11.13	87000	8990	11.13
88000	8990	11.13	89000	8990	11.13	89000	8990	11.13	89000	8990	11.13
90000	8990	11.13	91000	8990	11.13	91000	8990	11.13	91000	8990	11.13
92000	8990	11.13	93000	8990	11.13	93000	8990	11.13	93000	8990	11.13
94000	8990	11.13	95000	8990	11.13	95000	8990	11.13	95000	8990	11.13
96000	8990	11.13	97000	8990	11.13	97000	8990	11.13	97000	8990	11.13
98000	8990	11.13	99000	8990	11.13	99000	8990	11.13	99000	8990	11.13
100000	8990	11.13	101000	8990	11.13	101000	8990	11.13	101000	8990	11.13
102000	8990	11.13	103000	8990	11.13	103000	8990	11.13	103000	8990	11.13
104000	8990	11.13	105000	8990	11.13	105000	8990	11.13	105000	8990	11.13
106000	8990	11.13	107000	8990	11.13	107000	8990	11.13	107000	8990	11.13
108000	8990	11.13	109000	8990	11.13	109000	8990	11.13	109000	8990	11.13
110000	8990	11.13	111000	8990	11.13	111000	8990	11.13	111000	8990	11.13
112000	8990	11.13	113000	8990	11.13	113000	8990	11.13	113000	8990	11.13
114000	8990	11.13	115000	8990	11.13	115000	8990	11.13	115000	8990	11.13
116000	8990	11.13	117000	8990	11.13	117000	8990	11.13	117000	8990	11.13
118000	8990	11.13	119000	8990	11.13	119000	8990	11.13	119000	8990	11.13
120000	8990	11.13	121000	8990	11.13	121000	8990	11.13	121000	8990	11.13
122000	8990	11.13	123000	8990	11.13	123000	8990	11.13	123000	8990	11.13
124000	8990	11.13	125000	8990	11.13	125000	8990	11.13	125000	8990	11.13
126000	8990	11.13	127000	8990	11.13	127000	8990	11.13	127000	8990	11.13
128000	8990	11.13	129000	8990	11.13	129000	8990	11.13	129000	8990	11.13
130000	8990	11.13	131000	8990	11.13	131000	8990	11.13	131000	8990	11.13
132000	8990	11.13	133000	8990	11.13	133000	8990	11.13	133000	8990	11.13
134000	8990	11.13	135000	8990	11.13	135000	8990	11.13	135000	8990	11.13

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Federal Tables for Alberta

	\$25,000	\$50,000	\$75,000	\$100,000	\$125,000	\$150,000 or more
1 child	\$214	\$425	\$658	\$880	\$1,098	\$1,310 plus 0.85%
2 children	\$379	\$719	\$1,082	\$1,428	\$1,766	\$2,096 plus 1.32%
3 children	\$511	\$955	\$1,421	\$1,866	\$2,301	\$2,724 plus 1.69%
4 children	\$619	\$1,147	\$1,699	\$2,224	\$2,738	\$3,239 plus 2%
5 children	\$709	\$1,308	\$1,930	\$2,523	\$3,103	\$3,668 plus 2.26%
6 or more children	\$750	\$1,444	\$2,126	\$2,775	\$3,411	\$4,030 plus 2.48%

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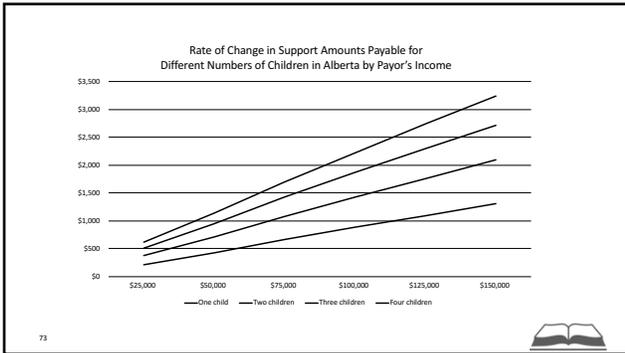
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**Special and extraordinary expenses**

- Not all expenses qualify; table amount expected to cover bulk of children's quotidian costs
- Court must consider:
  1. Necessity of expense in relation to child's interests
  2. Reasonableness of expense in relation to means of child and means of parents
  3. Reasonableness of expense in relation to spending patterns prior to separation

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**Special and extraordinary expenses**

- If expense is to be shared, parents share *net* cost of expense in proportion to *gross* income (plus spousal support for recipient, less spousal support for payor)

Parent A has income of \$30,000  
 Parent B has income of \$20,000  
 Total income available for expense: \$30,000 + \$20,000 = \$50,000  
 Parent A owes \$30,000 ÷ \$50,000 = 0.6 = 60%  
 Parent B owes \$20,000 ÷ \$50,000 = 0.4 = 40%

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### Child Support Guidelines

- Guidelines have achieved purpose of making child support orders more consistent and more easily predictable, and therefore reduced frivolous litigation on child support
- However, emphasis on income and exceptions to tables have undermined impact
- Tables well-suited to majority of Canadians who are salaried employees earning less than \$150,000 per year

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### Child Support Guidelines

- Exceptions:
  - Child over age of majority, s. 3(2)
  - Payor has income in excess of \$150,000, s. 4
  - Payor is stepparent, s. 5
  - Custody of children is split, s. 8
  - Custody is shared, s. 9
  - Payment of table amount would cause "undue hardship," s. 10
- Also: imputing income for unemployed, underemployed, self-employed, undertaxed, varying incomes

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A brief introduction to the Spousal Support Advisory Guidelines

### Spousal support




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### Basic principles

- Married spouses can apply
- Unmarried partners can apply, everywhere except in Quebec, providing they've lived together for the number of years specified by provincial legislation
- Right to *apply* doesn't necessarily imply right to *receive*, entitlement must be established case by case
- Three conceptual bases of entitlement: contractual, compensatory, non-compensatory

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### Spousal Support Advisory Guidelines

- Academic paper published in 2008, with preliminary draft in 2005; authors Carol Rogerson, Rollie Thompson
- When entitlement established, provides formulae to calculate range of results for quantum and duration
- Embraced by courts of every province and territory, with much wailing and gnashing of teeth in Alberta....

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**“There is no doubt that they are useful for a judge who does not wish to make a thorough and careful analysis of each case and wants a quick answer. However, it is not the role of judges to opt out for an easy answer. ... As well, the Guidelines are stated to be experimental. It is not the function of courts to experiment on the citizens of this country.”**

Trussler, J.  
V.S. v A.K., 2005

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### The "without children" formula

- Used whenever there are no children entitled to child support

Amount = 1.5 to 2.0% of difference in gross incomes per year of cohabitation  
 Duration = 0.5 to 1.0 years per year of cohabitation

*Party A earns \$50,000. Party B earns \$20,000. Parties moved in together in 2010 and separated in 2015.*

Amount (low)  $6 \text{ years} \times 1.5\% \text{ of } (\$50,000 - \$20,000) = 9\% \text{ of } \$30,000 =$   
 $\$2,700 \text{ per year, or } \$225 \text{ per month}$

Duration (low)  $6 \text{ years} \times 0.5 =$   
 3 years

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### The "with children" formula

- Used whenever there are no child entitled to child support, whether support is being paid or not

Amount = 40 to 46% of payor's net disposable incomes plus recipient's net disposable income  
 Duration (low) = 0.5 years per year of cohabitation OR time until youngest child starts school  
 (high) = 1 year per year of cohabitation OR time until youngest child finishes school

*Party A earns \$50,000. Party B earns \$20,000. Parties moved in together in 2010 and separated in 2015. They have a three year old child who lives with Party B*

Amount (high) \$165 per month, plus \$405 in child support

Duration (high) 5 years to 15 years

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How parenting disputes are resolved

### Making decisions




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### Negotiation

- Discussion between parties, with or without lawyers, aimed at finding compromise, usually mutual
- May resolve none, some or all issues
- Financial disclosure is necessary
- May incorporate advice or reports of financial experts, tax experts, parenting experts
- May include information about children's views and wishes
- Settlement recorded as order or agreement

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### Collaborative settlement processes

- Enhanced negotiation process
- Parties and lawyers sign agreement to make full disclosure, act in good faith, keep dispute
- Parties may have separate counsellors to address issues relating to separation and negotiation
- May use financial experts, parenting experts
- Parenting experts may meet children, report on views and wishes

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### Collaborative settlement processes

- Aimed at finding full settlement of all issues, while
  - Leaving parties as emotionally whole as possible
  - Giving parties best chance at coparenting into future
- Expensive, but able to handle challenging issues that would normally be extremely difficult to address in court
- Ideal dispute resolution process for family law problems
- Settlement usually recorded as agreement

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### Mediation

- Structured discussion between parties with assistance of neutral third party, with or without lawyers, aimed at finding compromise, usually mutual
- May resolve none, some or all issues
- Financial disclosure is necessary
- May incorporate advice or reports of financial experts, tax experts, parenting experts
- May include information about children's views and wishes
- Settlement recorded as order or agreement

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### Arbitration

- Issues between parties are determined by a neutral third party, with or without lawyers, parties agree to be bound by arbitrator's decision
- Financial disclosure is necessary
- May include reports and evidence of financial experts, tax experts, parenting experts
- May include evidence about children's views and wishes
- Decision recorded as arbitral award

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### Arbitration

- Process is court-like but completely confidential
- Hearing can occur as soon as agreeable date can be found in calendars of all involved
- Prescribed rules of procedure and evidence exist, but usually designed for commercial entities; parties may design rules and process as they wish
- Parties can select arbitrator known to be expert on matters in dispute

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### Litigation

- Issues between parties are determined by a neutral third party, with or without lawyers, parties are bound by judge's decision
- Financial disclosure is obligatory
- May include reports and evidence of financial experts, tax experts, parenting experts
- May include evidence about children's views and wishes
- Decision recorded as formal reasons for judgment and order

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### Litigation

- Trial occurs in public, court file may or may not be accessible to general public; judgment may be published
- Trial occurs when scheduled by trial coordinator, delays can be extraordinary
- Formal rules of procedure and evidence and prescribed, court has little discretion to act contrary to rules
- Judge is assigned by trial coordinator based on availability

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### Parenting coordination

- Process occurs after settlement or trial, aimed at implementing final arrangements on parenting where parties in high conflict
- Parenting coordinator is neutral lawyer or mental health professional, who attempts to resolve disputes by mediation but is able to impose a resolution in the manner of an arbitrator if dispute is urgent or compromise cannot be reached
- Terms of retainer set out in agreement or order

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### Summary

- Negotiation, collaborative processes and mediation are voluntary, require willingness to work together and abandon ideal outcome
- Process can derail if evidence of bad faith or trickery, or party cannot be brought to reasonable compromise
- Results will be respected by court if adequate disclosure, negotiations are fair, compromise is understood and agreed to, settlement is within range of probable outcomes if litigated

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### Summary

- Arbitration and litigation are coercive in imposing result, but must agree to enter arbitration process
- Arbitration offers flexibility of process not found in litigation, and can complete far sooner than trial
- Arbitration allows decision-making by subject matter expert
- Court has ultimate jurisdiction and ability to compel behaviour not available to arbitrator

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Provincial family law legislation and the Convention on the Rights of the Child

### Hearing from children




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### Legislative framework

- Provincial/territorial legislation goes into much more depth than federal Divorce Act in discussing content of “best interests of the child,” usually set out list of factors for court to consider
- BC includes child’s health and emotional wellbeing, child’s relationships with others, history of child’s care and “the child’s views, unless it would be inappropriate to consider them”

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#### Best interests of child

- 37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.
- (2) To determine what is in the best interests of a child, all of the child’s needs and circumstances must be considered, including the following:
- (a) the child’s health and emotional well-being;
  - (b) the child’s views, unless it would be inappropriate to consider them;
  - (c) the nature and strength of the relationships between the child and significant persons in the child’s life;
  - (d) the history of the child’s care;
  - (e) the child’s need for stability, given the child’s age and stage of development;
  - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
  - (g) the impact of any family violence on the child’s safety, security or well-being, whether the family violence is directed toward the child or another family member;
  - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child’s needs;
  - (i) the appropriateness of an arrangement that would require the child’s guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
  - (j) any civil or criminal proceeding relevant to the child’s safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child’s physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person’s conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

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### Legislative framework

- AB requires the court to consider “the child’s views and preferences, to the extent that it is appropriate to ascertain them”
- ON talks about “the child’s views and preferences, if they can reasonably be ascertained”
- QC says “the court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it”

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### Convention on the Rights of the Child

- UN convention ratified by general assembly in 1989, subsequently ratified by by all states parties (Canada in 1991) except the USA (Somalia was other exception until 2015)
- Deals with civil, political, economic, social, health and cultural rights of children, defined as persons under the age of 18
- Views of children in legal processes, and their right to express them, addressed in art. 12

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#### Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

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### Hearing from children

- Much research on how children's views are heard in Canada, notably by Birnbaum, Bala and Cyr
- Common means include:
  - Parents' testimony
  - "Dear judge" letters, video and audio recordings, affidavits
  - Lawyer for child
  - Expert's custody/parenting assessment
  - Judicial interview, especially in QC
  - Views of child reports, evaluative and non-evaluative

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### Hearing from children

- Parents' testimony
  - Hearsay, but admissible either under state of mind exception to bar on hearsay or as evidence going to best interests of child
  - High probability of bias
  - Child's statements may not reflect actual views
- Communications from child
  - Possibility of manipulation by parent
  - Possibility that child may become triangulated in parents' dispute, encouraged to take sides

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### Hearing from children

- Court usually discourages parents from questioning children, directly involving in litigation
- Lawyer for child
  - Lawyer has different roles in different jurisdictions, may take traditional advocacy role, best interests perspective or hybrid
  - Lawyers not usually allowed to report on children's wishes themselves
  - Concerns about cost
  - Possibility that giving child lawyer will enmesh child in high-conflict dispute or entrench negative views

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### Hearing from children

- Experts' reports
  - Expert usually asked to report and provide opinion on overall parenting arrangements for child, may express children's wishes in course of report
  - Cost (especially of private reports) and delay (especially of public reports) can be significant
    - **BC:** two to six months, \$10,000 to \$15,000
    - **AB:** four to more than 12 months, \$20,000 to \$30,000
    - **ON:** three to four months, \$15,000 to \$25,000

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### Hearing from children

- Judicial interviews
  - Exception rather than the rule, but more common in QC
  - Concerns about:
    - Evidentiary status of interview, status if appeal brought
    - Whether interview should be recorded, held in presence of parents or parents' lawyers or both
    - Whether and how content should be shared with parents
  - Most common practice is to provide parents with summary of child's contents rather than verbatim report

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### Hearing from children

- Evaluative views of the child reports
  - Report of an expert, produced after meeting with child on one or more occasions, potentially including interviews with other persons, psychometric testing, review of documents
  - Includes expert's opinion on strength and consistency of child's views, likelihood that child's expressed views match child's actual views
  - Opinion and analysis make report an *expert* report
  - May be prepared privately or publicly

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### Hearing from children

- Non-evaluative views of the child reports
  - Report of interviewer, produced after meeting with child on one or more occasions
  - No testing, no document review, no collateral interviews, no analysis, no opinion – simple reportage describing child's statements and gross observations of child's demeanour during interview
  - Purpose is to allow the child to speak to a third party without being pressured to say what the parents wish, but certainly not beyond possibility of influence

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### Hearing from children

- Inexpensive and quick
  - BC, AB, SK: \$250 to \$1,250
  - ON: \$750 to \$1,500
  - Can be prepared in a few days or weeks, sometimes same day as requested
- Best for more mature children able to express themselves, with specific issue or question to be addressed
- No consistency, standards or best practices, though some groups are attempting to develop

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### Weight to be given to children's wishes

- Court is not bound to accept child's statements or do as child asks, weight given to child's views and wishes will vary depending on issue and other factors:
  - Clarity, consistency and strength of views
  - Age and maturity of child
  - Duration during which child has expressed similar views
  - Practicality and reasonableness of child's views
  - Parents' influence over child's views

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### Processes other than litigation

- Children's views and wishes may be received in all other dispute resolution processes
  - Mediators and arbitrators may interview children
  - Expert reports may be entered into evidence in arbitration proceedings
  - Children are sometimes present at meetings in collaborative settlement processes, and sometimes in mediation proceedings
  - Private reports and consultations are always available to better inform parents and their lawyers about views of children

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## Fundamentals of Canadian Family Law

Children's Participation in Justice Processes: Pre-Symposium Conference  
14 September 2017, Calgary  
John Paul Boyd  
Canadian Research Institute for Law and the Family

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