



**Reach Canada™**

**EQUALITY AND JUSTICE  
FOR PEOPLE WITH DISABILITIES**

400 Coventry Road, Ottawa ON K1K 2C7  
(613) 236-6636 TTY (613) 236-9478  
[www.reach.ca](http://www.reach.ca) email: [reach@reach.ca](mailto:reach@reach.ca)

# **Family Law and Disability**

## **Participant's Manual**

---

Funded by:

**Community Foundation of Ottawa**

September 27, 2005

# Table of Contents

AGENDA .....	I
ABOUT REACH .....	II
ABOUT THE WORKSHOP .....	II
FOREWORD .....	III
<b>INTRODUCTION TO FAMILY LAW.....</b>	<b>1</b>
THE DEFINITION OF FAMILY .....	1
WHAT IS FAMILY LAW?.....	1
HISTORY AND EVOLUTION OF FAMILY LAW IN CANADA .....	1
FAMILY LAW LEGISLATION .....	2
COURTS AND FAMILY LAW.....	2
<b>CHAPTER 1:    SEPARATION AND DIVORCE.....</b>	<b>4</b>
SEPARATION.....	4
<i>The separation agreement</i> .....	4
<i>Alteration of the terms</i> .....	5
DIVORCE.....	6
<i>Grounds for Divorce</i> .....	6
<i>Bars to divorce</i> .....	8
<i>What about reconciliation?</i> .....	8
DIVORCE PROCEDURE.....	8
THE TRADITIONAL ADVERSARY SYSTEM .....	9
ALTERNATIVE DISPUTE RESOLUTION .....	10
COLLABORATIVE DIVORCE PROCEEDINGS .....	11
PEOPLE WITH DISABILITY AND DIVORCE.....	12
<b>CHAPTER 2:    PROPERTY ISSUES AND SPOUSAL SUPPORT.....</b>	<b>13</b>
PROPERTY ISSUES .....	13
<i>Division of property</i> .....	13
<i>The matrimonial home</i> .....	15
SPOUSAL SUPPORT .....	15
<i>How does spousal support work?</i> .....	16
<i>Factors Considered when Awarding Spousal Support</i> .....	16
<i>Keeping more control over the situation</i> .....	17
<b>CHAPTER 3:    CHILD CARE AND CUSTODY.....</b>	<b>18</b>
CUSTODY VS. ACCESS .....	18
THE CHILD’S BEST INTEREST .....	19
CHILDREN’S WISHES.....	20
TYPES OF CUSTODY ORDERS .....	22
CHILD SUPPORT .....	23
<b>CHAPTER 4:    ADOPTION .....</b>	<b>26</b>
TYPES OF ADOPTION.....	26
THE ADOPTION PROCESS .....	26
<b>CHAPTER 5:    NEW DEVELOPMENTS IN FAMILY LAW .....</b>	<b>28</b>
SAME-SEX MARRIAGE .....	28
SAME-SEX ADOPTION .....	28
PARTNERSHIP AND MARRIAGE OF PEOPLE WITH SEVERE MENTAL DISABILITIES .....	29
<b>RESSOURCES AND REFERENCES .....</b>	<b>31</b>

## Agenda

9:00 – 9:30	Registration
9:30 – 10:00	Welcome, introductions and explanation of the day's agenda - Speaker: Mr. Mike Sousa (President of Reach)
10:00 – 10:45	Separation and Divorce - Presentation by Mr. Jim Curran
10:45 – 11:00	Break
11:00 – 12:00	Property Issues and Spousal Support - Presentation by Ms. Sheena Laird
12:00 – 1:00	Lunch
1:00 – 2:00	Child Care and Custody - Presentation by Ms. Wendy Rogers
2:00 – 2:45	Adoption - Presentation by Mr. George MacPherson
2:45 – 3:00	New Developments in Family Law - Presentation by Mr. George MacPherson
3:00 – 3:30	General Questions - Evaluations

## About Reach

Founded twenty-five years ago during the International Year of the Disabled, Reach is a non-profit charitable organization dedicated to ensuring quality legal and social representation for persons living with disabilities. Our mission is to improve the quality of life for disabled citizens by offering lawyer referral and educational services at the community level.

It is our goal, through workshops such as this one on Family Law and Disability, to provide educational programs, awareness and information about the rights of individuals with disabilities.

## About the Workshop

Family Law and Disability is part of a series of workshops on Canadian law, designed for community service providers who want to improve their basic understanding of legal concepts and issues that are part of their day-to-day work environment. This workshop aims to enhance the participant's understanding of basic family law concepts, providing an important tool to better serve clients, service organizations and the community.

This manual was created for workshop participants and to serve as a reference tool for community service providers who interact with the legal system directly or indirectly and who want to obtain or enhance a basic understanding of family law.

**Caveat:** This participant's manual contains information about the law as it was at the time it was written. While every effort is made to ensure that the information contained in this document, as well as in the workshop presentations, is current and accurate it does not contain legal advice or replace the specialized advice of lawyers or other experts. It is highly recommended that a licensed attorney be consulted whenever legal advice is sought in relation to a specific case.

## Foreword

This booklet is about family law in Ontario. It contains information about the laws that may affect families in different situations.

This workshop will offer participants clear and thorough information, special attention will be given to disability issues as they pertain to family law in matters such as.

- Divorce and separation
- Spousal support and property issues
- Child custody
- Adoption
- Recent developments in family law

This manual will help answer questions such as:

- 1) What happens when people who are married or who are in common law relationships end those relationships:
  - How will the property be divided? (property division, matrimonial home)
  - Will either adult have to pay support to the other? (spousal support)
  - What living arrangements are to be made for the children? (custody and access)
  - Will one parent pay support to the other for the children? (child support)
- 2) Adoption
  - How does the adoption process take place?
- 3) New developments
  - What about same sex marriage?

## INTRODUCTION TO FAMILY LAW

### **The definition of family**

Defining what constitutes a family is difficult. Traditionally, the term “family” has implied a monogamous, male-female marriage. However, over the years this traditional outlook on family has been quickly evolving. This evolution can be attributed to the increase in divorce rates, the inclusion of women in the workforce, a decline in birth rates, an increase of single parent families, an increase in cohabitational relationships and same-sex relationships. Families take many different forms, including single people with children, couples without children, children born inside or outside of marriage, gay and lesbian couples, adopted children, etc. The term family will be used in this text in its broad sense to indicate that there are many family structures and acceptable definitions.

### **What is family law?**

Since the term “family” does not have a precise definition, “Canadian family law might more properly be called the “Law of Persons” in that it concentrates on the rights of individuals whose family relationships have become dysfunctional.” Therefore, Canadian Family law primarily addresses the breakdown of the family (however it might be defined) and its legal consequences. The term “family law” can also refer to the area of law governing the relationships between family members in various situations.

### **History and Evolution of Family Law in Canada**

In 1968, Canada’s first dominion-wide *Divorce Act* was passed. This meant that for most provinces, adultery no longer constituted the only grounds for divorce. In addition, it implemented a system of support and imposed certain obligations upon those members involved in the divorce towards one another and his or her children (for example, there was no longer the prototypical “guilty husband” responsible for paying child support; a financially-dependent spouse of either sex was responsible for payments). In fact, in 1996, the Supreme Court of Canada heard the *M v. H.* case, in which M claimed support from H after the dissolution of their same-sex partnership. M sought to challenge the definition of the term “spouse” in s. 29 of the *Family Law Act*, so

that partners of a same-sex couple could be entitled to receive child support should the partnership fall apart. Ultimately, the remedy was to sever the words "a man and a woman" from the definition of spouse in section 29, and to read in the words "two persons" in their place.

Since the nature of the family continues to change, so must the law and its applications. In the past, many divorce cases have been heard in a traditional court of law, but there is a recent movement towards alternative methods of dispute resolution when settling issues of family law.

### **Family Law Legislation**

There are two main legislations that deal with family law and marital breakdown: the *Divorce Act* and the *Family Law Act*. The ***Divorce Act*** came into effect in 1986. It is a federal legislation of uniform application throughout Canada, that deals with divorce, as well as claims for child and spousal support, and custody and access, in divorce cases. The ***Family Law Act*** is provincial legislation and applies only to the province of Ontario. The Act deals with issues such as separation, spousal and child support, division of property, and possession of the matrimonial home.

### **Courts and Family Law**

In Ontario, there are three different courts that hear family law cases. In some communities, family law matters are dealt with by the **Family Court of the Superior Court of Justice**. These specialized courts can deal with all family law matters, including divorce, custody, access, division of property and child protection. These courts also offer other resources such as Family Law Information Centers and family mediation services.

In other communities, family law matters are dealt with in two separate courts. The **Superior Court of Justice** handles divorces, applications for custody, access or support as part of the divorce, and matters related to the division of the family property. The **Ontario Court of Justice** handles applications for support, and resolves issues

related to custody of or access to the children when there is no application for divorce. This court also hears child protection matters.

Spouse can also resolve the issues between them through private settlement, negotiation or mediation. This booklet provides some information about each of these options.

## **Chapter 1:       SEPARATION AND DIVORCE**

When the breakdown of a long-term relationship or marriage occurs, many issues need to be resolved. The law provides for certain obligations and guarantees for spouses who have decided to go their separate ways.

### **Separation**

The separation of a couple occurs when they are no longer living together and where there is no chance that they will live together again. Court decisions have determined that the separation does not have to be in terms of place, but may exist solely in terms of attitude towards each other. Therefore it is possible for a couple still living under the same roof to be living “separate and apart”. The intention of the spouses to live separate lives must be proven with factors such as having very little or no communication, eating separate meals, not sharing social activities, and occupying separate bedrooms.

Issues that come up at the time of separation can be resolved in different ways:

- The couple can negotiate a separation agreement.
- An application to the court can be made to set up custody, support and property arrangements under the laws in the province.
- Spouses can come to an informal agreement that can be verbal or in writing. However, if one party decides not to honour that agreement, there will be no legal protection.

Two people who are living together but are not married are considered as being in a “common law relationship”. It is important to note that Common-law spouses have fewer rights upon separation than married couples.

### **The separation agreement**

A separation agreement is a legal document signed by both spouses (common-law or married) which details the arrangements they have agreed upon. This is usually the way that a separating couple resolves their disputes and settles issues such as child custody, division of property and financial support. This type of agreement is voluntary and nobody can be forced to sign one. In Ontario, there is no requirement of independent legal advice to make the document legally binding, however it is extremely

desirable since it effectively prevents either party from later claiming that he or she did not really understand the agreement. To be enforceable a separation agreement must meet three conditions:

- a) be written down
- b) be signed by both of the people involved
- c) be witnessed by someone else.

Generally, the terms of a separation agreement are expressed to continue after the parties are divorced. However, even if it doesn't say so specifically, a separation agreement ends if the parties effect a genuine reconciliation.

The contents of the separation agreement will vary from one situation to another as the separating couple can adapt it to its needs and circumstances. Usually such an agreement will contain financial provisions, perhaps for support payments, or it may contain a release of any such claims. The agreement may contain clauses covering division of property, possession of a home, payment of debts or any other issues that need to be resolved. Parties may also include information on children in the agreement such as visiting rights and child support payments, but the separation agreement cannot permanently settle custody details.

### **Alteration of the terms**

If partners decide to separate and prepare a separation agreement, courts will usually uphold the agreement unless it is found to be invalid. In Ontario, the *Family Law Act* says that separation agreements are valid unless there is something in the *Act* that provides otherwise on a specific point. Agreements are treated seriously by the courts. Any terms that are clearly unreasonable will not be accepted. However, judges do not usually change property or spousal support terms both spouses have agreed to. If one party wants to have the separation agreement declared invalid, the onus is on the claiming party to satisfy the court that the agreement was substantially unfair.

If terms in the separation agreement relate to the treatment and care of children, the court may decide that these are not in the best interest of the children, resulting in these

terms of the contract becoming null and void. The onus is on the party seeking to have the terms thrown out to prove that they are not in the best interest of the child.

A separation agreement can be found invalid by the courts, and deemed to be unfair to one spouse/partner if there is evidence that one spouse had an unfair advantage over the other such as:

- a) evidence of abuse, a disability of some kind, stress, or drug and/or alcohol abuse
- b) one spouse/partner doesn't tell the other about some assets that they have
- c) some significant debts were kept secret
- d) one spouse/partner didn't understand the implications of the separation agreement.

In these situations, the court can make an order changing some terms in the separation agreement.

## **Divorce**

A divorce is the legal process by which a valid marriage is dissolved. Separation agreements and court orders resolve family matters when a separation occurs but they do not legally end a marriage. The only way to do so is to get a divorce. Divorce in Canada is regulated by the federal *Divorce Act* which came into force in 1986.

### **Grounds for Divorce**

The *Divorce Act* provides that the only ground needed for divorce is the "breakdown of the marriage". This breakdown is established by one of two things.

- a) If the two people have lived apart for at least one year before they started to file for divorce, and they were still living apart when they began to file. This applies when both parties want the divorce, so there is no argument.
- b) If the person who is not the one filing for divorce has done one of two things. Either they have committed adultery while they were married, or they have been abusive (emotionally or physically) to their spouse/partner.

**Divorce on the ground of living “separate and apart”**

For divorce to be filed on this ground, the two people need to have been living apart for at least one year before they filed for divorce, and still be living apart when they filed the action. But this does not necessarily mean that the two people have to be living in separate homes. There are cases where “living separate and apart” can mean things like not sleeping together, no sexual relations, no communication, and no activities together. This situation may arise because of money or children, although there is debate as to whether living in the same locale and claiming this ground for divorce is allowable.

**Divorce on the grounds of adultery**

Adultery is defined as “voluntary intercourse by the married spouse with a person to whom he or she is not married.” Any other sexual acts don’t count as adultery. It seems that this definition is more concerned with reproduction and paternity than general sexual morality. It may be tricky to prove adultery for two reasons. First, it may be difficult to catch the person in the act, and second, you can’t force someone to confess to adultery in court. Proof that there was a chance to commit adultery can be enough. However, courts will likely want to see proof that a person actually used a suspected opportunity for adultery.

Adultery is a fault ground, so the party that committed the adultery cannot file for the divorce on the grounds of their own adultery. It has to be the party that did not commit the adultery who files for a divorce.

**Divorce on the ground of cruelty**

The claiming party has to show that the cruelty inflicted is “physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouse.” This usually means evidence such as a doctor’s note documenting physical and emotional problems. The court considers the actual effect on the person, given his/her qualities, so what would be cruel to one person might not be cruel to another.

It is of note that usually the parties will not be living together when divorce is filed on this ground, but it is sometimes the case that they are still living under the same roof because of children or poverty.

### **Bars to divorce**

Notwithstanding that the breakdown of the marriage is established with satisfactory proof, the court has the duty to refuse to allow a divorce in certain limited circumstances. For example, a court may suspend the granting of a divorce until reasonable arrangements are made to support children. This is to make sure that the interests of the adults are not put above those of the children involved.

Also, the court needs to make sure everything in the divorce action filed by the parties is really for a divorce, and not for some other purpose. If the court finds evidence of collusion, which means an agreement or conspiracy to fabricate or suppress evidence or to deceive the court, it can dismiss the application.

### **What about reconciliation?**

Except where the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, lawyers involved in a divorce must tell their client about options for reconciliation. The court, before considering the evidence in a divorce case, must be satisfied that there is no possibility of reconciliation between spouses. If the court sees a possibility of reconciliation it must adjourn the proceedings to give the parties the opportunity to attempt to reconcile.

### **Divorce procedure**

If both parties want the divorce (it is mutual) and agree on all issues, then it is an uncontested divorce which can be achieved easily by filing the necessary documents. A judge still has to determine that the grounds for divorce exist, but this is done “in chambers” (not in open court) and both spouses/partners are not required to attend. If the parties cannot agree on the terms of the divorce, they can go to court and let the court decide. In Ontario, only the Superior Court of Justice has jurisdiction in divorce matters.

The legal system places all divorce proceedings in the context of a formal lawsuit where the parties are: the petitioner (the spouse who initiates the divorce procedure) and the respondent (the spouse against whom the proceeding is commenced).

The petitioner starts the proceedings by presenting a petition for divorce. The petition is a document containing information about the marriage and any children involved, and sets out the facts and a statement of claims on which the petitioner relies. The completed forms must be filed at the courthouse, accompanied by the required court fees. The petition is then “served”, usually by mail or by physical delivery of a copy to the respondent or his lawyer. The respondent usually has twenty days to deliver an answer which may admit parts of the petition deny others and present a counter-petition.

Once all the documents have been received, the case is entered on a list of divorces awaiting a hearing. During the trial, each party explains its case to the judge and may present witnesses. The judge then makes a final decision about any issues the spouses cannot agree on.

The *Divorce Act* states that a judgment of divorce is first granted by the court upon proof of ground, but the divorce does not typically come into effect until after the decision is rendered and a one month appeal period has passed. Once it takes effect, the divorce dissolves the marriage and may not be appealed.

It is important to note that the reason for the marriage breakdown does not affect decisions the court might make about support, custody and access. These decisions are not based on who was at fault in the marriage breakdown.

## **The Traditional Adversary System**

Factors such as the growing number of divorces, the recognition of no-fault and the sensitivity to children as significant players in the process, mark a distinct transition in family law. This shift has forced the question of whether the traditional adversary model is appropriate for disputes on marriage breakdown.

The adversary system relies on the parties to present evidence and for an impartial decision-maker to make a determination on that evidence. The exercise pits one litigant

against the other, increasing hostility. Research has shown that those who suffer most from an adversarial divorce are children. This system creates emotional strain for adults and children and long delays in the courtroom keep people in limbo while litigating their family law matters.

The *Divorce Act* provides that lawyers must discuss with their clients the advisability of negotiation and must inform them of mediation facilities that might be able to assist the spouses in arriving to an agreement. The provisions emphasize that the lawyer in a family dispute has a great deal more responsibility than simply to advise on litigation. Court disputes over family matters can be a destructive process that should only be used when settlement cannot be achieved through lawyer assisted negotiations or mediation.

## **Alternative Dispute Resolution**

Generally, alternative dispute resolution (ADR) can be explained as:

Methods by which legal conflicts and disputes are resolved privately and other than through litigation in the public courts, usually through one of two forms: mediation or arbitration. It typically involves a process much less formal than the traditional court process and includes the appointment of a third-party to preside over a hearing between the parties. The advantages of ADR are speed and money: it costs less and is quicker than court litigation. ADR forums are also private. The disadvantage is that it often involves compromise.<sup>1</sup>

In a divorce action, ADR, as opposed to litigation, has the advantage of offering processes that can be less stressful on all parties involved (particularly for any children). There is minimized courtroom exposure and legal expenses. It must be noted that at any time during divorce proceedings the parties can still try to reach an agreement, and negotiate further with the help of lawyers or work with a mediator. Couples are often able to agree before or during divorce proceedings on how issues relating to divorce or separation should be resolved, and so the courts are relieved from having to make a decision.

---

<sup>1</sup> <http://www.duhaime.org/dictionary/dict-a.aspx>

**Mediation**

Mediation is a voluntary, informal negotiation that is facilitated by an objective, neutral third party called a mediator. The aim of mediation is to produce a mutually acceptable consensual settlement based on the issues and interests of each party. It attempts to meet as many interests as possible of each party under the circumstances. The mediator acts as an unbiased, neutral third party and holds no decision-making authority. His or her role is to help the parties achieve a negotiated settlement. In addition, the mediator attempts to encourage the flow of ideas, to clarify issues and interests, to meet with parties in both joint and private sessions and to overcome any impasses.

Compared with normal court proceedings, mediation can be advantageous in terms of cost and time. In addition, the contents of mediation remain private and confidential and can often lead to constructive brainstorming and problem solving. Mediators do not have to be lawyers and can be chosen to the satisfaction of both parties.

**Arbitration**

Arbitration, like mediation, can be more cost and time-effective than civil litigation, and the proceedings remain confidential. The arbitrator hearing a case is an impartial, unbiased party who must make a decision based on proof and reasonableness. Unlike mediation, however, the outcome of arbitration is binding.

**Collaborative Divorce Proceedings**

This type of process is a fairly new alternative to both ADR and the Traditional Adversary system. Pioneered in the United States in 1990 by a family lawyer named Stu Webb, collaborative divorce proceedings take a client-centered approach to reach divorce settlement agreements. In collaborative family law, the lawyers for both clients agree to assist them in resolving conflict using cooperative strategies rather than adversarial techniques and litigation. To ensure the right environment is in place during the proceedings, prior to embarking on discussions, both parties agree to work together to come to the best solution for the family.

This system emphasizes the co-operation of all participants with the aim of minimizing stress to reach a flexible arrangement in a cost effective manner. During the process, the participants communicate to promote the maximum exchange of information, to reveal all the parties' concerns to generate an idea of creative ideas and ultimately, to agree on the terms of a mutually acceptable settlement that satisfies the interest of both parties.

### **People with Disability and Divorce**

There is very limited information on divorce rates for people living with disabilities. A 1999 U.S. government National Health Interview Survey of nearly 50,000 households in 1994 found that 20.7 percent of the disabled adults among those polled were divorced or separated, compared with 13.1 percent of those without disabilities. It appears that depending on the disability, the divorce rate may be higher or roughly equal to the average divorce rate.<sup>2</sup>

---

<sup>2</sup> <http://www.mult-sclerosis.org/news/May1999/DivorceRateAmongDisabled.html>

## **Chapter 2:        PROPERTY ISSUES AND SPOUSAL SUPPORT**

### **Property Issues**

When marital breakdown occurs, many issues need to be resolved. Division of the couples' possessions is one of them. These possessions or "property" include anything that is capable of being owned. This includes such things as the home the couple shared, its contents, any other real estate, pensions from employment, RRSPs, investments, bank accounts and cash.

Marriage creates a statutory right to share in the value of the property acquired during the marriage and a right of possession of the family home. It is important to note that Common law couples do not have the same rights as married couples to share the property they bought when they were living together.

### **Division of property**

Usually, a couple who is separating may come to an agreement about how to divide the property and debts fairly. The terms of this arrangement may be included in their separation agreement. If the spouses cannot agree on some matters they can apply to a court to have a judge decide or wait until the divorce application is heard.

Property is divided equally at the end of a marriage. If one spouse has made most of the financial contributions to the relationship, the court recognizes the non-financial contributions of the other spouse (like child care and housework). Each spouse must calculate the value and the items which make up their portion of the net family property. This is the value of the property each spouse owned at the end of the marriage minus any debts and minus the value of property each brought into the marriage. Certain other pieces of property are not considered, like gifts that belong to just one spouse, or items that the two people have agreed will not be considered in the total.<sup>3</sup> The net property of the spouses is compared, and the one with a larger amount pays half of the value of the difference to the other.

---

<sup>3</sup> This is a very basic version, and there are a few rules and exceptions to this formula.

For this calculation, all that really matters is the dates on which the marriage begins and ends. The Family Law Act needs to fix a point in time to determine the value of the property in question. This is called the Valuation Date. If one spouse dies, then the date of death is the Valuation Date. Otherwise, the date of separation is used as the Valuation Date. Then the court goes on to determine the “fair value” of the property on the Valuation date. “Fair value” isn’t defined in the Act, so the court may need to determine what the fair value should be.

Common law couples do not have the same rights as married couples when it comes to the division of property they bought when they were living together. Usually, furniture, household belongings and other property belong to the person who bought them. Common law couples also do not have the right to divide between them the increase in value of the property they each brought with them to the relationship. Furthermore, if a person has contributed to property that his or her partner owns, he or she may have a right to part of it, but unless the partner agrees to pay back that share, the contribution will have to be proven in court.

### **Events that trigger the division of property**

Property can be divided and equalized under the scheme in a few ways. When there is a marriage breakdown either spouse has up to 2 years of the judgment for divorce or 6 years when dealing with separation, to make an application for division of property. The second event that can trigger the scheme is the death of one spouse. Here the surviving spouse can apply to the estate of the deceased spouse. Frequently the surviving spouse will be covered by a will. If there is no will, the surviving spouse has to choose between applying for the equalization or entitlement under the *Succession Law Reform Act*. The surviving spouse has six months to decide, and if he or she does nothing it will be assumed that he or she has chosen the *Succession Law Reform Act*. Under Section 45 of this Act the preferential share which the spouse is entitled to absolutely is \$200,000.00. If the estate is less than that amount, the spouse is entitled to the whole estate.

### **The matrimonial home**

The matrimonial home is the main residence of the family. Married spouses both have an equal right to the possession (but not the ownership) of the matrimonial home. This means that when a separation occurs, both spouses have the right to live in the home, even if only one of them owns it and that a spouse cannot decide to sell, rent or mortgage the house without the consent of the other.

If the couple is unable to agree, a court may decide who has the right to continue living in the matrimonial home. If there are children, the person who has custody of the children will most often be the one who stays in the family home with them. This helps children adjust to their new family situation in a place and neighbourhood that they already know.

Contrary to married couples, common law partners do not automatically have an equal right to stay in the matrimonial home. However, one may ask a court to grant them the right to stay in the home as part of a support order.

### **Spousal Support**

Spousal support is a way to help families to deal with the financial problems which may occur when there is a break up of the marriage. Spousal support may be temporary when it concerns the period between the date of separation and the divorce hearing. Temporary support may also be allowed when it is necessary to reduce the financial stress on one spouse as a result of the break up. At the divorce hearing, support may be given for longer periods of time to ensure that as little financial hardship as possible is placed on the spouse who has given up a certain amount of financial independence for the good of the marriage; for example, one spouse may have stayed at home for a lengthy period of time in order to raise the children. This could mean that the spouse has fewer skills that would be of use in the modern job market. The result of this would be reduced income.

When a common law relationship ends, a partner may ask that spousal support be paid if the couple had been living together for three years, or if they have lived together for less time and have had or adopted a child together.

### **How does spousal support work?**

The amount of spousal support to be paid depends on the needs of each spouse and on their income and resources. Spousal support can be set up in two different ways. The judge in the case chooses the way that best meets the needs of the divorcing couple. The ways are: a lump sum payment – where the judge orders one spouse to make a one time payment to their ex-partner; or periodic payments – where the Judge orders that support money is to be paid on a regular basis over a longer period of time. Judges can also order that some combination of the two ways be used where this meets the needs of the spouse who will receive support.

### **Factors Considered when Awarding Spousal Support**

There is no one basis for awarding spousal support, but the guidelines in the *Divorce Act* set out four objectives which guide judges when they are ordering spousal support:

- (1) recognize any financial gains or losses to the spouses arising from the marriage or its breakdown;
- (2) divide between the spouses any financial consequences arising from the care of any child of the marriage in addition to any obligation for the support of any child of the marriage;
- (3) relieve any financial hardship placed on the spouses arising from the breakdown of the marriage; and
- (4) As much as possible, encourage each spouse to be financially self-sufficient within a reasonable period of time.

The *Family Law Act* sets things up a little differently. It says that each spouse must do his or her best to support the other. The *Act* copied the four objectives set out above from the *Divorce Act* as well as 17 factors that the court can consider. In the list below “dependent” means the person seeking support and “respondent” is the person who must provide the support. These factors are:

- the dependant's and respondent's current assets and means;
- the assets and means that the dependant and respondent are likely to have in the future;
- the dependant's capacity to contribute to his or her own support;
- the respondent's capacity to provide support;
- the dependant's and respondent's age and physical and mental health;
- the dependant's needs. The court shall have regard to the accustomed standard of living while the parties resided together;
- the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;
- any legal obligation of the respondent or dependant to provide support for another person;
- the requirement of the dependant or respondent to remain at home to care for a child;
- any contribution by the dependant to which helped the respondent in the development of their career;
- if the dependant is a spouse,
  - the length of time the dependant and respondent lived together,
  - whether the dependent's household responsibilities affected their ability to work;
  - whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,
  - whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,
  - whether the dependent stayed at home to look after household or family responsibilities;
  - the effect on the spouse's earnings and career development of the responsibility of caring for a child; and
- any other legal right of the dependant to support, other than out of public money.

### **Keeping more control over the situation**

Many couples find it easier to make their own arrangements for separation or divorce outside of the *Family Law Act*. This way the couple may be able to arrive at solutions that better suit their needs and that a court may not have the discretion to order. Many types of arrangements are permitted, but the courts will not allow agreements that are unfair to continue.

### **Chapter 3: CHILD CARE AND CUSTODY**

When two people have a child, they both have equal right and equal responsibility to raise their child. This involves making decisions about the child's care and upbringing. Whether they are married or not, parents living together can make these decisions together on a day-to-day basis. When parents do not, or no longer, live together, they must arrange how they will share their parenting rights and responsibilities.

Custody of children is usually settled by an agreement reached by the parents and their lawyers, without going to court. Parents can write out their arrangements in a parenting plan. This plan includes details such as when each parent spends time with the children and who makes major decisions about them. A parenting plan can be an informal arrangement between the two parents, or it can be part of a separation agreement or judgment for divorce. It is important to note that informal arrangements can be difficult to enforce.

When parents cannot agree on who should have custody of the children, the matter can be brought to court to have a judge decide. The judge may ask for an assessment by a social worker, psychologist or psychiatrist. The assessor will speak to each parent, the children and sometimes to other people close to the family and will write a report for the court, recommending where the children should live and when they should see the parent who does not have custody.

#### **Custody vs. Access**

Custody and Access are not defined in either the *Children's Law Reform Act (CLRA)* or the *Divorce Act*. The law clearly states that both parents are equally entitled to the custody of the child. Specifically, section 20(2) of the CLRA states that a person entitled to custody of the child has the rights and responsibilities of a parent towards the child and must exercise those rights and responsibilities in the best interests of the child. Additionally, section 20(5), which addresses entitlement to access, makes it clear that access includes the right to visit with and be visited by the child. The access parent has

the further right to make inquiries and be given information as to the health, education and welfare of the child.

Thus, there is a significant difference between custody and access. The custodial parent has the right to make all decisions regarding the child, while the access parent is entitled to information concerning the child, but has no statutory right to take part in the decision-making process. Consequently, the custodial dispute involves not only where the child will reside, but who will make the decisions concerning the child.

### **The Child's Best Interest**

Both the *CLRA* and the *Divorce Act* require that a judge makes decisions about custody of children on the basis of a test called "the best interests of the child". This means that the judge looks at all of the factors that affect a child's life, such as his relationship with his parents, where the child lives and goes to school or daycare, what extracurricular activities and sports he is involved in, special health care needs and how these things could be disrupted as little as possible. After considering all relevant factors, the judge makes a decision that he believes will be of the greatest benefit to the child.

In determining the issue of custody the court will weigh such factors as:

- a) the ability and willingness of each parent to provide the child with guidance and education, the necessities of life and any special needs of the child, and
- b) the views and preferences of the child where such views and preferences can be reasonably ascertainable.

The object of the proceeding is to place the child, rather than the persons applying for custody, at the heart of the decision.

There are many considerations to be balanced in determining what is in the best interests of the individual child. In an attempt to objectively ascertain the best interests of the child, a judge must examine factors such as:

- physical and emotional well-being of the child
- plans for the education and maintenance of the child as presented by the parents
- financial position of the parents
- plans for fulfilling the religious or ethical upbringing of the child
- the sensitivity of the parents to their role as parents and their understanding and appreciation of the needs of the particular child.

The court will also consider parental factors when determining custody, and may take into consideration the past conduct of a person if it is relevant to the ability of that person to act as a parent. Additionally, if there is more than one child involved, courts prefer to keep siblings living together in the same household so they can grow up with each other and maintain a sense of family solidarity.

## **Children's Wishes**

When a judge addresses the wishes of a child in a custody dispute, the central concern for the judge is the level of importance he/she must place on such wishes. If the child is older, it is more difficult to enforce a custody order that is inconsistent with his or her wishes. On the other hand, when younger children are involved, their statements should not necessarily be taken at face value because of their impressionable age and level of maturity.

### **How are the child's wishes determined?**

To assist the court in ascertaining the preferences of the child in a custody hearing, four methods may be employed. They are as follows:

#### **1) Calling the child as a witness in court**

In custody cases, putting children in the witness box leaves them with the impression that they are the one making the final decision. The decision is made by the court, taking into account, the child's wishes. This method can be stressful for some children, there are more effective ways to obtain this kind of evidence from the child.

#### **2) Conducting a private interview with the child in the judge's chambers**

At times, a judge may conduct a private interview with the child to ascertain his or her wishes.

3) Interview and assessment by a childcare professional who reports to the court and counsel,

The *CRLA* allows the court to appoint a professional to assess and report on the needs of the child and the ability and willingness of the parties to satisfy these needs. A professional will be appointed when it appears necessary to arrive at a just and proper decision in the best interests and welfare of the child. (For example if there are allegations of poor parenting practices or if a parent is opposed to access by the other parent.) The assessment is conducted by either a social worker, psychologist or psychiatrist who sees the children, parents and extended family and who then issues a report of his findings to the parties and the court.

In the majority of cases, the assessor will make a specific recommendation with respect to custody and access. Contents of the report include the history and nature of the child's relationships with parents and siblings. Such information is used by the court to determine what is in the best interests of the child. Generally speaking, the results of an assessor's report will be considered very carefully by the court. The assessment is used where it is likely to provide information not available to the judge because it falls within the special knowledge of the expert. Often, the release of the assessor's report may end the custody dispute before trial.

4) Providing the child with legal counsel to advocate or report on the child's wishes

Lawyers represent children (those under the age of eighteen) in many areas of the law including custody and access disputes and child protection proceedings. In a custody or access proceeding, if the court feels that the children would benefit from having their own lawyer during the court process, the court can ask the Office of the Children's Lawyer (Ministry of the Attorney General of Ontario) to provide a lawyer to represent the children's interests in court.

## **Types of Custody Orders**

### **Interim Orders**

A short-term order granted by a court prior to a trial or a final court order is known as an interim order. Such orders may be used to temporarily settle such issues as custody, access or child support and will remain in effect until the court can fully consider all the factors and makes a final decision or until the parents reach an agreement. An interim order may be obtained under either the *Divorce Act* or the CLRA. As prerequisite to applying for an interim custody order, the parent must have put forth a claim before the courts to obtain the child's custody.

The most important factor in a custody dispute is the status quo. Normally, a trial judge will refrain from changing custody and disturbing what is working to the benefit of the child. Generally, the person who has de facto custody of the child at the time of the interim custody motion will generally be successful in keeping the child pending trial and the other parent will usually obtain interim access. On some occasions, if the parent removing the children cannot justify their removal, the court may well order the children back to the matrimonial home.

### **Sole custody**

Sole custody, sometimes also called full custody, means that one parent has the legal right to make all of the major decisions relating to the child without having to discuss the decisions with the other parent. Generally the other parent will have access to the children.

### **Joint custody**

Parents who have joint custody of their children share the right to make decisions about their care and upbringing. The children may spend half the time with one parent and half the time with the other or they may spend more time living with one parent than with the other. Both parents remain involved in making decisions about the children.

Joint custody requires communication and cooperation. Traditionally both parents had to agree to joint custody for it to be granted. Nowadays, judges have shown a willingness to grant joint custody even when one of the parents is opposed. The court may determine that it is in the child's best interest for parents to have joint custody. Courts have also been willing to impose joint custody to protect the parent-child relationship if there is danger that one parent will prevent contact with the other parent. Even though judge imposed joint custody is gaining acceptance, courts are still reluctant to impose joint custody, and as a general rule, courts will not grant custody unless the possibility of cooperation in the best interest of the child is evident.

## **Child Support**

Parents have a legal obligation to support their children and to provide them with the necessities of life, including adequate food, shelter, clothing, medical care, and education. This responsibility applies to all parents, regardless of whether they were married, living together or have never lived together. Child support is the financial contribution paid by a parent to help provide for his or her children, who are not in that parent's custody.

Parents have been defined to include both genetic and adoptive parents, as well as stepparents and other people who have made it their intention to treat the child as their own. As such, it is possible that more than two people could be ordered to pay support for a child. If a partner will not pay support, it is possible to go to court and ask a judge to order a parent to pay support for their child.

The Federal Child Support Guidelines have been implemented to help parents, lawyers and judges calculate child support obligations. The objectives of the Child support Guidelines are:

- a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

- c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement;
- d) to ensure consistent treatment of spouses and children who are in similar circumstances.

The Guidelines apply to new or revised child support orders made since May 1, 1997. All Ontario children are treated in the same way, regardless of whether their child support orders or agreements are made under the Federal *Divorce Act* or under Ontario's *Family Law Act*. (For example, this means that children of parents living in a common law relationship have the same rights to support from their parents as the children of married couples.) The Guidelines make the calculation of child support fair, predictable and consistent.

The child's age, independence and relation to the spouse who will be paying helps determine child support obligations. This payment is mandatory for the paying spouse if the child is under the age of majority and not in his or her custody, or if the child is over the age of majority but the children cannot care for themselves because of an illness, a disability, or because the child is in school. The amount of child support to be paid is set according to the annual income of the paying spouse and the number of children for whom child support is paid.

### **Can the amount be adjusted?**

There is some flexibility allowed in the Child Support Guidelines for the amount of support to be more or less than the amount set out in the table in certain circumstances. The amount of child support may be adjusted to recognize special expenses for the child or to prevent financial hardship for a parent or child in extraordinary circumstances. Special circumstances that can yield a higher amount of monthly child support include illness, disability, and expenses for the special needs of the child. While the court will consider exceptional circumstances, it is up to the parent applying for this consideration to make the case for additional funds. In other words, that parent has to demonstrate why he or she should receive child support payments that exceed what the formal Guidelines table would dictate.

In very limited circumstances, the court can also award less than the guideline amount where paying this amount would cause undue hardship for the parent required to pay. In the past decade, family courts have become more aware that disabilities can have a direct impact on the fundamental principles of family law. Some Canadian cases have assessed court-ordered child support, based on the spouse's inability to pay, or to continue paying, because a disability has prevented them from obtaining viable employment.

If both spouses agree to a plan to support the child, the court can consent to an award different from that specified in the guidelines. The Guidelines may also affect parents who have negotiated out-of-court child support agreements, but only if one or both of the parents bring the matter of child support before the courts.

Child support orders can also be varied under both the *Divorce Act* and the *Family Law Act* if there has been a change in the income of the paying spouse, or if the number of children being supported changes.

## **Chapter 4:       ADOPTION**

An adoption is a process through which the birth parents of a child give up their parental rights to the child either voluntarily or by court order. These parental rights are assumed by another individual or couple who takes over full responsibility for caring for the child. This is a government regulated process. If the child is seven years old or above, then his or her consent is required unless the court decides otherwise.

### **Types of Adoption**

An adoption can proceed through:

- a)     Crown wardship
- b)     Private adoption
- c)     Family adoption

In a **Crown Wardship**, the Crown is the legal guardian of the child while waiting for the adoption process to take place. The Crown then hands over this responsibility to the Children's Aid Society responsible for taking care of the child. The parents from whom the child has been removed are not entitled to notice of the adoption proceedings.

In a **private adoption**, the child can be adopted by a non-related or a related person. In this case, each parent is required to sign a written consent form before an order can be made. If the child is adopted by a relative (that is, a grandparent, an uncle, an aunt, a cousin, for example), then the process is called a **family adoption**.

### **The adoption process**

Statute sets out that *except* for family adoption; all other private adoptions must be arranged and supervised by a licensee. A licensee is an individual or non-profit corporation with a license issued by the Ministry of Community, Family and Children's Services for the authority to place children for adoption. No one other than a licensee or a Children's Aid Society may place children in Ontario for adoption

In order to determine whether or not an adopting family is suitable, the Children's Aid Society (in the case of Crown wardship) or the licensee will use its discretion. In general, the Ministry will appoint an agent approved by the Director (a representative of the Ministry chosen by the Minister) to do a "home-study" of potential adoptive parents (however, it is the court which has the ultimate authority to grant the adoption application based on what it feels is best for the child). The adopting parent must be at least 18 years of age unless there are special circumstances. If a couple would like to adopt a child, the application must be made jointly.

An adoption is final and irrevocable (unless appealed within 30 days). An adopted child is to be treated as if he or she was born to the adopting parents. Information about the adopted child's biological birth roots is confidential. Court records and other similar records pertaining to the adoption cannot be disclosed to the adopted child except under certain circumstances (note that there are certain qualifications to these rules, pertaining, more specifically, to issues of property rights and the adoption of an "Indian child" as defined by the *Indian Act*).

When an adoption is arranged through the Children's Aid Society or a licensee, the child must live with the applicant(s) for a **probationary period** of six months before an order can be made. Otherwise, the probationary period is two years.

The consent required in all adoptions must be signed in front of an officer of the Children's Aid Society. The Society or licensee must independently advise the parent of his or her rights and allow them the opportunity to seek counseling and independent legal advice. Their rights include the right to withdraw their consent within 21 days, the right to be informed as to when and if their child has been adopted, the right to take part in Ontario's voluntary disclosure register.

## **Chapter 5: NEW DEVELOPMENTS IN FAMILY LAW**

### **Same-Sex Marriage**

In 1999, the Supreme Court of Canada decided that people who live together in a same sex relationship have the same rights and obligations as opposite sex common law couples.

One of the most recent and profound changes to Canada's family law is the inclusion of same-sex marriage legislation. Bill C-38 received royal assent on July 20, 2005, making Canada one of only a handful of countries in the world that recognizes same-sex marriages. This bill includes consequential amendments to eight federal acts, including the *Divorce Act* and *Marriage (Prohibited Degrees) Act*. These amendments were made to ensure the equal treatment within federal law of opposite-sex and same-sex married couples.

The bill's passing was motivated by a number of cases in provincial courts of appeal. In April 2003, Ontario was the first province to institute same-sex marriage after the Ontario Court of Appeal found in favour of the plaintiffs in the case of *Halpern v. Ontario*. After this judgment, other provincial courts followed suit, and eventually the Supreme Court of Canada heard a reference case (test case brought by the government) re Same-Sex Marriage in December 2004. In this case, the federal government requested the SCC respond to questions related to proposed legislation that would permit same-sex marriages. The SCC stated that the proposed legislation was consistent with the charter however this did not prevent religious officials from refusing to perform marriages that were not in accordance with their religious beliefs.

### **Same-sex Adoption**

Related to same-sex marriage has been the right of same-sex couples to adopt. In 1995 British Columbia revised its Adoption Act to allow for same-sex couples to adopt. In the same year, in the case of *Re K and B* the Ontario Court found the Child and Family

Services Act 1990 (Ontario) infringed section 15 of the Charter by not allowing same sex couples to bring a joint application for adoption.<sup>4</sup>

The current situation for same-sex adoption in Canada is: in Alberta, gay men and lesbians may adopt their partner's child, but not the child of a third party. In Nunavut, Prince Edward Island and New Brunswick, same-sex couples are not allowed to adopt while the law in the Northwest Territories' is ambiguous.<sup>5</sup>

### **Partnership and Marriage of People with Severe Mental Disabilities**

An issue that is developing within Family Law in Canada is the right of people with severe mental disabilities to partner and marry. This issue is of particular relevance to people with Down syndrome and their families. The life expectancy of people with Down syndrome has risen from 9 years in the beginning of the 20<sup>th</sup> century to above 50 years in 1996 with 1 in 10 expected to live to seventy years of age.<sup>6</sup>

Because of such factors as variance in the severity of disability in people with Down syndrome, there are no clear answers to questions concerning marriage and partnership. Some of the issues that have been raised include:

- the increased risk of people with Down syndrome having children with Down syndrome (50% higher according to one study)
- ability to cope with pressure and stress associated with partnerships and child rearing
- increased prevalence and vulnerability to physical and sexual abuse.

The legal concept of consent plays an important part in the analysis of these issues. While courts apply general parameters for measuring consent – ie: medical consent uses the themes of risk, benefit, non-coercion and alternatives - the varying capacity of

---

<sup>4</sup> <http://www.aph.gov.au/library/pubs/rn/1999-2000/2000rn29.htm>

<sup>5</sup> <http://www.gaypeopleschronicle.com/stories05/february/0204055.htm>

<sup>6</sup> <http://www.down-syndrome.net>

people with mental disabilities makes these legal assessments difficult, some times impossible.

## RESSOURCES AND REFERENCES

### Family Law Legislation

*Divorce Act* R.S., 1985, c. 3 (2nd Supp.) (online)  
<http://laws.justice.gc.ca/en/d-3.4/49354.html>

*Family Law Act*, R.S.O. 1990, Chapter F.3 (online)  
[http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90f03\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90f03_e.htm)

*Federal Child Support Guidelines*, SOR/97-175 (online)  
<http://laws.justice.gc.ca/en/d-3.4/sor-97-175/text.html>

### Online ressources

Community Legal Education Ontario, *Getting Divorced*, 2003, (online)  
<http://www.cleo.on.ca/english/pub/onpub/PDF/family/getdiv.pdf>

Collaborative Divorce  
<http://www.collaborativedivorce.ca/>

Department of Justice Canada, *Bill C-38 - The Civil Marriage Act - Receives Royal Assent*, 2005, Online  
<http://www.news.gc.ca/cfmx/view/en/index.jsp?articleid=160739&>

Department of Justice Canada, *Divorce Law: Questions and Answers*, 2003 (online)  
<http://canada.justice.gc.ca/en/dept/pub/divorce/index.html>

Duhaime's Canadian Family Law Center,  
<http://www.duhaime.org/family/>

Kathy Carmichael, "New Directions: Divorce and Administrative Law" 1999 Canadian Forum on Civil Justice (online)  
<http://www.cfcj-fcjc.org/full-text/divorce.htm>

Ministry of the Attorney General, *What you should know about family law in Ontario*, 2002 (online)  
<http://www.attorneygeneral.jus.gov.on.ca/english/family/familyla.pdf>

### Other ressources

Most Family Courts in Ontario have Family Law Information Centres that provide a range of information and services. For more information consult:  
<http://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.asp>