Submission to

MINISTRY OF ATTORNEY GENERAL

Justice Services Branch
Civil and Family Law Policy Office

PHASE 3

FAMILY RELATIONS ACT REVIEW

Issued by:

***FRA* Working Group**
Canadian Bar Association
British Columbia Branch
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PREFACE

The Canadian Bar Association nationally represents over 35,000 members and the British Columbia Branch (the "CBABC") itself has approximately 6,000 members. Its members practise law in many different areas and the CBABC has established 67 different Sections to provide a focus for lawyers who practise in similar areas to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the CBABC.

This submission was prepared by a special committee: the *FRA* Review Working Group (the "CBABC *FRA* Working Group"). The comments expressed in this submission reflect the views of the CBABC *FRA* Working Group and are not necessarily the views of the CBABC as a whole.

The CBABC *FRA* Working Group was composed of the following members of the Family Law and Alternate Dispute Resolution (ADR) Sections and the Legislation and Law Reform Committee:

Family Law Sections

Kamloops

- David Dundee;

Nanaimo

- Sandra Dick;

Okanagan

- Valerie Bonga;
- Cathie Heinrichs;
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Westminster

- Don Boyd;
- Janet Clark
- David Halkett;
- David Hart;
- Jack Hittrich;

Vancouver

- John-Paul Boyd, also of the Legislation and Law Reform Committee;
- Veronica Franco;
- Ian Hayward;

Victoria

- Sandra Harper;
- Forrest Nelson;
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- Kay Melbye;
- Victoria Pitt; and
- Gwen Taylor.

SUBMISSIONS

BACKGROUND

In February 2006, the Ministry of Attorney General began a review of the *Family Relations Act,* R.S.B.C. 1996, c. 128 (the "*FRA*"). The review is to modernize the *FRA.* The *FRA* was first enacted in 1978.

The review is planned in three phases.

Phase 1 was from February to May 2007.

The following discussion papers were released in Phase 1:

- Chapter 1: Background and Context for the *Family Relations Act* Review;
- Chapter 2: Division of Family Property;
- Chapter 3: Division of Pensions; and
- Chapter 4: Judicial Separation.

Phase 2 was from June to September 2007.

The following discussion papers were released in Phase 2:

- Chapter 5: Programs and Services;
- Chapter 6: Parenting Apart;
- Chapter 7: Meeting Access Responsibilities;
- Chapter 8: Children's Participation; and
- Chapter 9: Family Violence.

Phase 3 was from September to December 2007.

The following discussion papers were released in Phase 3:

- Chapter 10: Legal Parenthood;
- Chapter 11: Spousal and Parental Support;
- Chapter 12: Co-operative Approaches to Resolving Disputes;
- Chapter 13: Time Limits and Definitions; and
- Chapter 14: Relocation.

In March 2007, for Phase 3, and related to parental support, the British Columbia Law Institute released a report recommending that the parental support obligation contained in section 90 of the *FRA* be repealed.[1] Section 90 of the *FRA* provides that a child is liable to maintain and support a parent having regard to the other responsibilities and liabilities and the reasonable needs of the child.

For both Phase 1 and 2, the CBABC *FRA* Working Group filed detailed submissions and made specific recommendations to the Attorney General.

[1] British Columbia Law Institute, Report on the Parental Support Obligation in Section 90 of the *Family Relations Act*. (BCLI Report No. 48) (March 2007) (www.bcli.org/pages/projects/parentalsupport/Parental_Support_FRA_section_90_Report.pdf).

PHASE THREE SUBMISSIONS

These submissions of the CBABC *FRA* Working Group are restricted to Phase 3 of the *FRA* Review.

For Phase 3, the CBABC *FRA* Working Group's Submissions are in response to the five discussion papers released by the Attorney General:

- Chapter 10: Legal Parenthood;
- Chapter 11: Spousal and Parental Support;
- Chapter 12: Co-operative Approaches to Resolving Disputes;
- Chapter 13: Time Limits and Definitions; and
- Chapter 14: Relocation.

Where questions or issues set out in the discussion papers are not considered by the CBABC *FRA* Working Group in these Submissions, this does not mean that the CBABC *FRA* Working Group either accepts or rejects these matters, but that the CBABC *FRA* Working Group has no comment on these matters at this time.

CHAPTER 10: LEGAL PARENTHOOD

The British Columbia Ministry of Attorney General's discussion paper, Chapter 10: Defining Legal Parenthood, focuses on who is a child's legal parent. [2]

Parenthood has traditionally been defined on different terms for men and women, for a very good reason: while one could always be certain who the mother of a child is, one could never be certain who the father is. As a result, motherhood has been defined biologically (the mother of a child is the woman who gave birth to the child) while fatherhood has been defined relationally (the father of a child is the man who stands in a relationship to the mother of a qualifying nature or duration).[3]

With the advent of modern assisted reproduction techniques, the traditional definitions of motherhood and fatherhood have lost much of their utility: a child may be intentionally conceived using another man's sperm and a child's birth mother may not be the child's genetic mother. It is not clear, however, that a purely genetic definition should be employed, particularly when defining paternity:

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[2] British Columbia Ministry of Attorney General, "Chapter 10: Defining Legal Parenthood" in ***Family Relations Act*** Review (August 2007)(www.ag.gov.bc.ca/legislation/pdf/Chapter10-DefiningLegalParenthood.pdf) ("Chapter 10").

[3] While Watson and Crick discovered DNA in 1953, genetic fingerprinting was not developed until 1985; section 95.1 regarding genetic paternity testing, was not added to the *FRA* until 2003.

- relational fatherhood has certain social benefits in that it promotes stable families and gives a child the best chance of being raised by two parents, as long as the man remains under the conviction that the child is his or is sufficiently selfless to remain in the relationship if the child isn't;

- genetic fatherhood, while certain, absolute and helpful in cases of assisted reproduction, may undermine the social benefits of relational fatherhood where the child is the product of infidelity. Even if a couple remained together, they might be required to address and respond to the third party's interest in the child vis-à-vis custody, guardianship and access over a lengthy period of time;

- genetic fatherhood may pose other problems where neither party had the intention that the mother would conceive and where the mother's relationship with the father was exceedingly brief, particularly if the consequences enmesh the parties in a long-term legal relationship neither sought nor desired.[4]

Couples conceiving or bearing a child through the use of assisted reproduction have one common characteristic that can be used to cleave the knot of parenthood while avoiding the mischief a purely genetic definition of parent might entail. All

[4] On the other hand, these problems might not be problems at all if one takes the view that a competent adult should be held accountable for his or her actions, including the choice to stray outside a committed relationship or the choice not to take adequate contraceptive measures in the course of a casual sexual relationship.

means of assisted reproduction require planning, a strong commitment to a lengthy process, and, for the most part, paying significant medical costs; in other words, these couples, unlike the Lothario trolling a bar for prospects, **intend** to have a child and are highly motivated to assert maternity or paternity.

A definition of parenthood that includes a test for intentionality would have collateral benefits:

- it addresses the unique issues faced by gays and lesbians, for whom the traditional definitions work an obvious injustice;

- it is capable of encompassing the possibility of a child having more than two legal parents; and,

- it could exclude donors of genetic material from inadvertently assuming parental responsibilities.

The most obvious means of establishing intentionality can be found in another characteristic common among couples relying on assisted reproduction to have a child: the existence of an assisted reproduction agreement. Such agreements are universal where a couple reproduces by means of a surrogate mother and are only slightly less common where a couple must avail themselves of donated sperm.

Accordingly, the CBABC *FRA* Working Group recommends that parenthood continue to be presumptively defined on the traditional biological and relational definitions, but that this presumption be subject to rebuttal by a valid assisted reproduction agreement that otherwise assigns parenthood among one or more of the parties to the agreement.

CHAPTER 11: SPOUSAL AND PARENTAL SUPPORT

The Ministry of Attorney General's discussion paper, Chapter 11 Spousal and Parental Support, discusses spousal and parental support in 4 parts:

- Part A – Principles Of Spousal And Parental Support;
- Part B – Continuing Support After The [sic] Payer's (hereafter "Payor's") Death;
- Part C – Changing A Spousal Support Order; and
- Part D – General Feedback. [5]

[5] British Columbia Ministry of Attorney General, "Chapter 11: Spousal and Parental Support" in ***Family Relations Act*** Review (August 2007)(www.ag.gov.bc.ca/legislation/pdf/Chapter11-SpousalandParentalSuppor.pdf)("Chapter 11").

PART A: PRINCIPLES OF SPOUSAL AND PARENTAL SUPPORT

The two principles of spousal support and parental support are analyzed below.

Spousal Support

The way the courts and spouses resolve the issue of spousal support changed in 2005 with the advent of an academic paper setting out a formula for determining the quantum of spousal maintenance, namely, the Spousal Support Advisory Guidelines (the "SSAG"). The SSAG do not determine entitlement to spousal maintenance. Entitlement to spousal maintenance has to be determined before the SSAG formulae can be used. However, since the advent of the SSAG, British Columbia Courts have basically assumed entitlement if the SSAG formulae show that spousal maintenance should be paid. While the negotiations of settlements of spousal support have been made less complicated since the advent of the SSAG, the thorny issue of entitlement remains a stumbling block.

Section 89 of the *FRA* sets out the various criteria. These criteria must be considered in determining one's entitlement to spousal maintenance.

The CBABC *FRA* Working Group does not agree that any preference should be given to compensatory over non-compensatory maintenance or that section 89 of the *FRA* should be amended to give preference to compensatory maintenance. In many situations, even if there is no entitlement to compensatory maintenance (in that the recipient is basically in the same position he or she was prior to the marriage), there is a wide discrepancy in the standard of living. After a long

marriage, both the payor and recipient of spousal maintenance should have a similar standard of living. For example, an executive who earns substantially more than her spouse throughout a 20 year marriage because the spouse remained a waiter throughout the marriage, should not be able to claim the spouse is not entitled to maintenance simply because he is in the same job or profession earning the same income he did when they were married or began a common law relationship. In that situation, the spouse has suffered an economic disadvantage with the breakdown of the marriage, namely, the loss of the spouse's income.

The CBABC *FRA* Working Group, for the most part, agrees that the criteria in section 89 of the *FRA* are clear and give enough flexibility to deal with many different scenarios and entitlement to spousal maintenance. The criteria should remain the same.

In question 1b of Chapter 11 are listed the following criteria regarding amendment to section 89 of the *FRA*:

- agreement between the spouses that one will support the other;
- to compensate for the role taken on during the relationship, such as childrearing;
- to compensate for missed career opportunities as a result of the relationship;
- to relieve economic disadvantage caused by the relationship;
- need;

- need, in exceptional circumstances only, such as significant illness or disability;
- lower income than the other spouse;
- entitlement should be assumed if the factors used to calculate the amount of spousal support result in an amount payable by the other spouse;
- other.

If however, there is to be an amendment to section 89 of the *FRA*, the CBABC *FRA* Working Group agrees that the following first five criteria set out in question 1b of Chapter 11 should be included in any such amendment:

- agreement between the spouses that one will support the other;
- to compensate for the role taken on during the relationship, such as childrearing;
- to compensate for missed career opportunities as a result of the relationship;
- to relieve economic disadvantage caused by the relationship; and
- need.

The CBABC *FRA* Working Group does **not** agree with including the last three proposed criteria in question 1b, being:

- need, in exceptional circumstances only, such as significant illness or disability;

- lower income than the other spouse; and

- entitlement should be assumed if the factors used to calculate the amount of spousal support result in an amount payable by the other spouse.

The simple fact one spouse has lower income than the other spouse should not entitle one to spousal maintenance. Take for example, the case where two professionals are married and one earns $160,000 and the other $120,000 annually. In this case, it does not appear that maintenance would be appropriate in the circumstances, barring some exceptional factors. In this case, the fact one spouse earns less money should not automatically entitle that spouse to spousal maintenance. The CBABC *FRA* Working Group believes that including in the *FRA* a provision where it is a factor used in determining entitlement that one spouse earns less than the other spouse would be open to abuse. Further, we believe that such a provision would not meet the goals and intentions of spousal maintenance case law and legislation.

In Chapter 11, question 2 asks:

> Should the *Family Relations Act* explicitly set out three separate models of spousal support, that is, compensatory, non-compensatory and contractual? Why or why not?

In response to question 2, the CBABC *FRA* Working Group takes the position there is no need to delineate the three separate models of spousal support. The three models are well known and understood. *Bracklow v. Bracklow*[6] sets out that all three are available. It would be superfluous to put these models in any legislation.

In Chapter 11, question 3 asks:

> Should the *Family Relations Act* say that, when determining an amount of spousal support, compensatory factors must be considered first, and only if the spouse is still in financial need, should non-compensatory objectives be used? Why or why not?

In response to question 3, none of the three models of spousal support should be given precedence.

In Chapter 11, questions 4 to 6 ask:

> 4. Have you ever used the Spousal Support Advisory Guidelines?

[6] [1999] 1 S.C.R. 420. Unofficial copy available: http://csc.lexum.umontreal.ca/en/1999/1999rcs1-420/1999rcs1-420.html.

5. Do you think that the Spousal Support Advisory Guidelines make it easier to resolve spousal support disputes? Result in fair amounts of spousal support? Are a better way than previously available for determining the amount and duration of spousal support?

6. Should some form of spousal support guidelines be made part of the law in British Columbia? Why or why not?

In response to questions 4, 5 and 6, invariably, members of the CBABC *FRA* Working Group have used the SSAG and find them a useful tool in argument and negotiation of spousal support disputes. We are in agreement that the SSAG should not be made part of the *FRA* or the law of British Columbia. The SSAG are not legislation, they are not even regulations to any legislation. They are the result of an academic paper produced by law professors Rollie Thompson and Carol Rogerson. The SSAG are intended to reflect the law of spousal maintenance but not to create any new law. Neither Professors Thompson nor Rogerson anticipated, nor want, the SSAG to become law.[7] In fact, there is an ongoing review and update as to what should be done with the SSAG across Canada. In some provinces, the SSAG are not being considered to any great extent, whereas in British Columbia, our Court of Appeal has decided that barring exceptional

[7] "In our travels, we have continued to emphasise that the Advisory Guidelines are not "default rules", but only a tool to be used as part of the spousal support analysis." at 6 in "The Advisory Guidelines 31 Months Later" (September 2007)(www.law.utoronto.ca/documents/rogerson/ssag_31months_en.pdf).

circumstances, it might be an error not to award spousal maintenance within the SSAG ranges if there is entitlement.[8]

By making the SSAG law in British Columbia, the British Columbia government would be giving SSAG greater status than even their authors wanted and would likely be raising SSAG to include entitlement. The CBABC *FRA* Working Group is of the opinion that the SSAG should remain a tool to be used in determining quantum but not be raised to the level of legislation or law in British Columbia.

There is a dissenting opinion amongst the CBABC *FRA* Working Group regarding entitlement to maintenance. Some members are of the opinion, and forcefully argued that, entitlement to spousal maintenance in non-legally married situations, should begin the moment there is a relationship of some mutual dependency. Some members dissented. These dissenting members believe in the status quo. They believe there needs to be a waiting period of two years before any such entitlement arises, as is the present law in British Columbia, since dependency is paramount, not the length of time there was such a dependency.

Parental Support

The issue of parental support under section 90 of the *FRA* is one in which most lawyers in British Columbia have little experience. There is general consensus that, with an aging population, it might be a more important issue in the future.

[8] *Yemchuk v. Yemchuk*, 2005 BCCA 406. Unofficial copy available: http://www.courts.gov.bc.ca/jdb-txt/ca/05/04/2005bcca0406err2.htm.

However, the consensus of the CBABC *FRA* Working Group Working is that section 90 should be repealed. Having section 90 does little for family harmony. In reality, it is likely only the most dysfunctional of families that would be involved in using section 90 to seek parental support. The CBABC *FRA* Working Group believes that, given the high costs of living in this Province, in particular for those living in the Lower Mainland, it is likely not possible that even such applications for parental support will be brought, let alone that that any significant payment could be ordered by a court. If section 90 remains in the *FRA*, there would need to be a provision providing that, before any parental support could be ordered, first, the child's reasonable living expenses (based on his or her standard of living) would have to be met. Second, any child or spousal maintenance orders would have to be met. Third, if there were any assets left, then perhaps a court could make a parental support order.

In Chapter 11, question 8b asks:

> If [the *FRA* continues to allow parents to claim support from their adult children], which of the following should apply? [check all that apply]
>
> - Parental conduct should be a disqualifying factor;
> - The concept of dependency should be kept;
> - The concept of dependency should be replaced with the concept of need;
> - The parent should be required to become self-sufficient;
> - There should be a time limit to parental support orders [please specify what the time limit should be];

- There should be guidelines for determining the amount of parental support;
- Parental support should be restricted to legal parents;
- Agreements between adult children and their parents for paying parental support or waiving a claim to parental support should be recognized;
- It should be possible to allocate legal responsibility for parental support between two or more adult children;
- Other.

In particular, under question 8b, the CBABC *FRA* Working Group submits that:

- parental conduct should be a disqualifying factor unless that conduct is the result of dementia or mental illness;

- dependency should remain the concept to be used if parental support remains in the *FRA*;

- need should not replace dependency as a child should be allowed to meet his or her own needs first and not satisfy his or her parent's needs;

- parents should be required to become self-sufficient including exhausting all government subsidies and programs;

- if there are to be parental support orders, there should not be a time limit. Instead, these orders should be reviewable and variable on a change of circumstances. The change to circumstances to include voluntary circumstances, such as the assumption of family obligations by the child;

- there should not be any guidelines for parental support;

- parental support should be restricted to legal parents;

- only written agreements where both parties received independent legal advice should be recognized; and

- responsibility for parental support should be allocated between all adult children so that the parent cannot pick and choose which child to sue for parental support.

PART B: CONTINUING SUPPORT AFTER THE PAYOR'S DEATH

There is uncertainty expressed in some of the case law whether or not a judge may make a support order that survives the payor's death. In practice, these support orders are made and often enough to make one wonder whether that uncertainty has now been resolved.

The CBABC *FRA* Working Group submits that the real difficulties in this area are:

- the problems such orders cause for the payor's estate;

- the number of cases that interpret orders or agreements as creating a lasting obligation. Arguably, that result may never have been contemplated by the parties or the court (eg. "until further order" or "for so long as the child is a 'child of the marriage'" or "for a period of x years"– which may become increasingly common with the SSAG); and

- the rule that such obligations may not be created, or arguably modified, **after** the death of the payor.

As discussed in the recent CLE course, *Aging, Death, and Divorce*, [9] it is far from easy for the payor's estate to settle whether such an obligation exists or how to deal with it if it does. How do you settle an ongoing and potentially open-ended

[9] Continuing Legal Education Society of British Columbia (February, 2007) (www.cle.bc.ca).

obligation with a capital fund and little or no income? How do you deal with other heirs and claimants against the estate? Can you apply to modify or terminate the obligation? What is the effect of life insurance or a pension survivor benefit payable to the support recipient?

In Chapter 11, question 9 asks:

> Should the *Family Relations Act* be changed to allow judges to make support orders binding on the estate of the paying spouse?

In answer to question 9, the CBABC *FRA* Working Group recommends that there should be statutory authority to make an order for support that survives the death of the payor and that the claimant should be allowed to advance a claim both before and after the death of the payor.

More importantly, the CBABC *FRA* Working Group recommends that there should be statutory authority, either in the *FRA* or in the *Wills Variation Act*, to allow:

- the estate to apply to vary or terminate the support obligation; and/or

- allow both the estate and the support recipient/claimant to replace the support obligation with a share of the estate, to allow the estate to be distributed and wound up.

The factors affecting the support application, variation or termination application, and/or the allowance/substitution application would all be the same:

- existence of an ongoing and significant need of the recipient;
- the size of the estate;
- the nature and amount of competing claims; and
- the existence of any insurance or pension (survivor benefit) monies to reduce or eliminate the recipient's need.

In most cases, the CBABC *FRA* Working Group believes the estate claims of dependant children will be an adequate substitution for child support. As for spousal support, the CBABC *FRA* Working Group thinks that support based on need should be protected, if the estate has the means. The CBABC *FRA* Working Group is less concerned about compensatory support claims, even where the estate is large. Indeed, in the case of compensatory support, the CBABC *FRA* Working Group believes there may be some element of "double-dipping" if the recipient was allowed to claim for continued support or a share of the estate after the death of the payor.

PART C: CHANGING A SPOUSAL SUPPORT ORDER

Part C of Chapter 11 discusses changing a spousal support order by:

- increasing or decreasing the court-ordered amount; or
- reducing or cancelling arrears of spousal support.

The approach in both cases seems to regard either application as a form of variation of the original court order. Part C of Chapter 11 appears to ignore the third possibility, namely, a "review".

It appears that the primary deficiency is that the original court order does not contain sufficient information to enable the court to determine whether the significant and unforeseen change being alleged, if known at the time of making the order, would likely have resulted in a different order being made.

The most prudent practitioners will ensure that at the time of the making of the order, transcripts or minutes of settlement are filed. Transcripts of the Reasons for Judgment are filed if it is a trial order. Minutes of Settlement, indicating the basis on which the order is made, are filed if it is a consent order.

If the application is a retrospective variation, then there must be some consideration of the timeliness of the application in light of the change of circumstance. This is required so the respondent is not prejudicially affected by undue delay. However, the current practice of the courts in limiting retrospective variations to the date of the application itself can work serious prejudice to the

applicant if there are circumstances that excuse the delay in applying. Unfortunately, the courts currently seem to be considering a dated application as to be essentially a mandatory notation to the extent of the retroactive variation.

On the one hand, if the circumstances giving rise to the original order and the "foreseeable" future events are sufficiently delineated, then the occurrence of the event should be the triggering factor, not the commencement of the proceeding or the application. On the other hand, if the circumstances giving rise to the original order are not sufficiently delineated on the record, then the date upon which the unforeseen or unforeseeable event actually occurred will likely require a view of the evidence. This review of the evidence will relate to the circumstances existing at the time of the original order and the history of the events occurring between the date of the original order and the date of the occurrence of the unforeseen or unforeseeable event.

In Chapter 11, question 10b lists those factors to be considered in deciding whether to vary a spousal support order. These factors are:

- evidence that was not available at the previous hearing;

- failure of the recipient spouse to become self-sufficient;

- conduct of the recipient spouse that has unreasonably prolonged or increased the need for support;

- misconduct of the recipient spouse such as denying access, alienating the children from the support paying parent;

- ill health or disability of the recipient spouse;

- retirement of the paying spouse; and

- ill health or disability of the paying spouse.

All of the factors listed in question 10b would normally be considered by the court at the hearing. It is not necessary to incorporate these factors into the *FRA.* These factors are, in essence, strictly evidentiary matters.

With regard to reducing or cancelling arrears of spousal support, this is a variation application and the same test should apply as applied to a variation of the original order. Any reduction or cancellation is a variation of the intent of the original order and the evidentiary matters that relate to a variation matter should equally apply in the case of a reduction or cancellation application. The "gross unfairness" test is too extreme. As currently applied by the courts, this test does not afford sufficient consideration of the basis on which the original order was made and the nature of the intervening circumstances and their "foreseeability".

The court or the parties will frequently suggest a review. A review is intended to permit the court to apply a wide ranging consideration of the original

circumstances and the current circumstances without needing to test the foreseeability of the current circumstances. Normally, the very fact of a provision for a review indicates the intention of the parties. This intention is a factor that the court should consider and the court should not be bound strictly by the foreseeability of those circumstances.

Take for example, if the payor is five years from pension age but the order is made in favour of a late middle-aged spouse without any termination date being provided. In this example, the court frequently can be persuaded that the fact of retirement is not a sufficient intervening circumstance to justify any substantial variation as the retirement was foreseeable. However, many forms of employment provide for mandatory retirement or an optional retirement date. Should the retirement leave the employee without anything other than pension benefits (which have already been divided) and the reasonableness of his continued employment, continued employment is not an issue and the circumstance should be one justifying the variation, despite that the retirement was a foreseeable event at the time of the making of the original order.

A prudent practitioner will attempt to ensure that, at the very least, a retirement date is a date for a review so that the foreseeability issue does not arise and the actual circumstances can be properly considered at the time of the review. Unfortunately, some judges consider a review to require a strict compliance with the foreseeability test, the variation test (or something similar) notwithstanding that it is not a variation application.

The CBABC *FRA* Working Group recommends that a review should be required to be a term of the original order and, failing that, would result in the applicant being put to the same test as for a variation application. However, the review test should be available to the application in the event that the circumstance relied upon is of the nature of a substantial change "not provided for or addressed" in the original order even though foreseeable.

PART D: GENERAL FEEDBACK

Chapter 11, questions 12 and 13 ask:

> 12. Are there issues related to spousal support or parental support and the *Family Relations Act* not covered in this paper that you would like to raise?
>
> 13. Excessive process and procedure are widely recognized as a barrier to access to justice. Can you suggest anything that could be done to streamline the resolution of issues in spousal support cases?

In response to questions 12 and 13, the CBABC *FRA* Working Group submits that the length of time needed to obtain a spousal support order can cause hardship on the recipient spouse, especially if access to bank accounts or other sources of money have been curtailed by the economically dominant party. The CBABC *FRA* Working Group is in favour of early Case Conferences. These Case Conferences would be, in effect a triage kind of conference, where a judge could impose a without prejudice spousal maintenance order, which would expire on a given date, and whose sole purpose would be to cover immediate need until a full hearing could be held.

CHAPTER 12: CO-OPERATIVE APPROACHES TO RESOLVING DISPUTES

The Attorney General's discussion paper, Chapter 12: Co-Operative Approaches To Resolving Disputes, examines the co-operative approaches to making the family justice system less adversarial, such as providing information, encouraging agreements and promoting consensual dispute resolution. [10]

INTRODUCTORY COMMENTS

Legal fictions are sometimes necessary, but we should never pretend they represent real life. Contract and tort law, for example, often have recourse to the concept of the "reasonable man," but how many of us can say we met one? Likewise, in family law, the "reasonable parent" or the "co-operative spouse" might be laudable goals, but the one place you are least likely to find one is within the family justice system. If they exist, they often do not need lawyers.

Co-operation, collaboration, moderation, proportionality and consideration for both the best interests of children involved and the long term consequences for all concerned: these are all excellent values. Doubtless, if family litigants took such values to heart, there would be far less strife in the family justice system and we

[10] British Columbia Ministry of Attorney General, "Chapter 12: Co-Operative Approaches To Resolving Disputes" in *Family Relations Act* Review (August 2007)(www.ag.gov.bc.ca/legislation/pdf/Chapter12-Co-operativeApproaches.pdf)("Chapter 12").

would see far better outcomes. That is just common sense. The problem, of course, is that common sense is not a big feature in most family break-ups.

Family law describes an ideal. It presents a picture of how we would want families to behave, not how they actually behave. For the family justice system to be effective, we must find a way to help clients make a transition between the ideal picture and reality. We can't just tell them to, or show them the error of their ways. That would be like telling a man with a broken leg how to walk and then expecting him to just get up and do it. Without a walker, or a crutch, it just isn't going to happen.

The fact is broken families are often broken for a reason. They are not seeing clearly. They do not have good coping skills. They are not capable of collaboration or cooperation or sometimes even communication. We may be able to change that, but not unless we see the problem – and the parties – clearly, as they are, rather than as we might wish them to be.

We all tend to make assumptions about family law: that if litigants knew what we know, they would act differently; that self-interest will eventually triumph over hurt; that parents will put their children's interests ahead of their own; or that they can even see those interests clearly. As family practitioners, the CBABC *FRA* Working Group has come to be distrustful of such assumptions. Experience has taught us that they often do not apply in reality.

Chapter 12 examines three broad propositions. Each proposition has its own underlying assumptions. The first is that the *FRA* should ensure that family litigants or potential litigants will be fully informed of the alternatives to litigation. This assumes that if people had a better understanding of the alternatives to litigation, the people would be more likely to use these alternatives.

While the CBABC *FRA* Working Group supports the idea of maximum education about alternative and collaborative measures, we do not share the view that this alone will encourage more people to resolve their differences out of court. As noted in Chapter 12, the Family Justice Reform Working Group concluded that, "the increasing availability of mediation has not led to as many people choosing mediation as might have been expected given the high levels of resolution in mediated disputes."[11]

Certainly, collaborative processes are a much better way of resolving disputes, but the participants have to come to that conclusion on their own, and in their own time. Some people are simply, as the popular song goes, "not ready to make nice".[12] They are hurt, angry, confused. They have to go through a grieving process; and until they do, mediation may be wasted on them.

Sometimes the best and only cure is time. People need to come to grips with what has happened to them and try to find some way to make peace with it. Until they

[11] Chapter 12 at page 5.
[12] Dixie Chicks, "Not Ready To Make Nice." Taking the Long Way. Open Wide/Columbia, 2006.

have done so, the best the family justice system can hope for is to restore some sense of stability or equilibrium, not press for a full resolution of all issues.

The second broad proposition is that the *FRA* should encourage resolution by agreement. Again the CBABC *FRA* Working Group supports that proposition in general, but is acutely aware that separating spouses have varying abilities to negotiate or draft comprehensive, practical, or fair agreements. The degree to which they will be successful depends in large part:

- on each spouse receiving proper and full disclosure;

- on each spouse being able, emotionally and practically, to negotiate for him or her selves; and

- on the degree to which each spouse is able to appreciate the legal issues, the range of options available to each of them and for each of them to anticipate and address the practical day-to-day problems of living apart, especially with children.

The CBABC *FRA* Working Group believes the *FRA* should encourage settlement by agreement, should provide spouses and parents with model forms to assist them and should encourage the negotiation of agreements that satisfy the above criteria. Where such criteria are met, agreements should be afforded certain

protections under the *FRA*. Where such requirements are lacking, the courts should have more jurisdiction to reopen or even throw out agreements altogether.

Finally, the third broad proposition in Chapter 12 is that, since many people who would benefit from mediation will not choose it voluntarily, they should be forced to try before having recourse to the court. The CBABC *FRA* Working Group supports the idea of mandatory mediation, but not as a precondition to accessing the court. We believe the court should be the one to decide whether the parties have an issue that cannot wait or whether they should be sent off to mediation before proceeding further.

PART A: PROVIDING INFORMATION

In Chapter 12, question 1 asks:

> Do you think it would encourage people to co-operate in resolving family disputes if the *Family Relations Act* required that they be given certain information before starting a court case? If so, what information should be given? Who should give it and when should it be given?

The CBABC *FRA* Working Group believes that family litigants should be constantly reminded of the cost and consequences of continued litigation and of the alternatives available to them.[13] The CBABC *FRA* Working Group does not

[13] Cost is not always a bad thing. Our experience with duty counsel and legal aid suggests that sometimes removing cost can encourage litigation. So, while we do not want considerations of cost to become an

believe this should be a one-time thing, but should be reinforced at every stage in the proceeding.

The CBABC *FRA* Working Group supports the general idea of the Australian model, which requires that all litigants be informed/reminded about:

- the legal and practical effects of the continued proceeding;
- potential dangers for children involved;
- the services provided by family counselors and family dispute resolution practitioners;
- the likely next steps involved in the litigation; and
- both judicial (case or settlement conferences) and non-judicial (arbitration or mediation) alternatives.

Where lawyers are involved, the CBABC *FRA* Working Group supports the idea that before initiating a family proceeding, lawyers should certify that they have informed the client of these matters.

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insurmountable barrier to family justice, a healthy respect for cost/benefit analysis can be useful in promoting collaboration and alternative methods of dispute resolution.

We are not uniformly comfortable, however, with the idea that lawyers should be required to (or are capable of) explaining the "social effects" of litigation on children or other such vague formulations. Some do it as a matter of course, and consider it part of the new, holistic approach in family practice. Others would rather leave such things to the counsellors and other mental health professionals.

The CBABC *FRA* Working Group believes that court registries should pass out packages of information relating to the subject matter of the dispute (children, property and support). We also think that, once the proceeding has begun, the court itself should reinforce these messages, not only at Family Case Conferences or Judicial Case Conferences, but even at the commencement or termination of interim hearings.

PART B: ENCOURAGING CO-OPERATION

In Chapter 12, question 2 asks:

> If the *Family Relations Act* specifically encouraged people to try to resolve disputes by agreement, would that help promote co-operative dispute resolution?

Again, the CBABC *FRA* Working Group is not under any illusion that simply saying in the statute that parties should resolve their own disputes by negotiation will lead them to do so. Nonetheless, any concrete reminder what alternatives are available would assist parties.

This is especially so, when parties have recently broken up and are afraid of what might happen to them. If they should read the *FRA* on the Internet or at the library, it may send them a reassuring message that they are not inevitably bound for court. It would also help for counselors, lawyers or social workers to be able to point to the *FRA* in order to reassure freshly-separated parties that they are not necessarily doomed to a destructive round of litigation.

In Chapter 12, question 3 asks:

> Should the *Family Relations Act* specifically encourage people to try to resolve disputes by agreement? If yes, what should the *Family Relations Act* say?

The CBABC *FRA* Working Group likes the language in Australia's *Family Law Act*. We would only add that the *FRA* should provide a model for separation agreements generally and parenting plans in particular, as well as set out the minimum criteria for the parties to meet in crafting a "protected" separation agreement.

Negotiated agreements are preferable to contentious or protracted litigation, but our goal cannot be agreement at any price. The fact is some couples come up with truly atrocious agreements. They settle in a moment of panic, or guilt, or emotional or financial distress. They often have little concept of what they are signing or what it will mean in practical terms. How many times have parents

agreed to joint custody without having the slightest idea what that will mean for their day to day parenting or even that it involves actually **discussing** his or her child with the other parent?

It is not enough just to encourage parties to settle. We have to give them some tools and examples to show them how. This is also why the CBABC *FRA* Working Group supports parenting plans becoming enforceable as a court order only after they have been vetted by the court, usually at a Case Conference. Parents cannot always be trusted to know what issues they should address without someone (a lawyer or the court) or something (a model agreement or parenting plan) directing them.

In Chapter 12, question 4 asks:

> What if any provision should be included in the *Family Relations Act* to support mandatory consensual dispute resolution?

The CBABC *FRA* Working Group does not believe that mediation should be made mandatory **before** being allowed to file a family law proceeding. Rather, CBABC *FRA* Working Group believes the *FRA* should allow the judge to require parties to attend mandatory mediation before taking another step in family court. This would allow judges to decide when mediation will have the best chance for success.

As the CBABC *FRA* Working Group commented in our response to the Attorney Generals' discussion paper, Chapter 5 Programs and Services, we submit that mediation or other consensual dispute resolution techniques will have the most benefit when parties' situations have stabilized. Often the only way to achieve that stability on an interim and timely basis is through some kind of court intervention.

There may be any number of reasons why mediation is either premature or inappropriate and the court is in the best position both to make that determination and, in many cases, to provide the remedy. For example:

- the parties are not yet emotionally ready – the court may be able to suggest, or order, some form of counseling or just give the parties time to get ready;

- the level of conflict is too high – the court may assign a parenting coordinator and adjourn other issues until the co-ordinator has had a chance to settle things down a bit and make his or her recommendations;

- the parties, or the court, need more information – the court might order:

    - a medical report or
    - a custody and access report or

    - an expert to report on whether there is an addictions issue or an abuse issue or
    - for a child to be interviewed;

- there hasn't been full disclosure – the court can order it, with specific directions if necessary;

- the parties' circumstances are too unstable – the court can make interim orders for support, interim occupancy or possession, arrangements for children or restraining orders; and

- the issues are not appropriate for mediation – the court can schedule a hearing.

This last point regarding issues not appropriate for mediation bears some further comment. There is an argument for promoting mediation in all or most cases involving children. Even where one or more of the parties is being totally unreasonable, the process of mediation itself may provide the parties with, or reinforce, skills that will help them settle future issues by themselves, or with reduced intervention. Where there are likely to be many such future issues, as where the parties have young children, the opportunity for developing these skills is a useful goal on its own, quite apart from any immediate issue under discussion.

The same cannot be said for most financial issues. If a spouse is resisting a claim for property because “she didn’t earn it”, or for spousal support because “she left me”, there is little value in humouring such notions with rational negotiation. To the contrary, some ideas are just silly. The court should not be afraid to say so – nor should the opposing party or the mediator be distracted or delayed by having to discuss such nonsense before the court has the opportunity to dismiss it.

In Chapter 12, question 5 asks:

> If BC were to adopt mandatory consensual dispute resolution for family disputes, when should people be required to try it?

As previously stated, the CBABC *FRA* Working Group suggests that this decision should be left to a judge, preferably at what the CBABC *FRA* Working Group calls a "triage" case conference.

In Chapter 12, question 6 asks:

> Are there issues related to co-operative approaches not covered in this paper that you would like to raise?

The CBABC *FRA* Working Group considers that proper and timely financial disclosure is often the most significant obstacle to settling property and support issues. The CBABC *FRA* Working Group submits that the *FRA* should address financial disclosure more particularly and with more consequences for non-compliance.

Mr. Justice Fraser's description in *Cunha v. Cunha* of "non-disclosure" as "the cancer of matrimonial property litigation" captures the essence of the fundamental problem here.[14] Accessing reliable financial information at an early stage and with a minimum of expense and complexity should be one of the primary objectives and a key rationale in the current review of our family justice system. Our current court rules simply do not go far enough. Very real barriers continue to exist to obtaining accurate and reliable financial information upon which informed decisions can be made. A complex, expensive and often unpredictable court process is frequently necessary to determine income and asset information in cases of self-employed individuals.

It is unfortunate that our adversarial legal system places the onus on usually the weaker spouse. It is the weaker spouse who lacks the knowledge and often the financial means, to prove on a balance of probabilities, that her spouse (yes, this is usually gender specific) has income at a certain level or has this or that asset and its value. Why force the weaker party to spend thousands and thousands of dollars on lawyers, forensic accountants and business valuators to prove income levels and business values when the party in control of the key financial information can often sit back and wait to see if his (yes, it is usually "his") spouse will tire and hopefully give up and take a settlement that is less than fair?

The key here is to shift the burden and expense of disclosure to the spouse who

[14] [1994] B.C. No. 2573. Unofficial copy available: www.courts.gov.bc.ca/jdb-txt/sc/94/15/s94-1585.htm.

controls the financial information. The traditional burden of proof, on a balance of probabilities, on the claiming party is deeply flawed in the area of disclosure in family law.

Why should there be a requirement to commence litigation before the disclosure rules of our courts apply? Why should the party seeking the disclosure through the court process be required to seek costs, usually at a small fraction of their real costs? Why should the non-disclosing party have the opportunity to delay and then produce at the last minute knowing very well how lax courts tend to be about awarding costs?

The CBABC *FRA* Working Group recommends that:

- there should be an automatic right to seek full financial disclosure by means of appropriate demands, without the need to start any legal action. Rule 60D of the Supreme Court Rules could be amended to include pre-writ disclosure demands;

- if the demand is made on a self-employed individual, in addition to the usual disclosure requirements, there should be a clearly specified requirement to produce banking records, both personal and business, over a period of 2 to 3 years;

- court forms for financial demands should clearly spell out that failure to produce by a stipulated date will automatically result in a fixed financial

penalty unless the non-disclosing party brings on a successful application in court to show cause why the penalty should not apply;

- if the commencement of legal action is required for failure to comply with disclosure, special costs should be awarded unless the offending party can show compelling reasons to the contrary;

- the scope of Interrogatories should be broadened to include demand for specified documents;

- there should be the option in family cases to specify on a Demand for Lists of Documents the subject area in issue;

- photocopying costs and costs of accessing third party documents should be controlled as much as possible with an automatic payment out of family assets unless cause can be shown otherwise;

- Judicial Case Conference and Family Case Conference judges and masters should have broad and specific powers to order extensive financial disclosure with meaningful penalty provisions in case of noncompliance;

- at any stage of the proceeding, either party should be able to bring on an application to fund the full costs of an appropriate investigation and report

into financial matters with legal fees, accounting fees and disbursements paid by the other party or from family assets;

- non-disclosure, partial disclosure and financial ability to bear costs, should be specified criteria in the awarding of costs to fund investigations and reports into financial matters;

- Rule 60D of the Supreme Court Rules should be clearly linked to Rules 32 and 32A of the Supreme Court Rules with expanded powers for court appointed masters, registrars, special referees and experts to investigate and report on financial matters. Investigations under section 15 of the *FRA* and reports into custody and access matters are well known and routinely ordered while Rules 32 and 32A of the Supreme Court Rules are little known and rarely used to investigate and report on financial matters;

- if there is a judicial finding of material non-disclosure, there should be specific legislative authority for judges to reverse the onus of proof on evidence and to draw appropriate adverse inferences against the non-disclosing party, essentially incorporating the rationale of *Cunha v. Cunha, supra*. This goes beyond the scope of procedural law and will require amendments to the *FRA* and possibly the *Divorce Act*.

In Chapter 12, question 7 asks:

Are there ways not covered in this paper that the *Family Relations Act*

could be amended to help reduce conflict?

This is covered elsewhere, but the CBABC *FRA* Working Group strongly supports the accreditation of, and use of parenting co-ordinators and the increased use of means of involving the views of children in disputes concerning custody, guardianship and access.

In Chapter 12, question 8 asks:

> What are the three most important things that the *Family Relations Act* could do to promote co-operative resolution of family disputes?

The CBABC *FRA* Working Group submits that the three most crucial features of an effective and efficient family justice system are:

- the ability to intervene quickly when necessary to return some measure of stability to separated families (finances and access);

- the flexibility to provide or require collaborative measures when they are most likely to have effect, rather than based on some inflexible criteria or timetable (such as before the first application); and

- the ability to call on all appropriate judicial and non-judicial resources to assist families in grieving, healing and moving on.

As the CBABC *FRA* Working Group has repeated several times, we believe the court is the key to all of these three. In our view, erecting barriers to court access will detract from the first and impede the flexibility and co-ordination required for the remaining two elements.

The CBABC *FRA* Working Group is fully aware that this view differs fundamentally from some of the recommendations of the Family Justice Reform Working Group but we wonder if this difference may be attributable to a misunderstanding of the present reality of family practice before the courts.

There are assumptions underlying some of the comments of the Family Justice Reform Working Group, and, in particular, in the opening paragraph of Chapter 12, that bear examination. The key passage in the opening paragraph of Chapter 12 is:

> The [Family Justice Reform] Working Group reviewed the many family law reports and studies that have been done in B.C. and elsewhere over the past three decades and noted that these reports have consistently recommended "that family cases not be treated as potential trials but be managed through processes designed to address the relationship issues and underlying emotions which actually drive family conflict." Still, the family justice system steers people with family disputes to court.[15]

[15] Chapter 12 at page 1.

What strikes the CBABC *FRA* Working Group about this passage are two implicit assumptions: the first is that the work of family court is all about trials; and the second is that collaborative processes and non-judicial resources are somehow antithetical to the work of the court. As practitioners, we know that trials are by far the least of the work we do in family court. Trials are a rarity in family law. The bulk of the work in family court consists of case conferences or interim applications, which often eventually lead to settlement.

We also know that, especially since the advent of *Child, Family and Community Service Act*, case conferencing, family case conferencing and Rule 60E of the Supreme Court Rules, that family courts have embraced and, indeed, become a prime mover of collaborative dispute resolution methods. We know of no judges and few lawyers who would press for a trial when any reasonable chance for a collaborative resolution or settlement exists.

CHAPTER 13: TIME LIMITS AND DEFINITIONS

The British Columbia Ministry of Attorney General's discussion paper, Chapter 13: Time Limits And Definitions, examines how limitation periods might be changed to make the *FRA* simpler, fairer and more certain.[16]

SETTING THE SCENE

In determining how limitation periods can be changed to make the *FRA* simpler, fairer and more certain, it is important to establish consistency in setting limitation periods both for ease of application and for public confidence in the fairness of the legal process. Although short limitation periods may reduce the volume of applications before the court, unfairness may result. Any streamlining of the process in the area of family law must take into account that family clients are often grieving the loss of their family unit and may not have full capacity to make decisions in their or their children's best interests for more than a year after separation. Often, they simply need time to emotionally process what has happened to them.

Many family clients find the first few months after separation to be particularly intense, and the first year very difficult, especially as holiday and family event

[16] British Columbia Ministry of Attorney General, "Chapter 13: Time Limits And Definitions" in ***Family Relations Act*** Review (August 2007)(www.ag.gov.bc.ca/legislation/pdf/Chapter13-TimeLimitsDefinitions.pdf) ("Chapter 13").

milestones are passed. A one year limitation period is problematic, as the parties may find that just at the point where they are able to deal with the mechanics of resolving their issues, they no longer qualify to do so. Therefore, the CBABC *FRA* Working Group recommends that the following general limitation periods be in the *FRA*, to:

- establish a claim for spousal support: two years following separation;

- establish a claim for property (exclusive of pension): six years following separation;

- apply to set aside a settlement: six years following the making of the settlement agreement or consent order;

- establish a claim to pension rights: ten years if not already determined in a settlement agreement or court order; and

- establish a support claim such as support for parental leave based on childbirth or spousal support based on detrimental reliance: one year.

PART A: SPOUSAL SUPPORT

Part A considers spousal support for unmarried spouses and the timing of spousal support claims.

Unmarried Spouses

Regarding unmarried spouses, for the purpose of spousal support, an unmarried spouse is a person who has lived with another person in a marriage-like relationship for at least two years if a claim under the *FRA* is made within one year after separation. Two years is viewed as an indicator of permanence and stability in the relationship but does not take into account the intentions of the people involved as to contribution to and sharing their finances after the end of their relationship. Most provinces require a two to three year period of cohabitation as proof of permanence but some jurisdictions shorten this period once a child is born to the relationship because the child makes a couple more interdependent.

Because there is generally no formal event signifying the beginning of a common-law relationship, it is not clear when a common law relationship begins. The courts generally use the same criteria to determine separation dates as are used for separations relating to marriages. Finally, the current British Columbia legislation does not specify whether the required cohabitation period must be continuous or how periods of separation affect that time period.

In Chapter 13, question 1a asks:

> Should an unmarried couple's status as spouses continue to be based on the length of time they have lived together? Why or why not?

The length of time that a couple has lived together is a strong indicator of their status as spouses, whether or not they have had children together. The birth of a child to cohabiting parents does not necessarily indicate that the parents have made a decision to enter into a relationship of any permanence and could just as well lead to a termination of the cohabitation, particularly if the pregnancy was not a planned one.

The CBABC *FRA* Working Group recommends that the expectation of a relationship of permanence between the couple ought to require cohabitation in excess of one year to enable the couple a trial period before committing to such a relationship. In that light, two years is a more sensible time period **provided that** such cohabitation is continuous. If it is not continuous, that is, if cohabitation in a marriage-like relationship is interrupted by reason of **an intention not to cohabit in a marriage-like relationship,** as distinct from taking separate holidays or being away on business, then two years isn't long enough.

In Chapter 13, question 1b asks:

> If yes, how long should they have to live together before they are considered to be spouses under the *Family Relations Act*? [check one]
>
> - no set length of time, but in a "relationship of some permanence"

- 2 years
- 3 years
- other [please specify]

The CBABC *FRA* Working Group recommends that a minimum cohabitation period of two years within the last two and one-half (2.5) year period, provided that if, during that period an event indicating a permanent separation (such as entering into a separation agreement or a separation of finances) occurs, the period of cohabitation prior to that event should not be counted toward the total.

In Chapter 13, question 1c asks:

> Should the *Family Relations Act* specify that the length of time be continuous? Why or why not?

If a couple separates during the first three years of marriage, it is a significant event in the relationship and indicates that the relationship may not be stable or permanent. In our view, a two year period of cohabitation that includes periods of separation does not sufficiently indicate stability and permanence in a relationship. This, in fact, may indicate that the relationship is not one destined to last. Despite that, some relationships with periods of separation do stabilize. As a result, it would be unfair not to count the time of earlier cohabitation unless a significant event of separation occurred. A significant event of separation could be entering into an agreement dividing the parties' affairs, a period of separation in excess of three months or significant actions resulting in the separation of the

parties' financial affairs, such as closing joint accounts or changing beneficiaries in wills, RRSPs or insurance documents.

For that reason, the CBABC *FRA* Working Group recommends that a minimum cohabitation period be two years within the last two and a half year period. If, during that period, an event indicating a permanent separation such as entering into a separation agreement or a separation of finances occurs, the period of cohabitation prior to that event should not be counted toward the total.

In Chapter 13, question 2 asks:

> If a couple has had a child together, should the *Family Relations Act* consider them to be spouses [check one]
>
> - if they have been in a "relationship of some permanence"
> - if they meet the same minimum cohabitation period as unmarried spouses who have not had a child together
> - other.

The CBABC *FRA* Working Group is divided on this issue. Some members believe that no relationship of permanence is required but that support should be available to a woman who has given birth to a child. This support should be available regardless of whether the parties ever lived together, both before the birth and for a period thereafter (a form of parental leave where such is not available through Canada Pension Plan or private insurance). Others members of the CBABC *FRA* Working Group believe that a relationship of some permanence

is required. Yet other members think that the advent of children should have no bearing on the determination of when a party becomes a spouse under the *FRA*.

In Chapter 13, question 3a asks:

> Should the *Family Relations Act* specify indicators of the end of a marriage-like relationship? Why or why not?

The CBABC *FRA* Working Group recommends that the *FRA* should not specify indicators of the end of a marriage-like relationship. Ultimately, it is the intention of one or both of the parties to terminate their marriage-like relationship and that termination can have many aspects beyond those enumerated. At present, the court is free to take into account all the circumstances of the spouses in making its determination as to whether the relationship has been terminated. As a consequence, the codification in the *FRA* of such indicators would not assist in that determination. In fact, the codification of such elements in the *FRA* may lead to abuse in situations. For example, there may be abuse in situations where a party is in fact committed to a relationship of some permanence but seeks to use the legislation to avoid his or her obligations by creating the appearance of a separation.

In British Columbia, a claim for spousal support must be brought within two years after divorce for married spouses and within one year after separation for unmarried spouses. Other jurisdictions do not impose a limitation for the claim of spousal support. Some jurisdictions provide for different limitation periods. The

FRA does not allow for an extension of the one year limitation period for unmarried spouses but the courts have, on occasion, extended that period in certain circumstances. There may be a *Charter* issue with using different time limitations for married and unmarried spouses but this issue has not been tested in court to date.

Timing Of Spousal Support Claims

In Chapter 13, question 4a asks:

> Should there be a time limit for starting a claim for spousal support? Why or why not?

The CBABC *FRA* Working Group recommends that there should be a time limit for starting a claim for spousal support. There is an obligation on each party to become self-supporting wherever possible. If one party is not capable or potentially not capable of becoming self-supporting or if one party requires assistance in achieving that goal, it should be relatively obvious that a spousal claim should be made shortly after the parties' separation. If a spouse has not received support and there is no other explanation to the contrary, it may be inferred that the spouse is not in need of support.

To include a time limit for starting a claim for spousal support would also give spouses some certainty. This certainty would be that the claim was no longer live after the limitation period had expired. This would allow spouses then to plan their lives accordingly.

A different question is asked as to the time limit in respect of married spouses and unmarried spouses. In the case of married spouses, the time limit suggested is in the format of **so many years after divorce** and in the case of unmarried spouses, the time limit suggested is in the format of **so many years after separation**. The limits could be the same and may still be applied differently unless married spouses were limited to a time after separation rather than after divorce.

In Chapter 13, question 4b asks:

> If yes, how long should the time limit be for married spouses? [check one]
>
> - 1 year after divorce
> - 2 years after divorce
> - 3 years after divorce
> - other.

The CBABC *FRA* Working Group recommends that the time limit for married spouses be 2 years after separation.

There is no time limit for bringing a spousal support claim under the *Divorce Act*, so that if a spouse or a former spouse were to bring such a claim ancillary to a divorce, there would be no limitation. But if no divorce were claimed, the spouse would have to bring his or her claim under the *FRA* and its limitation periods would apply.

The justification of the "after divorce" model seems to arise out of the definition of "spouse" in the *FRA*, whereby a former spouse is not entitled to claim support. If the limitation were changed to an "after separation" model for married people, there may be a higher incidence of claims for a divorce to preserve the spousal support claim. But there would also be symmetry between the treatment of married and unmarried spouses. This may avoid future *Charter* litigation.

Changing the legislation to provide that married spouses must establish their claims for spousal support within a two year period following separation may also have the effect of resolving their property disputes earlier as the courts typically consider the two issues together.

In Chapter 13, question 4c asks:

> If yes, how long should the time limit be for unmarried spouses? [check one]
>
> - 1 year after separation
> - 2 years after separation
> - 3 years after separation
> - other.

The CBABC *FRA* Working Group recommends that the time limit for unmarried spouses be 2 years after separation. One year after separation is not long enough for a spouse to assess whether or not he or she is in need of support in the longer term. This is particularly so after the dissolution of a long common-law

relationship and with consideration to the emotional issues generally involved in the dissolution of one's most primary relationship.

That said, if the limitation period is two years, there should be no need for an extension of that period. It would, in our view be reasonable to provide that this limitation may not be extended.

PART B: PROPERTY DIVISION

Part B examines property division for married spouses and unmarried spouses.

Property Division For Married Spouses

The *FRA* provides that upon divorce or annulment, a married spouse must apply to the court for a division of family assets within two years. If there is no divorce, then the issue of property division remains live presumably until the death of one or the other spouse. Other Canadian jurisdictions use different limits, some relating to the event of the divorce or annulment and some to the event of the separation and some using a combination. Some jurisdictions make specific mention of the death of a spouse as being a limiting factor.

Currently, a spouse seeking to review a "marriage agreement" under section 65 of the *FRA* must do so within two years of divorce/annulment/judicial separation while the spouse is a "spouse." There is no extension available. Spouses seeking to review a "separation agreement" may find that their agreement are reviewed

under section 65 or 68 of the *FRA*, but section 68, which applies the two year limitation, also allows for an extension of the time limit. Such a difference leads to uncertainty and possibly unfairness.

In Chapter 13, question 5a asks:

> Should there be a time limit for married spouses to apply for a division of family assets? Why or why not?

The CBABC *FRA* Working Group recommends that there should be a time limit for starting a claim for a division of family assets. The prevailing case law provides that a claim for spousal support should only be considered after the determination of property issues between the parties, assuming that both claims are made or available. Accordingly, if there is a time limit for the claim of spousal support, there should also be a corresponding limit for property claims.

To include a time limit for a starting a claim for property division would tend to focus the spouses on the need to resolve finally the corollary issues surrounding their separation and allow them to plan their lives accordingly.

At the same time, we are mindful that simple reference to a period after divorce will not resolve the property issue unless a divorce/annulment is ordered and accordingly, this does not give the spouses the certainty they need.

We also know that a time limit that is too brief may result in substantial unfairness to one spouse or the other. This unfairness may result if some family assets are held only in one spouse's name or if the parties have an informal agreement that provides for the temporary retention of a family asset by one of the spouses while the children remain resident with one spouse or the other.

Some unmarried couples have entered into, or will enter into, agreements pursuant to section 120.1 of the *FRA*. Where married and unmarried spouses are subject to the same property division regime, there should be no distinction made between them.

That being the case, we are of the opinion that the appropriate limit for the claim of property for married people is six years after separation. This mirrors the six year limitation for trust claims.

The CBABC *FRA* Working Group has also given separate consideration to the matter of employment pensions. To many spouses, this is an invisible asset. Their spouse's employment pension is not of immediately obvious financial value. In fact, the employment pension can be a major family asset. If the spouse does not receive legal advice or is not aware of this asset or its value, he or she could be substantially deprived. Oftentimes the spouse does not give consideration to the pension until the pension holder's retirement is imminent. Given this, we are of the view that a separate limitation should be set out for the division of pensions, that being 1 year after the retirement of the pension holder if

the pension is not already the subject of a separation agreement or court order relating to those two parties.

In Chapter 13, question 5b asks:

> If yes, how long should the time limit be? [check one]
>
> - 1 year after divorce
> - 2 years after divorce
> - 3 years after divorce
> - the earlier of 2 years after divorce and 6 years after separation
> - other.

The CBABC *FRA* Working Group recommends that the time limit for married spouses to apply for a division of family assets be:

- six years after separation generally;
- one year after the retirement of the pension holder;
- ten years after separation in respect of employment pensions if the pension is not already the subject of a separation agreement or court order relating to those two parties.

In Chapter 13, question 6a asks:

> Should the *Family Relations Act* be amended to remove the difference between the time limits in s. 65 and s. 68? Why or why not?

Generally speaking, an agreement made for the purpose of arranging spouses' financial affairs (whether made before, during or after marriage and whether or not the parties marry), should be treated similarly so that there is no unfairness or perception of unfairness arising out of the treatment of those agreements. Further, these agreements should be treated similarly so that neither section 65 nor 68 can be used to circumvent the other. To that end, the CBABC *FRA* Working Group recommends that the *FRA* be amended to remove the difference between the time limits in sections 65 and 68.

It may take several years for unfairness to show itself regarding an agreement. Unfairness could result as a result of a variety of factors. Accordingly, the CBABC *FRA* Working Group recommends that an extension of the two (or six) year time limit under both section 65 and 68 is appropriate. Indeed, it may make more sense to merge sections 65 and 68 in order to cover all agreements.

In Chapter 13, question 6b asks:

> If yes, how should this be done? [check one]
>
> - allow judges to extend the two year time limit under s. 65
> - remove the authority for judges to extend the two year time limit under s. 68
> - other [please specify].

The CBABC *FRA* Working Group recommends that judges be permitted to extend the two year time limit under section 65 of the *FRA.*

Property Division For Unmarried Spouses

Unmarried spouses may "opt in" to the provisions of the *FRA* by making an agreement under section 120.1 while they are still spouses within the meaning of the *FRA*. At present, unmarried spouses who make an agreement under section 120.1 do not have the opportunity to opt out of that provision. This matter is the subject of discussion of the Chapter 2 Division of Family Property discussion paper. If they wish to change the agreement, parties must do so by commencing a court proceeding within one year of separation.

Unmarried couples have very limited protection under the *FRA* and only where they have made such an agreement. They may not be emotionally ready to enter into such agreements within the short time frames contemplated, either at the beginning or the end of the relationship. If they do not make a section 120.1 agreement, they are limited to trust claims. Trust claims have a six year limitation period. Trust claims are difficult to prove in court.

The Supreme Court of Canada has ruled that different property division regimes for married and unmarried spouses are not discriminatory and therefore the provinces are free to enact legislation that treats married and unmarried spouses the same or treats them differently.[17]

[17] See D.*B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, [2006] 2 S.C.R. 231. Unofficial copy available: http://scc.lexum.umontreal.ca/en/2006/2006scc37/2006scc37.html.

In Chapter 13, question 7a asks:

> Should there be a time limit for unmarried spouses who "opt in" to the *Family Relations Act* to apply for the division of family assets? Why or why not?

The CBABC *FRA* Working Group recommends that, to the extent that married and unmarried spouses are accessing the same property division regime, they should be subject to the same time limits. This promotes fairness and the public's perception of fairness.

In Chapter 13, question 7b asks:

> If yes, how long should the time limit be? [check one]
>
> - 1 year after separation
> - 2 years after separation
> - 3 years after separation
> - other.

The CBABC *FRA* Working Group recommends that the time limit for unmarried spouses who "opt in" to the *FRA* to apply for the division of family assets be two years after separation.

PART C: CHILD SUPPORT

Parents are legally obligated to support their children, both under the *Divorce Act* and under applicable provincial legislation. Child support is a right of the child and an obligation of the parent as a parent.

Qualifying As A Stepparent

British Columbia is unique in Canada in providing a special definition for stepparents with limitation periods contained therein. A stepparent relationship with a child may result in support obligations similar to those of a legal parent. This support obligation cannot be unilaterally withdrawn by the stepparent. This support obligation is activated only if the stepparent voluntarily steps into the role of financial provider for the child. In contrast, Alberta's *Family Law Act* sets out a relatively extensive list of factors to be considered in determining whether a stepparent relationship was intended, including whether the stepparent intended to treat the child as his or her own.

The *FRA*'s definition of stepparent considers only whether or not the stepparent is, or was, in a common-law relationship and whether the stepparent has contributed to the support of the child for at least one year. In fact, the courts also consider all aspects of the stepparent's relationship with the child.

Potentially, the British Columbia stepparent could be held responsible for the benefit and support of a stepchild for the balance of that child's dependency, however long that lasts.

In Chapter 13, question 8 asks:

> What factors should the *Family Relations Act* include in order to determine whether a person is a stepparent? [check all that apply]
>
> - the child's age
> - the duration of the child's relationship with the person
> - the nature of the relationship between the person and the parent of the child
> - the nature of the relationship between the person and the child:
>   - the child's perception of the person as a parental figure
>   - the extent to which the person is involved in the child's care, discipline, education and recreational activities
>   - any continuing contact or attempts at contact between the person and the child if the person is living separate and apart from the child's father or mother
> - whether the person has considered applying for guardianship of the child, adopting the child, or changing the child's surname
> - whether the person has provided indirect or direct financial support
> - the nature of the child's relationship with any other parent
> - other.

Child support is a strictly economic situation. It runs counter to common sense to create a situation permitting stepparents to argue in court that they had a poor relationship with the child solely to diminish their financial responsibilities. On

that basis, the CBABC *FRA* Working Group recommends that non-financial considerations should not form part of this legislation in this area.

The CBABC *FRA* Working Group recommends that, as a threshold, the definition of "stepparent" should continue to include the reference to the common law relationship to establish that there is a relationship of some permanence and the reference to contribution to the support of the child for a period of at least one year. Presumably this is included to ensure that such contribution was intentional and not merely coincidental. It may be advisable to specify that the period of contribution be continuous.

In some situations, the child may be resident with the other parent during the common-law relationship and only come to the residence of the stepparent as a result of some other agreement between the natural parents or otherwise. Duration of that residence and perhaps frequency should also be considered if the child moves from residence to residence. Shared parenting arrangements may result in the child being parented by several adults, all of whom have some obligation to the child.

Contributions, whether direct or indirect, should be regularly occurring and not simply the provision of gifts to the child from time to time.

Time Limits For Child Support Claims Involving Stepparents

Currently, a claim for child support by or against a stepparent must be started within one year of the last contribution of a stepparent to the support of the child. There is no time limit for a claim by or against a legal parent or guardian.

The obligation of a stepparent does not arise out of natural parenthood but rather out of a marriage or marriage-like relationship with a parent of the child. This constitutes a profound departure from the situation where the party is a parent rather than a stepparent. It is not enough that the person contributes to the support of a child. He or she must also have demonstrated the intention to live in a relationship of some permanence with the child's parent. If the relationship is sufficiently impermanent that the person does not meet the definition of "spouse", there is no obligation to pay support, even if he or she has a strong emotional bond with the child.

In Chapter 13, question 9a asks:

> Should there be a time limit for child support claims involving a stepparent? Why or why not?

The CBABC *FRA* Working Group recommends that there should be a time limit for child support claims involving a stepparent.

The provision in the *FRA* for a stepparent to pay support in respect of a child takes into account the possibility of a long term relationship and bond between a

child and the step-parent and the propriety of that stepparent paying support in the circumstances.

The provision of a time limit provides certainty to the stepparent that he or she will not be faced with unexpected litigation for a child with whom he or she no longer has a parental relationship.

In Chapter 13, question 9b asks:

> If yes, how long should the time limit be?

Members of the CBABC *FRA* Working Group disagree on the proposed length of the limitation period. Some members think that there should be a one year limitation period from the date of separation. Other members think that one year does not take into account the length of time necessary to process the grief and emotional turmoil resulting from a failed relationship and that the limitation period should be either, two years from the date of separation or, failing that, one year from the date of last periodic contribution to the child's support. This should be adequate time for the parties to deal with the worst of their emotional issues and to resolve their outstanding financial issues. It should also be sufficient time to determine whether the stepparent will have a continuing parental relationship with the child.

In Chapter 13, question 9c asks:

> If yes, when should the time limit begin? [check one]
>
> - after the last support payment
> - after the last contact with the child
> - other.

The CBABC *FRA* Working Group recommends that the time limit for child support claims involving a stepparent be after the date of separation of the parent and the stepparent. In question 9c, the phrase "after the last support payment" may not be the best choice of words in the circumstances, because the contribution made may not be a "support payment" per se. It may be that the stepparent continues to contribute to the payment of the mortgage or rent or continues to retain the child on his or her medical or dental plan. It may be more appropriate to refer specifically to a regular periodic payment for the child or on the child's behalf, which benefits the child.

Similarly, in question 9c, the phrase "after the last contact with the child" may not cover the ground because it presumes that the stepparent and the child have an unrestricted ability to maintain contact with each other and that may not be the case.

PART D: EXTENDING A TIME LIMIT

Sometimes court actions are started to preserve claims in court although the parties are hopeful of settling the matter out of court. It has been suggested that in order to keep the matter out of court, the parties be able to agree to extend the limitation periods set out in the legislation or be able to file a notice with the court preserving their claims. The purpose of such options would be to allow people extra time to resolve their issues before proceeding to court and to remove the pressure to go to court just to preserve their claims.

In Chapter 13, question 10a asks:

> Should there be a way, other than starting a court action, to preserve the right to start a claim under the *Family Relations Act*? Why or why not?

The CBABC *FRA* Working Group recommends that there should **not** be a waiver of time limits for starting a claim under the *FRA*. A waiver simply adds another layer to the legal process and may delay matters unduly.

There is a clear understanding among family law practitioners that most family litigation settles prior to a trial. But often it is the threat of litigation that focusses the parties to resolve their disputes in a timely manner. In the absence of such a threat, or where such a threat is not for the most part absolute, there is a good likelihood that significant delay will result, absent some other factor such as plans for imminent remarriage.

In Chapter 13, question 11a asks:

> Should there be a limit on how long the right to start an action can be extended? Why or why not?

The CBABC *FRA* Working Group recommends that the right to start an action should not be extended for the reasons set out above.

PART E: GENERAL FEEDBACK

Time limits should be consistent and consistently applied. There should be firm end dates to provide parties with the incentive to resolve their respective issues during the time allotted. The prospect of litigation is a powerful incentive for parties to settle. Firm time limits on litigation are also an effective way to compel parties to resolve their outstanding issues.

Time limits need to take into account the grief arising from family breakup and the time required by spouses to grieve and heal.

CHAPTER 14: RELOCATING CHILDREN

The British Columbia Ministry of Attorney General's discussion paper, Chapter 14: Relocating Children, reviews the issues affecting children and families after a separation or divorce triggers a move.[18]

Mobility issues are notorious among the family bar as being unpredictable, inimical to mediation and expensive to litigate. Chapter 14 accurately summarizes much of the difficulties associated with arguing and defending mobility applications.

While there is no dispute that mobility issues are fraught with uncertainty, it is not clear that amending the *FRA* would help. Proponents of a legislative amendment might argue that:

- legislation would clarify and codify the principles to be applied in such applications, therefore lending increased certainty to such applications;

- current case law on mobility is a hodgepodge and must be reformed and legislation is the only way to accomplish this; and

[18] British Columbia Ministry of Attorney General, "Chapter 14: Relocating Children" in ***Family Relations Act*** Review (August 2007)(www.ag.gov.bc.ca/legislation/pdf/Chapter14-RelocatingChildren.pdf) ("Chapter 14").

- legislation would make the factors for and against moves more accessible to the public, thereby deterring unilateral decisions to move and discouraging insincere objections to *bona fide* requests to move.

Opponents might argue that:

- *Gordon v. Goertz*[19] clarified the law considerably, yet despite its listing of factors for and against moves, no consistency has developed in subsequent case law. Legislated factors will inevitably suffer the same fate and evolve their own inconsistent interpretations;

- family law is circumstantial by necessity. Circumscribing the court's consideration of these issues would rob it of the ability to address the unique facts of each case; and

- establishing a list of factors would encourage parents to engineer circumstances to fit those factors, thereby increasing the number of such applications.

The CBABC *FRA* Working Group was not able to reach a consensus on amending the *FRA* to address mobility issues. As a result, these submissions on

[19] [1996] 2 S.C.R. 27. Unofficial copy available: http://scc.lexum.umontreal.ca/en/1996/1996rcs2-27/1996rcs2-27.pdf.

Chapter 14 are written on the premise that a change will be made to the *FRA* and these submissions neither discourage nor encourage such an amendment.

PART A: WHAT IS "RELOCATION"?

In Chapter 14, question 1 asks:

> Should the *Family Relations Act* include a definition of "relocation"? Why or why not?

Relocation should be defined as any move by a parent with a child that:

- interferes with the child's ability to maintain a meaningful relationship with an adult;

- significantly interferes with an adult's ability to maintain a meaningful relationship with the child;

- significantly increases an adult's cost of exercising access to the child; or

- interferes with an adult's access to the child.

PART B: RESOLVING RELOCATION ISSUES OUT OF COURT

In Chapter 14, question 2 asks:

> Should the *Family Relations Act* include a notice to move provision? Why or why not?

Any notice period should be sufficient to allow the non-moving party to retain legal counsel. As a result, the CBABC *FRA* Working Group recommends a 60 day period. In order to prevent mischief, notice should be written although it need not be confined to a specific form. A notice provision should be mandatory **providing** that the other adult has maintained a relationship with the child or the other adult has a right of custody, guardianship or access respecting the child.

In Chapter 14, question 3 asks:

> What, if anything, could be added to the *Family Relations Act* to encourage out-of-court settlement of relocation disputes?

In the experience of the members of the CBABC *FRA* Working Group, it is possible to mediate a mobility dispute, although successful mediation requires cooperative and mature parents and a highly skilled mediator. In practice, success is thereby the exception rather than the rule. Parents like this are predisposed to attempt mediation and we do not believe that the *FRA* could be meaningfully amended to encourage mediation for those who are not so predisposed.

PART C: IS THERE A WAY TO MAKE RELOCATION LAW MORE CERTAIN?

In Chapter 14, question 4 asks:

> Would a presumption in the *Family Relations Act* – either in favour of or against relocation - help resolve or prevent relocation disputes by placing the burden of proof on one parent or the other? Why or why not?

The CBABC *FRA* Working Group recommends that the burden of proof fall on the parent proposing the change. Further, this parent should be required to establish that the move is in the child's long-term best interests.

In Chapter 14, question 5 asks:

> Would a provision in the *Family Relations Act* setting out which considerations are to be given the most weight help resolve or prevent relocation disputes? Why or why not?

The CBABC *FRA* Working Group does not recommend a weighted list of factors as mobility disputes, like most issues in family law, are highly circumstantial and each case will rest on its own peculiar factors.

In Chapter 14, question 6 asks:

> Should the *Family Relations Act* include factors to be considered in relocation cases? Why or why not?

The CBABC *FRA* Working Group has two concerns with a list of factors. First, such a list, while providing the appearance of enhanced certainty, would likely become as clogged with conflicting interpretations over time as the list established in *Gordon v. Goertz, supra*. Second, the list would give parents who are not operating on good faith the opportunity to engineer their circumstances to fit the list.

If there were to be a list of factors, however, the CBABC *FRA* Working Group recommends the following, in addition to those set out at section 24(1) of the *FRA* regarding the best interests of the child being paramount:

- the existing arrangements for custody of, or access to, the child;

- the other parent's historic pattern of commitment to those custody and access arrangements and involvement with the child's life;

- the impact of the relocation with the child's relationship with the other parent;

- the impact of the relocation on the child's community, school, family and other relationships;

- the desirability of maximizing contact with both parents;

- the child's age and maturity, where the child's age and maturity are such that the relocation would undermine the child's ability to form a meaningful relationship with the other parent;

- the views of the child, where appropriate;

- the permanence of the move;

- the duration of travel time between the parents' residences;

- the increased cost of exercising access by the other parent; and

- any other factor that the court deems relevant.

In Chapter 14, question 7 asks:

> Should the *Family Relations Act* include factors that must not be considered in relocation cases? Why or why not?

The suggestion in question 7 of Chapter 14 that there be factors the court must not consider in mobility applications was welcomed by the CBABC *FRA* Working Group. Were there to be such a list the CBABC *FRA* Working Group recommends the following:

- the misconduct of a parent where the misconduct is not relevant to the parent's ability to care for a child or the child's best interests;

- the willingness of the parent bringing the application to move without the child; and

- the relative cost of living of the intended destination.

This last point regarding the cost of living of the intended destination deserves comment. Cost of living arguments are common and almost uniformly weak. Apart from housing costs, there is no intra- or extra-provincial index that can reliably establish comparative costs of living between communities. These arguments essentially ask the court to take judicial notice of an alleged fact and draw the assumption that the child will automatically and invariably benefit from a lower cost of living.

PART D: COSTS OF MAINTAINING CONTACT AFTER THE MOVE

In Chapter 14, question 8 asks:

> Would it be helpful to amend the *Family Relations Act* to say that a judge may allocate between parents the costs of maintaining contact between the child and the staying parent? Why or why not?

Firstly, giving the court such express authority would help to distribute the costs of access as claims for relief from the Child Support Guidelines for undue hardship caused by access costs are rarely successful. Secondly, mobility applications might be reduced if the parent proposing the move was aware that the move might come at a financial cost.

With respect to other suggestions about mobility-related costs, the CBABC *FRA* Working Group is of the view that costs should always be awarded against a parent who unilaterally moves with a child without consulting the other parent, provided that the other parent has maintained a meaningful role in the child's life following separation, whether by custom or by court order.

CBABC *FRA* WORKING GROUP RECOMMENDED LEGISLATION: CHILD RELOCATION

In the process of the CBABC *FRA* Working Group's consultations on this subject one of our members prepared legislation on child relocation. This recommended legislation is attached at Appendix A to our submission.

The recommended legislation was prepared using the current framework and language of the *FRA* and does not reflect the CBABC *FRA* Working Group's previous recommendations for reform.

SUMMARY OF RECOMMENDATIONS

As a result of our submissions above, the recommendations of the CBABC *FRA* Working Group are summarized below for each of Chapters 10 to 14.

The CBABC *FRA* Working Group recommends that:

CHAPTER 10: LEGAL PARENTHOOD

Part A: A Child's Parentage At Birth

1. the term "assisted reproduction agreement" be defined in the *FRA* and that the execution requirements mirror those of section 4 of the *Wills Act*;

2. persons designated as "parents" by an assisted reproduction agreement are parents for all purposes under the *FRA*;

3. persons who are parties to an assisted reproduction parents who are not designated parents are not "parents" regardless of their donation of any genetic material or service as surrogate;

4. assisted reproduction agreements be capable of designating more than two people as "parents";

5. assisted reproduction agreements be capable of assigning custody, guardianship and rights of access and contact among the parties to the agreement;

6. automatically defining motherhood by birth would serve as a strong disincentive for any woman willing to serve as surrogate. Instead, we propose retaining the biological assumption of motherhood subject to existence of a valid assisted reproduction agreement that otherwise assigns parenthood and we recommend amending the *FRA* to include a new section to this effect (response to question 1).

7. it is not technically necessary to extend the presumption of fatherhood beyond Part 7, however in light of our recommendations respecting presumptions of motherhood, the presumptions of fatherhood should be located in the same part of the *FRA*. The presumptions should be amended to reflect the assignation of parenthood by an assisted reproduction agreement (response to question 2);

8. the presumptions should continue to apply, but be subject to the existence of a valid assisted reproduction agreement (response to question 3);

9. a presumption should continue to apply, as we have recommended, and be subject to the existence of a valid assisted reproduction agreement (response to question 4);

10. the definitions of parenthood we propose would obviate this concern (response to question 5);

11. a surrogate mother or ovum donor should have no presumptive rights or obligations, save as an assisted reproduction agreement may provide (response to question 6);

12. a sperm donor should have no presumptive rights or obligations, save as an assisted reproduction agreement may provide (response to question 7);

13. the CBABC *FRA* Working Group cannot discern any rational basis on which a child should be restricted to having two parents. As a result, assisted reproduction agreements should be capable of assigning parenthood among one or more parties to the agreement (response to question 8);

Part B: Surrogacy

14. it is an essential element of our proposal that assisted reproduction agreements, including surrogacy agreements, be presumptively enforceable but subject to the usual defences to a contract (response to question 9);

15. legal parentage can be assigned under a valid assisted reproduction agreement. The existence of the valid agreement should entitle persons

designated as parents to register as the child's legal parents (response to question 10);

16. it is unclear why any couple would embark on the expensive process of assisted reproduction if neither was a genetic parent of the child, rather than simply adopting an existing child. Nevertheless, the existence of the valid agreement should entitle persons designated as parents to register as the child's legal parents (response to question 11);

Part C: Information And Privacy

17. a medical history be made available where a donor has not maintained a role in the child's life (response to question 12).

CHAPTER 11: SPOUSAL AND PARENTAL SUPPORT

18. no preference should be given to compensatory over non-compensatory maintenance or that section 89 of the *FRA* should be amended to give preference to compensatory maintenance (response to question 1a);

19. the CBABC *FRA* Working Group, for the most part, agrees that the criteria in section 89 of the *FRA* are clear and give enough flexibility to deal with many different scenarios and entitlement to spousal maintenance. The criteria should remain the same (response to question 1b);

20. if, however, there is to be an amendment to section 89 of the *FRA*, the following first five criteria set out in question 1b should be included in any such amendment:

- agreement between the spouses that one will support the other;

- to compensate for the role taken on during the relationship, such as childrearing;

- to compensate for missed career opportunities as a result of the relationship;

- to relieve economic disadvantage caused by the relationship; and

- need;

21. if, however, there is to be an amendment to section 89 of the *FRA*, the CBABC *FRA* Working Group does not agree with including the last three proposed criteria in question 1b, being:

- need, in exceptional circumstances only, such as significant illness or disability;

- lower income than the other spouse; and

- entitlement should be assumed if the factors used to calculate the amount of spousal support result in an amount payable by the other spouse;

22. including a provision in the *FRA*, setting out that a factor in determining entitlement to spousal maintenance where one spouse earns less than the other, would be open to abuse and not meet the goals and intentions of spousal maintenance case law and legislation;

23. there is no need to delineate the three separate models of spousal support: compensatory, non-compensatory and contractual (response to question 2);

24. none of these three models of spousal support should be given precedence (response to question 3);

25. members of the CBABC *FRA* Working Group have used the SSAG and find them a useful tool in argument and negotiation of spousal support disputes. The SSAG should not be made part of the *FRA* or the law of British Columbia (response to questions 4, 5 and 6);

Parental Support

26. section 90 of the *FRA s*hould be repealed (response to question 8a);

27. if section 90 remains in the *FRA*, there would need to be a provision providing that, before any parental support could be ordered, the child's reasonable living expenses, based on his or her standard of living would have to be met, then any child or spousal maintenance orders, after which, if there was anything left, perhaps a parental support order could be made;

28. if section 90 remains in the *FRA*, in particular, under question 8b:

- parental conduct should be a disqualifying factor unless that conduct is the result of dementia or mental illness;

- dependency should remain the concept to be used if parental support remains in the *FRA*;

- need should not replace dependency as a child should be allowed to meet his own needs first and not satisfy his parent's needs;

- parents should be required to become self-sufficient including exhausting all government subsidies and options;

- if there are to be parental support orders, there should not be a time limit but they should be reviewable and variable on a change of circumstances, which could include voluntary circumstances such as the assumption of family obligations by the child;

- there should not be any guidelines for parental support;

- parental support should be restricted to legal parents;

- only written agreements where both parties received independent legal advice should be recognized; and

- responsibility for parental support should be allocated between all adult children so that the parent cannot pick and choose which child to sue for parental support;

Part B: Continuing Support After The Payor's Death

29. there should be statutory authority to make an order for support that survives the death of the payor and that the claimant should be allowed to advance a claim both before and after the death of the payor (response to question 9);

30. there should be statutory authority, either in the *FRA* or in the *Wills Variation Act*, to allow:

    - the estate to apply to vary or terminate the support obligation; and/or

- allow both the estate and the support recipient/claimant to replace the support obligation with a share of the estate, to allow the estate to be distributed and wound up (response to question 9).

31. the factors affecting the support application, variation or termination application, and/or the allowance/substitution application would all be the same:

- existence of an ongoing and significant need of the recipient;

- the size of the estate;

- the nature and amount of competing claims; and

- the existence of any insurance or pension (survivor benefit) monies to reduce or eliminate the recipient's need (response to question 9b).

Part C: Changing A Spousal Support Order

32. all of the factors listed in question 10b would normally be considered by the court at the hearing and it is not necessary to incorporate those into the *FRA.* These factors are, in essence, strictly evidentiary matters;

33. any reduction or cancellation is a variation of the intent of the original order and the evidentiary matters that relate to a variation matter should

equally apply in the case of a reduction or cancellation application. The "gross unfairness" test is too extreme. As currently applied by the courts, this test does not afford sufficient consideration of the basis on which the original order was made and the nature of the intervening circumstances and their "foreseeability" (response to questions 11a and b);

34. a review should be required to be a term of the original order and, failing that, would result in the applicant being put to the same test as for a variation application. However, the review test should be available to the application in the event that the circumstance relied upon is of the nature of a substantial change "not provided for or addressed" in the original order even though foreseeable;

Part D: General Feedback

35. the length of time needed to obtain a spousal support order can cause hardship on the recipient spouse, especially if access to bank accounts or other sources of money have been curtailed by the economically dominant party. The CBABC *FRA* Working Group is in favour of early Case Conferences. These Case Conferences would be, in effect a triage kind of conference, where a judge could impose a without prejudice spousal maintenance order which would expire on a given date, and whose sole purpose would be to cover immediate need until a full hearing could be held (response to questions 12 and 13);

CHAPTER 12: CO-OPERATIVE APPROACHES TO RESOLVING DISPUTES

Introductory Comments

36. while the CBABC *FRA* Working Group supports the idea of maximum education about alternative and collaborative measures, we do not share the view that this alone will encourage more people to resolve their differences out of court;

37. the CBABC *FRA* Working Group supports the proposition in general that the *FRA* should encourage resolution by agreement, but is acutely aware that separating spouses have varying abilities to negotiate or draft comprehensive, practical, or fair agreements. The degree to which they will be successful depends in large part:

- on each receiving proper and full disclosure;

- on each being able, emotionally and practically, to negotiate for themselves; and

- on the degree to which each is able to appreciate the legal issues, the range of options available to them and to anticipate and address the practical day to day problems of living apart, especially with children;

38. the *FRA* should encourage settlement by agreement, should provide spouses and parents with model forms to assist them and should encourage the negotiation of agreements that satisfy the above criteria. Where such criteria are met, agreements should be afforded certain protections under the *FRA*. Where such requirements are lacking, the courts should have more jurisdiction to reopen or even throw out agreements altogether;

39. the CBABC *FRA* Working Group supports the idea of mandatory mediation, but not as a precondition to accessing the court. We believe the court should be the one to decide whether the parties have an issue that cannot wait, or whether they should be sent off to mediation before proceeding further;

Part A: Providing Information

40. the CBABC *FRA* Working Group believes that family litigants should be constantly reminded of the cost and consequences of continued litigation and of the alternatives available to them (response to question 1);

41. the CBABC *FRA* Working Group supports the general idea of the Australian model, which requires that all litigants be informed/reminded about:

- the legal and practical effects of the continued proceeding;

- potential dangers for children involved;

- the services provided by family counselors and family dispute resolution practitioners;

- the likely next steps involved in the litigation; and

- both judicial (case or settlement conferences) and non-judicial (arbitration or mediation) alternatives.

42. where lawyers are involved, the CBABC *FRA* Working Group supports the idea that before initiating a family proceeding the lawyer should certify that they have informed the client of these matters;

43. the CBABC *FRA* Working Group is not uniformly comfortable, however, with the idea that lawyers should be required to (or are capable of) explaining the "social effects" of litigation on children or other such vague formulations. Some do it as a matter of course, and consider it part of the new, holistic approach in family practice. Others would rather leave such things to the counsellors and other mental health professionals;

44. the CBABC *FRA* Working Group believes that court registries should pass out packages of information relating to the subject matter of the dispute

(children, property and support). We also think that, once the proceeding has begun, the court itself should reinforce these messages, not only at family case conferences or judicial case conferences, but even at the commencement or termination of interim hearings;

Part B: Encouraging Co-Operation

45. the CBABC *FRA* Working Group is not under any illusion that simply saying in the *FRA* that parties should resolve their own disputes by negotiation will lead them to do so; nonetheless, any concrete reminder what alternatives are available would assist parties (response to question 2);

46. the CBABC *FRA* Working Group likes the language in Australia's *Family Law Act*. We would only add that the *FRA* should provide a model for separation agreements generally and parenting plans in particular, as well as set out the minimum criteria for the parties to meet in crafting a "protected" separation agreement (response to question 3);

47. the CBABC *FRA* Working Group supports parenting plans becoming enforceable as a court order only after they have been vetted by the court, usually at a case conference. Parents cannot always be trusted to know what issues they should address without someone (a lawyer; the court) or something (a model agreement or parenting plan) directing them;

48. the CBABC *FRA* Working Group does not believe that mediation should be made mandatory **before** being allowed to file a family law proceeding. Rather, CBABC *FRA* Working Group believes the *FRA* should allow the judge to require parties to attend mandatory mediation before taking another step in family court. This would allow judges to decide when mediation will have the best chance for success (response to question 4);

49. as the CBABC *FRA* Working Group commented in our response to the Attorney Generals' discussion paper, Chapter 5 Programs and Services, we submit that mediation or other consensual dispute resolution techniques will have the most benefit when parties' situations have stabilized;

50. the CBABC *FRA* Working Group suggests that the decision to require mandatory consensual dispute resolution for family disputes should be left to a judge, preferably at what the CBABC *FRA* Working Group calls a "triage" case conference (response to question 5);

51. the CBABC *FRA* Working Group considers that proper and timely financial disclosure is often the most significant obstacle to settling property and support issues. The CBABC *FRA* Working Group submits that the *FRA* should address financial disclosure more particularly, and with more consequences for non-compliance (response to question 6);

52. further, the CBABC *FRA* Working Group recommends that:

- there should be an automatic right to seek full financial disclosure by means of appropriate demands, without the need to start any legal action. Rule 60D of the Supreme Court Rules could be amended to include pre writ disclosure demands;

- if the demand is made on a self employed individual, in addition to the usual disclosure requirements, there should be a clearly specified requirement to produce banking records, both personal and business, over a period of 2 to 3 years;

- the forms for financial demands should clearly spell out that failure to produce by a stipulated date will automatically result in a fixed financial penalty unless the non disclosing party brings on a successful application in court to show cause why the penalty should not apply;

- if the commencement of legal action is required for failure to comply with disclosure, special costs should be awarded unless the offending party can show compelling reasons to the contrary;

- the scope of Interrogatories should be broadened to include demand for specified documents;

- there should be the option in family cases to specify on a Demand for Lists of Documents the subject area in issue;

- photocopying costs and costs of accessing third party documents should be controlled as much as possible with an automatic payment out of family assets unless cause can be shown otherwise;

- Judicial Case Conference and Family Case Conference Judges and Masters should have broad and specific powers to order extensive financial disclosure with meaningful penalty provisions in case of noncompliance;

- at any stage of the proceeding, either party should be able to bring on an application to fund the full costs of an appropriate investigation and report into financial matters with legal fees, accounting fees and disbursements paid by the other party or from family assets;

- non disclosure, partial disclosure and financial ability to bear costs, should be specified criteria in the awarding of costs to fund investigations and reports into financial matters;

- Rule 60D of the Supreme Court Rules should be clearly linked to Rules 32 and 32A with expanded powers for court appointed masters, registrars, special referees and experts to investigate and report on

financial matters. Investigations under section 15 of the *FRA* and reports into custody and access matters are well known and routinely ordered while Rules 32 and 32A are little known and rarely used to investigate and report on financial matters;

- if there is a judicial finding of material non-disclosure, there should be specific legislative authority for judges to reverse the onus of proof on evidence and to draw appropriate adverse inferences against the non disclosing party, essentially incorporating the rationale of *Cunha v. Cunha, supra*. This goes beyond the scope of procedural law and will require amendments to the *FRA* and possibly the *Divorce Act*;

53. the CBABC *FRA* Working Group strongly supports the accreditation of, and use of, parenting co-ordinators and increased means of involving the views of children in disputes concerning custody, guardianship and access (response to question 7);

54. the CBABC *FRA* Working Group submits that the three most crucial features of an effective and efficient family justice system are:

- the ability to intervene quickly when necessary to return some measure of stability to separated families (finances and access);

- the flexibility to provide or require collaborative measures when they are most likely to have effect, rather than based on some inflexible criteria or timetable (such as before the first application); and

- the ability to call on all appropriate judicial and non-judicial resources to assist families in moving on (response to question 8).

55. further, as the CBABC *FRA* Working Group has repeated several times, we believe the court is the key to all three. In our view, erecting barriers to court access will detract from the first and impede the flexibility and co-ordination required for the remaining two elements;

CHAPTER 13: TIME LIMITS AND DEFINITIONS

Setting The Scene

56. the following general limitation periods should be established to:

- establish a claim for spousal support: two years following separation;

- establish a claim for property (exclusive of pension): six years following separation;

- apply to set aside a settlement: six years following the making of the settlement agreement or consent order;

- establish a claim to pension rights: ten years if not already determined in a settlement agreement or court order; and

- establish a support claim such as support for parental leave based on childbirth or spousal support based on detrimental reliance: one year;

Part A: Spousal Support

Unmarried Spouses

57. the expectation of a relationship of permanence between the couple ought to require cohabitation in excess of one year to enable the couple a trial period before committing to such a relationship. In that light, two years is a more sensible time period **provided that** such cohabitation is continuous. If it is not continuous, that is, if cohabitation in a marriage-like relationship is interrupted by reason of **an intention not to cohabit in a marriage-like relationship,** as distinct from taking separate holidays or being away on business, then two years isn't long enough (response to question 1a);

58. a minimum cohabitation period of two years within the last two and one-half (2.5) year period, provided that if, during that period an event indicating a permanent separation (such as entering into a separation

agreement or a separation of finances occurs), the period of cohabitation prior to that event should not be counted toward the total (response to question 1b);

59. a minimum cohabitation period should be two years within the last two and a half year (2.5) period. If, during that period, an event indicating a permanent separation such as entering into a separation agreement or a separation of finances occurs, the period of cohabitation prior to that event should not be counted toward the total (response to question 1b);

60. the CBABC *FRA* Working Group is divided on the issue of determining whether or not a couple who have had a child together are spouses under the *FRA*. Some members of the CBABC *FRA* Working Group believe that no relationship of permanence is required but that support should be available to a woman who has given birth to a child regardless of whether the parties ever lived together, both before the birth and for a period thereafter (a form of parental leave where such is not available through Canada Pension Plan or private insurance). Others members believe that a relationship of some permanence is required, yet others feel that the advent of children should have no bearing on the determination of when a party becomes a spouse under the *FRA* (response to question 2);

61. the *FRA* should not specify indicators of the end of a marriage-like relationship (response to question 3a);

Timing Of Spousal Support Claims

62. there should be a time limit for starting a claim for spousal support (response to question 4a);

63. the time limit for married spouses should be 2 years after separation (response to question 4b);

64. the time limit for unmarried spouses should be 2 years after separation (response to question 4c);

Part B: Property Division

Property Division For Married Spouses

65. there should be a time limit for starting a claim for a division of family assets (response to question 5a);

66. for unmarried couples, who have entered into or will enter into agreements pursuant to section 120.1 of the *FRA* and where married and unmarried spouses are subject to the same property division regime, there should be no distinction made between them. The appropriate limit for the claim of property for married people is six years after separation. This mirrors the six year limitation for trust claims;

67. the time limit for married spouses to apply for a division of family assets should be:

- six years after separation generally;
- one year after the retirement of the pension holder;
- ten years after separation in respect of employment pensions if the pension is not already the subject of a separation agreement or court order relating to those two parties (response to question 5b);

68. the *FRA* should be amended to remove the difference between the time limits in sections 65 and 68 (response to question 6a). It may take several years for a situation of unfairness to develop in relation to an agreement and this could occur as a result of a variety of factors. Accordingly, an extension of the two (or six) year time limit under both sections is appropriate, and indeed, it may make more sense to merge the two sections to cover all agreements;

69. judges should be permitted to extend the two year time limit under section 65 of the *FRA* (response to question 6b);

Property Division For Unmarried Spouses

70. to the extent that married and unmarried spouses are accessing the same property division regime, they should be subject to the same time limits (response to question 7a);

71. the time limit for unmarried spouses who "opt in" to the *FRA* to apply for the division of family assets be two years after separation (response to question 7b);

Part C: Child Support

Qualifying As A Stepparent

72. non-financial considerations should not form part of this legislation in this area (response to question 8);

73. the definition of "stepparent" should continue to include the reference to the common law relationship to establish that there is a relationship of some permanence and the reference to contribution to the support of the child for a period of at least one year. Presumably this is included to ensure that such contribution was intentional and not merely coincidental. It may be advisable to specify that the period of contribution be continuous (response to question 8);

Time Limits For Child Support Claims Involving Stepparents

74. there should be a time limit for child support claims involving a stepparent (response to question 9a);

75. members of the CBABC *FRA* Working Group disagree on the proposed length of the limitation period. Some members think that there should be a one year limitation period from the date of separation. Other members

think that one year does not take into account the length of time necessary to process the grief and emotional turmoil resulting from a failed relationship and that the limitation period should be either two years from the date of separation or, failing that, one year from the date of last periodic contribution to the child's support. This should be adequate time for the parties to deal with the worst of their emotional issues and to resolve their outstanding financial issues. It should also be sufficient time to determine whether the stepparent will have a continuing parental relationship with the child (response to question 9b);

76. the CBABC *FRA* Working Group recommends that the time limit for child support claims involving a stepparent to be after the date of separation of the parent and the stepparent (response to question 9c). In question 9c, the phrase "after the last support payment" may not be the best choice of words in the circumstances, because the contribution made may not be a "support payment" per se. It may be that the stepparent continues to contribute to the payment of the mortgage or rent or continues to retain the child on his or her medical or dental plan. It may be more appropriate to refer specifically to a regular periodic payment for the child or on the child's behalf which benefits the child. Similarly, in question 9c, the phrase "after the last contact with the child" may not cover the ground because it presumes that the stepparent and the child have an unrestricted ability to maintain contact with each other and that may not be the case;

Part D: Extending A Time Limit

77. there should **not** be a waiver of time limits for starting a claim under the *FRA* as this simply adds another layer to the process and may delay matters unduly (response to question 10a);

78. the right to start an action should not be extended (response to question 11a);

Part E: General Feedback

79. time limits should be consistent and consistently applied. There should be firm end dates to provide parties with the incentive to resolve their respective issues during the time allotted. Time limits need to take into account the grief arising from family breakup and the time required to by spouses to grieve and heal;

CHAPTER 14: RELOCATING CHILDREN

80. the CBABC *FRA* Working Group was not able to reach a consensus on amending the *FRA* to address mobility issues. As a result, these submissions on Chapter 14 are written on the premise that a change will be made to the *FRA* and these submissions neither discourage nor encourage such an amendment;

Part A: What Is "Relocation"?

81. "relocation" should be defined as any move by a parent with a child that:

- interferes with the child's ability to maintain a meaningful relationship with an adult;

- significantly interferes with an adult's ability to maintain a meaningful relationship with the child;

- significantly increases an adult's cost of exercising access to the child; or

- interferes with an adults access to the child (response to question 1);

Part B: Resolving Relocation Issues Out Of Court

82. any notice period should be sufficient to allow the non-moving party to retain legal counsel, so a 60 day notice period is recommended (response to question 2);

83. notice should be written although it need not be confined to a specific form (response to question 2);

84. a notice provision should be mandatory **providing** that the other adult has maintained a relationship with the child or the other adult has a right of custody, guardianship or access respecting the child (response to question 2);

85. the *FRA* could not be meaningfully amended to encourage mediation for those who are not so predisposed to mediation (response to question 3);

Part C: Is There A Way To Make Relocation Law More Certain?

86. the burden of proof should fall on the parent proposing move and this parent should be required to establish that the move is in the child's long-term best interests (response to question 4);

87. a weighted list of factors should not be added to the *FRA* (response to question 5):

88. if there were to be a list of factors added to the *FRA*, those factors should be, in addition to those set out at section 24(1) of the *FRA* regarding the best interests of the child being paramount, the following:

- the existing arrangements for custody of, or access to, the child;

- the other parent's historic pattern of commitment to those custody and access arrangements and involvement with the child's life;

- the impact of the relocation with the child's relationship with the other parent;

- the impact of the relocation on the child's community, school, family and other relationships;

- the desirability of maximizing contact with both parents;

- the child's age and maturity, where the child's age and maturity are such that the relocation would undermine the child's ability to form a meaningful relationship with the other parent;

- the views of the child, where appropriate;

- the permanence of the move;

- the duration of travel time between the parents' residences;

- the increased cost of exercising access by the other parent; and

- any other factor that the court deems relevant (response to question 6);

89. if there were to be a list of factors added to the *FRA* that a court is **not** to consider, those factors should be the following:

- the misconduct of a parent where the misconduct is not relevant to the parent's ability to care for a child or the child's best interests;

- the willingness of the parent bringing the application to move without the child; and

- the relative cost of living of the intended destination (response to question 7);

Part D: Costs Of Maintaining Contact After The Move

90. giving the court such express authority to allocate between parents the costs of maintaining contact between the child and the staying parent would help to distribute the costs of access and mobility applications might be reduced if the parent proposing the move was aware that the move might come at a financial cost (response to question 8);

91. that costs should always be awarded against a parent who unilaterally moves with a child without consulting the other parent, provided that the other parent has maintained a meaningful role in the child's life following separation, whether by custom or by court order (response to question 8);

CBABC *FRA* WORKING GROUP RECOMMENDED LEGISLATION: CHILD RELOCATION

92. the legislation on child relocation attached as Appendix A be added to the *FRA*.

CONCLUSION

The CBABC *FRA* Working Group would welcome the opportunity to provide further input and dialogue with the Attorney General respecting these submissions or any other submissions made for Phase 1 or 2.

Any communications can be directed to:

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APPENDIX A

CBABC FAMILY RELATIONS ACT REVIEW

WORKING GROUP

RECOMMENDED LEGISLATION

CHAPTER 14: RELOCATING CHILDREN

35.1 An order for custody of or access to a child made pursuant to section 35 must contain a notice about the provisions of Part 2.1.

Part 2.1 – Child Relocation

Definitions for Part
42. In this Part:

"child" includes a child not yet born on the death of the child's mother or father but subsequently born alive

"interested adult" includes parents, grandparents, other relatives of a child and persons who are not relatives of the child who have a meaningful relationship with a child

"primary residence" means the home where a child normally lives most of the time, whether by custom or other informal arrangement or by a written agreement or order about the custody of and access to the child

"relocation" means a change or proposed change in the location of a child's primary residence which may:

(a) interfere with the child's ability to maintain a meaningful relationship with an interested adult;

(b) significantly interfere with an interested adult's ability to maintain a meaningful relationship with the child;

(c) increase an interested adult's cost of exercising access to the child; or

(d) interfere with an interested adult's access to a child.

Purposes of Part

43 (1) The purposes of this Part are:

(a) to ensure that applications concerning the relocation of children will be determined on the basis of the best interests of the children;

(b) to recognize the importance to children of maintaining meaningful relationships with parents and other persons, and to ensure the continuation of these relationships to the greatest extent possible;

(c) to recognize that the long-term benefits to children of relocation may in certain circumstances outweigh the harm caused by the impairment of a children's relationships with parents and other persons; and

(d) to discourage the relocation of children without notice to parents or other persons as an alternative to the determination of relocation by due process.

(2) The references to "other persons" in subsection (1) (b), (c) and (d) include parents, grandparents, other relatives of the child and persons who are not relatives of the child.

Best Interests of the child are paramount

44 (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

(a) the health and emotional well being of the child including any special needs for care and treatment;

(b) the material well being of the child;

(c) if appropriate, the views of the child;

(d) the love, affection and similar ties that exist between the child and other persons;

(e) education and training for the child; and

(f) the capacity and willingness of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

(2) The references to "other persons" in subsection (1) (d) and to "each person" in subsection (1) (f) include parents, grandparents, other relatives of the child and persons who are not relatives of the child.

(3) If the conduct of a person does not substantially affect a factor set out in subsection (1), the court must not consider that conduct in a proceeding respecting an order under this Part.

Application of Part

45 (1) This Part applies to the relocation of children where:

(a) an order has been made for custody of or access to a child;

(b) there is a written agreement for custody of or access to a child;

(c) an interested adult who is not intending to relocate with the child has a right of custody pursuant to section 34 (1) (a) or (b); or

(d) an interested adult who is not intending to relocate with the child has regular contact with a child and the child has a meaningful relationship with that person, and there is not an order or written agreement for custody of or access to a child.

(2) This Part does not apply where:

(a) the other parent of a child is unknown; or

(b) there is an order or written agreement for custody of or access to a child and an interested adult has failed to exercise a right of access under that order or agreement within a one year period preceding the relocation without reasonable excuse.

Notice of relocation and notice of objection

46 (1) A person seeking to relocate a child must provide notice to all interested adults of his or her intention to relocate at least 60 days before the relocation is to occur.

(2) An interested adult receiving notice under subsection (1) who objects to a proposed relocation must notify the person seeking to relocate the child of his or her objection within 14 days of receiving notice of that person's intention to relocate the child.

(3) Notice under subsection (1) and (2) includes notice given orally or in writing.

Applications for order or directions

47 (1) Where objection has been given under section 46(2), the person seeking to relocate a child must apply to court for orders or directions about the proposed relocation and must serve all persons objecting to the relocation with notice of hearing of the application.

(2) Applications brought under subsection (1) must be scheduled for hearing and heard at least 14 days before the date of the proposed relocation.

(3) Despite subsections (1) and (2), the court may:

(a) waive the requirement that persons objecting to the relocation be notified of a hearing for orders or directions about a proposed relocation;

(b) order that the hearing for orders or directions about the proposed relocation be heard on short notice to persons objecting to the relocation; and

(c) direct that the hearing for orders or directions about the proposed relocation be heard less than 14 days before the proposed application or, in exceptional circumstances, after the relocation has occurred.

Orders or directions about a proposed relocation

48 (1) Subject to the *Divorce Act* (Canada), a court may make an order on application allowing a proposed relocation and give such directions as may be necessary to give effect to the order if the court is satisfied that the relocation is in the best interests of the child, taking into account the following factors:

(a) the existing arrangements for custody of and access to the child;

(b) the impact of the proposed relocation on the child's relationship with the interested adult;

(c) the impact of the proposed relocation on the child's community, school, family and other relationships;

(d) the desirability of maximizing contact between the child and both parents;

(e) the child's age and maturity, where the child's age and maturity are such that the proposed relocation would undermine the child's ability to form and maintain a relationship with a parent;

(f) the views of the child;

(g) the permanence of the proposed move;

(h) the duration of the child's travel time between the proposed residence and the home of the interested adult;

(i) the increased cost to an interested adult of exercising a right of access to the child;

(j) an agreement between the parties about the proposed relocation; and

(k) any other factor the court considers appropriate.

(2) In making an order under subsection (1) court must not consider:

(a) the alleged misconduct of a person where that misconduct is not relevant to:

(i) the person's ability to care for the child,

(ii) the child's best interests, or

(iii) the child's relationship with that person;

(b) the willingness of the person proposing the relocation to relocate with or without the child; and

(c) the relative cost of living between the child's primary residence and proposed residence.

(3) In giving effect to orders made under subsection (1), the court may additionally:

(a) vary an order or written agreement about the custody of or access to a child;

(b) allocate between the parties all or some of the costs of exercising a right of access; and,

(c) make such other orders and directions as may be necessary to ensure ongoing contact between the child and an interested adult.

Failure to give notice or bring application

49 (1) Where

(a) a person relocates a child without giving notice of his or her intention to relocate the child under section 46(1), or

(b) a person fails to schedule a hearing for orders or directions about the proposed relocation under section 47(1) before relocating the child,

an interested adult may apply:

(c) for orders or directions about the relocation of the child;

(d) to enforce an order or written agreement for custody of or access to a child; or

(e) to vary an order or written agreement for custody of or access to a child.

(2) At the hearing of applications under subsections (1) (c), (d) and (e), the court may:

(a) order that the child be

(i) delivered and placed in the care of an interested adult or other person, or

(ii) returned to and reside at the child's primary residence

under such terms and conditions as the court deems appropriate until an application regarding the relocation is heard;

(b) order that the child continue to reside with the person who has relocated the child until an application regarding the relocation is heard; or

(c) order that a party be restrained from removing the child from a place.

(3) Where the court is satisfied that a person has relocated a child knowing that an interested adult would have objected to the relocation, had notice of the relocation been given as required by section 46(1), the court may order the person to post security for:

(a) the costs of the other person for the hearing of future applications regarding the relocation of the child; and

(b) the other person's costs of exercising access to the child.

(4) The place and duration of a child's residence under an order made pursuant to subsections (2) (a) and (b) must not be considered at the hearing of an application regarding the relocation of the child, providing that the hearing occurs within one year from the date the order was made.

Variation

50 (1) A person may apply to vary or rescind an order made under this Part where the order was made at least one year before the application is brought, or earlier with leave of the court, and:

(a) there has been a material change in circumstances adversely effecting the child's best interests since the order was made; or

(b) the person who has relocated with the child has repeatedly failed to comply with an order concerning an interested adult's access to the child without reasonable excuse.

(2) Subject to the *Divorce Act* (Canada), a court may vary or rescind an order made under this Part if the court is satisfied that the variation or rescission is in the best interests of the child, having regard to the length of time the child has resided in a place since relocation and the factors set out in section 48(1).

END