Submission to

MINISTRY OF ATTORNEY GENERAL

Justice Services Branch
Civil Policy and Legislation Office

WHITE PAPER ON *FAMILY RELATIONS ACT* REFORM

PROPOSALS FOR A NEW *FAMILY LAW ACT*

Issued by:

***Family Relations Act* 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") has over 6,400 members. Its members practise law in many different areas and the CBABC has established 74 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 *Family Relations Act* 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 is presently was composed of the following members of the Family Law Sections:

Family Law Sections

Kamloops

- David Dundee;

Nanaimo

- Sandra Dick;
- Stephen McPhee

Okanagan

- Cori L. McGuire;

Prince George

- Richard Bjarnason;

Westminster

- Janet L. Clark;
- David Halkett;
- David Hart;
- Jack Hittrich;

Vancouver

- John-Paul Boyd;
- Lisa Hamilton;
- Karen Nordlinger, QC;
- Meghan J. Selinger;

Victoria

- Kay Melbye.

SUBMISSIONS

BACKGROUND

In 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.

In 2007, the Ministry of Attorney General conducted a review in three phases and released discussion papers on a variety of family law topics. For all three phases, the CBABC *FRA* Working Group filed extensive written submissions and made specific recommendations to the Attorney General.

In July 2010, the Ministry of Attorney General released the White Paper on *Family Relations Ac*t Reform: Proposals for a new *Family Law Act*. The White Paper has a draft *Family Law Act* (the "Proposed Act"). The White Paper is organized by 14 chapters as follows:

- Chapter 1: Introduction;
- Chapter 2: Non-Court Dispute Resolution And Agreements;
- Chapter 3: Legal Parentage;
- Chapter 4: Children's Best Interests;
- Chapter 5: Guardianship;
- Chapter 6: When Orders And Agreements For Time With A Child Are Not Respected;
- Chapter 7: Relocation;
- Chapter 8: Children's Property;
- Chapter 9: Family Property;
- Chapter 10: Support;
- Chapter 11: Case Management And Enforcement Tools;
- Chapter 12: Protection Orders;
- Chapter 13: Court Jurisdiction And Procedural Matters; and
- Chapter 14: Transition.

The CBABC *FRA* Working Group has reviewed all 14 chapters and the Proposed Act.

CHAPTER 1: INTRODUCTION

The CBABC *FRA* Working Group has been and is tremendously supportive of the Proposed Act and its objectives overall. Having said that, the CBABC *FRA* Working Group does have specific suggestions for amending the Proposed Act. Many of these suggestions are technical or recommend what we see as a better means of achieving the proposed objectives. In some areas, though, we have larger concerns. These include: resources, agreements, multiple parents, property, support, protection orders, court jurisdiction and procedural matters and transition.

Resources

We see a significant need for public education regarding the Proposed Act and the way it will change family law and practice. We also think the government should actively support the expansion of existing resources to meet the need for mediation, arbitration, parenting coordinators, and professionals to help provide the voices of children affected by the system. In these submissions, we suggest ways in which that can be done.

Agreements

We strongly support the goal of encouraging out of court settlements and upholding properly prepared agreements. However, we are concerned about the possible misuse of the provisions concerning agreements. Promoting agreements is one thing. Promoting good agreements is another. We recommend the latter. A

good agreement is the result not only of full disclosure, but proper legal drafting and based on fully informed consent. Just as family arbitration can have the unintended consequence of subverting the principles and objectives of the Proposed Act, so too can an incautious embrace of family law agreements prepared by those without full knowledge of the law and the parties' alternatives.

Multiple Parents

We are concerned about the guardianship, support and estate implications in cases where there are more than two parents, as with surrogates or genetic donors. We have some suggestions in this area.

Property

We are concerned that sections 81 and 82 of the Proposed Act provide an appropriate balance between excluded and family property, especially in cases where:

- family and non-family property are mixed;
- excluded property goes down in value;
- non-owning spouses make contributions to excluded property; and
- excluded property increases in value where there has been no contribution by the non-owning spouse nor any use of the excluded asset for family purposes.

We are also concerned about the definition of family debt, and the possible unintended consequences of making the date of separation the new triggering event.

We recommend that there be extensive public education about the new rules applicable to common law couples and that transition rules be sensitive to allow them time to reorganize their affairs.

Support

We have made some mostly technical suggestions for child and spousal support.

With respect to making support binding on the estate of the payor as a default position, we think the estate should be able to ask the court for permission to satisfy the obligation through an annuity or insurance or to substitute an allowance from the estate in lieu of on-going support (which might not be the same as [i.e. less than] a lump sum payment or simple variation).

We think the Wills and Estates Bar should be consulted on the implications of and remedies for the estate in such situations.

Protection Orders

The manner in which protection orders are made and enforced under the Proposed Act will have a significant impact on family litigants. Of particular concern is the current practice of some judges making restraining orders mutual as between

spouses. This may leave an abused spouse open to a criminal record or at least criminal charges.

In addition, a conviction under section 127 of the *Criminal Code* may result in a criminal record which could negatively impact upon a spouse or parent's ability to obtain work or to otherwise provide for children.

Significant delays presently experienced in the courts may result in an effective lack of enforcement of protection orders in the face of a clear need for it. The higher burden of proof effectively may render the enforcement process meaningless.

The Proposed Act creates a protection order scheme that changes the current quasi-criminal enforcement process into a fully criminal enforcement process. It is unclear if the enforcement of the new resulting protection orders will be more effective than the existing regime. Court orders under the existing regime are, at best a rare occurrence, particularly in light of current regional disparities in enforcement across the Province.

Court Jurisdiction & Procedural Matters

We welcome the empowerment of the Provincial Court through statutory conduct and protective orders. We also suggest other ways in which questions about the power of the Provincial Court and the interaction of the Supreme and Provincial Courts could be improved.

Transition

Several of the members of the CBABC *FRA* Working Group have expressed concern about the transition provisions. It seems problematic to apply two sets of laws indefinitely, depending on whether the action was started prior to or after the effective date of the legislation. Also, it may be unfair to impose a drastically different property regime on existing common law spouses, in particular if they have governed themselves based on the current regime.

While we cannot say we have any firm recommendations in these areas. A starting point which did appeal to members of the CBABC *FRA* Working Group was to consider three transition issues. First, litigation regarding children under the *FRA* should continue under the old rules. Second, new rules about property should apply to all relationships, but the government should provide plenty of notice using a delayed commencement date to give British Columbians the opportunity to readjust their affairs. Third, litigation about support should go under the new law when it takes effect.

CHAPTER 2: NON-COURT DISPUTE RESOLUTION & AGREEMENTS

Chapter 2 provides that the Proposed Act should encourage non-court dispute resolution and agreements between parties.

The CBABC *FRA* Working Group is strongly supportive of the policy promoting a broader range of dispute resolution options to assist clients in resolving family issues, both in and out of court. Our concerns are two-fold. First, without public education, average British Columbians will be less likely to know they have a family issue, what the law says about it or what resources are available to help them resolve it. Second, without a concerted effort and governmental support, such resources will not be widely available.

Resources & Public Education

Chapter 2 raises the issue of the need for public education and the availability of resources.

There is already significant disparity in the availability of judicial and non-judicial resources throughout the Province. Civil justice reforms like case conferencing, while hugely successful, are not evenly distributed. There are major differences in availability, duration and wait times. A case conference in Vancouver or Victoria is often 45 minutes to 2 hours or more in length, set for a specific time, and can be scheduled within 3 to 4 months. A case conference in smaller, more rural communities like Williams Lake, Lillooet or Cranbrook is

rarely more than 20 or 30 minutes, is set on the general civil or family list and so is susceptible to adjournment, and can take 6 months or more to schedule.

Legal aid and family court counselor services vary from region to region, as do legal information services, courthouse and public library assistance, and non-governmental resources like The Access Pro Bono Society of BC, community advocacy groups and Indian Band services.

Increasingly, legal aid and legal information services are available only through call centres or Internet-based services. Such services can be extremely helpful for rural or remote communities, but the studies show that they are best utilized by persons of reasonable income, education and literacy levels.[1]

Persons with low income, literacy, education, or facing language, cultural or mental health barriers can make little use of such services.[2] In the result, they often do not know they have a legal problem or that they have rights or that there is something they can do to enforce them.[3] As community, social, and legal

[1] Carol McEown, *Civil Legal Needs Research Report*, 2ed. (Vancouver, B.C.: The Law Foundation of BC, 2009) at 30 < http://www.lawfoundationbc.org/>. *Listening to Ontarians: Ontario Civil Legal Needs Project* (Toronto: The Ontario Civil Legal Needs Project Steering Committee, 2010) at 28 <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf>. Karol Kohl and George Thomson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services* (Toronto: The Law Foundation of Ontario, 2008) at 49. <http://www.lawfoundation.on.ca/pdf/linguistic_rural_report_dec2008_final.pdf>. Melina Buckley, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches* (Ottawa, The Canadian Bar Association, 2010) at 83 < http://www.cba.org/CBA/Advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf >.

[2] *Civil Needs*, *supra* at 30; *Listening to Ontarians*, *supra* at 28 and 56 ; *Connecting*, *supra* at 50 and 52; *Moving Forward*, *supra* at 83; *Voices From a Broken Family Justice System*, (Toronto: Law Commission of Ontario, 2010) <http://www.lco-cdo.org/>.

[3] *Civil Needs*, *supra* at 8; *Connecting*, *supra* at 45.

(courthouses and legal aid offices) resources are closed or cut back, these people find themselves disproportionately cut off from the legal system generally and from the objectives of the proposed new legislation in particular.

For persons in this second group, the studies show that they access and make use of services effectively only if they have in-person assistance. For the system to have an effective "front door", as proposed by the 2005 Family Justice Reform Working Group, that front door cannot just be a telephone kiosk or a computer terminal.[4]

Finally, while the goal of promoting alternative dispute resolution services is laudable, it must be recognized that such services are also unevenly available across the Province. Child protection mediation has proven itself a cost efficient, timely, and effective tool for dealing with such cases. But *Child, Family and Community Service Act* ("*CFCSA"*) mediators are not universally available, nor are all Ministry offices uniformly open to such means of resolution. The BC Mediator Roster Society is woefully short on mediators in many communities. While new, the persons qualified either through the BC Parenting Coordinators Roster Society or through the BC Hear the Child Society are also few, and largely if not exclusively limited to high population urban areas. These are new entities and require financial and staffing resources to expand their scope.

[4] See Note 1, but especially *Civil Needs, supra* at 35 to 37; *Listening to Ontarians, supra* at Part 4; *Connecting, supra* at Chapter 5; *Moving Forward, supra* at Chapter V.

The BC Mediator Roster Society offered practicums in conjunction with the Small Claims Court to facilitate candidates getting the requisite training and hours to qualify for the mediation roster. Perhaps such programs could be expanded in regional areas in conjunction with local family courts. That would not only promote the induction of more regional mediators, it would take a significant burden off local family cases. As a recent project has shown, distance mediation may also be feasible for remote areas.

Similar programs could be encouraged for parenting coordinators, perhaps in conjunction with the Family Justice Centres, counselors, or local Pro Bono offices.

We already have a number of Family Justice Centres, Justice Access Centres, and Access Pro Bono Society of British Columbia offices. The Legal Services Society has all but disbanded their regional offices, yet they still have some connections left in the regions they used to serve. If all such offices were to work cooperatively, they could each provide in-person assistance to clients in their separate fields and act as a conduit to help such clients remotely access the services of the other partners, through teleconference or videoconference links or by computer. These services could include: family justice counseling, legal information and advice (pro bono or duty counsel), mediation (Family Justice Centre ("FJC") or distance mediation) and document assistance.

In short, we envision a sort of virtual Justice Access Centre, with the local office providing the real, in-person anchor, and the other elements participating remotely. We appreciate funding is an acute issue, but we think that if existing services, including especially the Legal Services Society were re-examined and restructured in cooperation with other existing governmental and non-governmental resources and agencies, there may well be fiscal effiencies that could party offset any increased costs.

The CBABC *FRA* Working Group recommends that the government:

- assist and encourage the BC Mediator Roster Society to hold regional practicums for training family mediators, using cases from the local family courts;
- assist and encourage the BC Parenting Coordinators Roster Society and the BC Hear the Child Society to expand their services regionally;
- rethink existing governmental and non-governmental resources to expand Justice Access Centres-like, or virtual Justice Access Centres entry points broadly across the province; and
- encourage consultation and co-operation across all judicial districts to alleviate regional disparities in services and wait times.

Competency

Chapter 2 highlights another issue: competency. While the CBABC *FRA* Working Group supports the regulation of family dispute resolution professionals, we question whether the definition of "family dispute resolution professional" is sufficiently broad.

Despite the prominent role that family lawyers have played in the reform of family practice and law and the evolution of alternative means of dispute resolution, there is still a perception that family lawyers are too expensive and too intent on going to court. This mis-perception has fueled an emerging industry of non-lawyer dispute resolution services. It started with paralegal document assembly services, but is now growing to include full-on negotiation and advice. Notaries are even wanting in on the business.

The selling points for such non-lawyer services are often price – and sometimes just the idea that they are not being performed by lawyers. However, the fact that such services are often overpriced. For example, we have heard of Fairway Divorce Solutions packages costing $5,000 to $7,000 that are non-refundable.

Also, these non-lawyer services are often ill-informed or incompetent. Nor do they have the necessary training to screen for domestic violence or other power imbalances. These problems should be a concern for the government. It is a question of protecting the public.

If the policy of the government is to promote resolution by agreement, that policy must also seek to ensure that such agreements are fair, informed and effective. Otherwise, the policy only acts to undermine the very principles and standards the rest of the Proposed Act seeks to promote.

It is the Law Society's role to protect the public from unauthorized legal practice. It must fall to the government, however, to regulate all activity that sells services to the public in an area that so fundamentally affects their lives and savings. Only the government can ensure minimum standards, encourage informed consent and protect the public against predatory pricing.

Just as we applaud the requirement for family dispute resolution professionals to advise clients of non-court dispute resolution services, so we believe there should also be a requirement to advise potential clients of the need for legal information and advice about the rights and obligations in the Proposed Act and to warn that agreements which are entered into in ignorance of such rights or obligations risk being set aside or ignored by the courts.

The CBABC *FRA* Working Group recommends that:

- anyone who, for a fee, assists in the negotiation or drafting of family law agreements be considered a "family dispute resolution professional" and be subject to regulation; and
- family dispute resolution professionals should be required to advise potential clients of the need for legal information and advice about the rights and obligations in the Proposed Act and to warn that agreements which are entered into in ignorance of such rights or obligations risk being set aside or ignored by the courts.

Inter-Disciplinary Cooperation

Chapters 2 and 4 raise the issue of inter-disciplinary cooperation. Often, the various professions who interact on family matters have an imperfect understanding of the family justice system or how they can best contribute to it.

There is a growing view in case law that if children can and wish to have their views heard, they must be allowed to do that.[5] The only question is how. The Proposed Act supports this view and encourages consultations of children's views, unless it would be clearly inappropriate to do so. The question remains. How?

[5] See *B.J.G. v D.L.G.* 2010 YKSC 44. <http://www.yukoncourts.ca/judgements/supreme/2007/b_j_g_v_d_l_g_2010_YKSC_44.pdf>.

A number of avenues have been developed, but with varying degrees of understanding, acceptance, and availability.[6] The BC Hear the Child Society promotes child interviews and straight-forward reporting of their views, without commentary or opinion. Even among the BC Hear the Child Society members, however, there are divergent views about interviewing or reporting protocols.

The Children's Lawyer Project in Nanaimo also provides reports of children's views. The reports are all prepared by experienced lawyers, though interviewing and reporting practices are too new to yet establish recommended standards at this time.

Among mental health or counseling professionals, there is still disagreement about the standards or protocols for "views of the child reports." Some of these professionals express no opinion. Others feel their professional standards require that they investigate and provide some opinion on the sincerity or maturity of expressed views or whether they see signs of parental influence. Judges who order these reports and lawyers who request them, often have different views or expectations, leading to confusing results.

Full custody and access reports can run afoul of due diligence standards. Psychiatrists and psychologists are often required to insist on payment for minimum hours for interviews and reports. This drives up expenses. While we recognize the need for professional standards, they seem at times to be remote

[6] *Ibid.*

from the parties' needs or expectations. Ironically, even professionals experienced in family law can sometimes be unsure just what the court wants or expects them to comment on or how their findings inform the court's decision of who should have what parenting responsibilities or what parenting time arrangement best suits the family in question.

Further, mental health and counseling professionals are often bound by a professional code that discourages judging or taking sides on client's issues. This can run directly counter to the needs or expectations of the court. This not only leads to a reluctance to get involved in the family justice system, but it can expose professionals to censure when they do. One side or the other – sometimes both – are often unhappy with these reports, as valuable as they are. Professional ruling bodies can become unwittingly complicit in revenge taking after the fact.

The issue becomes even more difficult when mental health professionals or counselors are asked to play mediation or parenting coordination role. As family justice professionals, we see the value of their involvement, especially when the clients have mental health or personality challenges. Yet their professional ruling bodies are less supportive.

If we want mental health and counseling professionals involved as resources for the family justice system and our clients, we have to resolve this tension. We also need to work toward established standards for interviewing children, reporting on their views and the qualifications and training needed for both.

The CBABC *FRA* Working Group recommends that the government form or encourage the formation of an action committee comprised of representatives from the:

- Bench;
- Bar;
- BC Mediator Roster Society;
- BC Hear the Child Society;
- BC Parenting Coordinators Roster Society;
- Family Justice Centre/Justice Access Centre;
- psychiatrists from the College of Physicians and Surgeons of British Columbia;
- College of Psychologists of British Columbia; and
- British Columbia Association of Clinical Counsellors.

The CBABC *FRA* Working Group further recommends that this action committee establish a working relationship on matters of family justice and to define standards and protocols for interviewing children, providing reports and acting as mediators or parenting coordinators.

Family Law Arbitration

The proposed amendments to the *Commercial Arbitration Act* are welcomed by the CBABC *FRA* Working Group as they clarify the availability of arbitration as another tool for dispute resolution in appropriate cases.

Section 190 of the Proposed Act states that a ""family law dispute' has the same meaning as in the *Family Law Act*". Section 2 of the Proposed Act defines "family law dispute" to mean "a dispute respecting a matter that may be the subject of a court order under this Act". The difficulty with this definition with regard to the *Commercial Arbitration Act* is that this may be unduly restrictive. Often the parties are involved in disputes that raise the *FRA*, the *Divorce Act* or the common law as the basis for relief. Where the parties are involved in a family law dispute, they should have the ability to arbitrate all issues, notwithstanding the legal basis underlying the issue. The definition unnecessarily sets up a potential interpretation difficulty.

The CBABC *FRA* Working Group recommends that the section 190 of the Proposed Act be amended as follows:

> "Dispute" includes a family law dispute;
>
> "Family law dispute" has the same meaning as "family law case" in the Supreme Court Family Rules.

Section 193 of the Proposed Act seeks to amend section 23 of the *Commercial Arbitration Act* by renumbering it as section 23(1) and adding two subsections. The proposed section 23(1) will read as follows:

> (1) An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.
>
> (2) Despite subsection (1) and any agreement of the parties to a family law dispute, an arbitrator making an award respecting the family law dispute is bound, in the same way as a court would be in making an order, by the provisions of the *Family Law Act*.
>
> (3) A provision of an award that is inconsistent with a provision of the *Family Law Act* referred to above is not enforceable.

Regarding section 23(2) of the Proposed Act, the CBABC *FRA* Working Group recommends that to be consistent and clear, the language in section 23(2) follow the language in section 23(1). The CBABC *FRA* Working Group recommends that section 23(2) be drafted in this following way:

> (2) Despite subsection (1) and any agreement of the parties to a family law dispute, an arbitrator must adjudicate the matter before the arbitrator by reference to the *Family Law Act*, the *Divorce Act* and the common law.

Regarding section 23(3) of the Proposed Act, section 23(3) is inconsistent with the arbitrator's award in section 14 of the *Commercial Arbitration Act*.

Section 14 of the *Commercial Arbitration Act* reads:

> 14. The award of the arbitrator is final and binding on all parties to the award.

The arbitrator's award should be binding on the parties until such time as it has been appealed and found by an appellate court to be inconsistent the law. Otherwise, an award may go unpaid or unheeded because one litigant thinks this it is inconsistent with a provision of the proposed *Family Law Act*, the *FRA*, the *Divorce Act* or the common law. It needs to be clear that the arbitrator's award is final and binding on the parties as set out in section 14 of the *Commercial Arbitration Act*, unless overturned by an appellate court. If a party is appealing an arbitrator's award, that party should have the ability to apply to the court for a stay of the award.

The CBABC *FRA* Working Group recommends that section 23(3) of the Proposed Act be eliminated and in its place a provision that would permit a party to seek an application to stay the award pending appeal.

Section 196 of the Proposed Act amends section 31 of the *Commercial Arbitration Act* by adding a new subsection 3.1 as follows:

> (3.1) A party may appeal to the court an arbitration award with respect to a family law dispute on a question of fact or on a question of mixed fact and law.

A real problem with section 31(3.1) is that it could leave the door wide open for litigants to re-litigate all the matters dealt with by the arbitrator before a court. This may be seen by the parties as a disincentive to arbitration. There is a significant body of law which mandates deference to an arbitral award by the courts on appeal. A leading case is *Chera v. Chera* which sets out the standard of review by an appellate court on support orders.[7] Consequently, the CBABC *FRA* Working Group recommends that language be added to the Proposed Act to ensure deference to an arbitral award as follows:

> A party may appeal to the court an arbitration award with respect to a family law dispute where there has been a material error of fact or of mixed fact and law.

The CBABC *FRA* Working Group's proposed provision employs the wording used by the British Columbia Court of Appeal in *Chera v. Chera, supra.* This makes it consistent with the case law. The CBABC *FRA* Working Group's

[7] 2008 BCCA 374 <http://www.canlii.org/en/bc/bcca/doc/2008/2008bcca374/2008bcca374.pdf>.

proposed provision would signal to the parties that they simply cannot expect to re-litigate the matter before a court if they are unhappy with the result.

Agreements

Agreements are referred to in several parts of the Proposed Act. The provisions for filing agreements for enforcement under the section 17 of the Proposed Act are left largely unchanged from the current *FRA*. New sections seek to codify, and in some cases to limit, the ability of courts to interfere with contractual arrangements. For example, sections 19 and 21 of the Proposed Act set out separate standards for review of agreements on spousal support or property versus agreements on child support. Section 18 attempts to capture the rationales from the Supreme Court of Canada cases *Rick v. Brandsema*[8] and *Hartshorne v. Hartshorne*.[9] Sections 22, 127 and 134 of the Proposed Act attempt to do away with the frustrating complications from *Zimmerman v. Shannon*.[10] And sections 129 and 137 of the Proposed Act articulate the standards for varying child or spousal support orders, though not agreements.

[8] 2009 SCC 10, [2009] 1 S.C.R. 295
< http://www.canlii.org/en/ca/scc/doc/2009/2009scc10/2009scc10.pdf >.

[9] [2004] 1 S.C.R. 550, 2004 SCC 22 <http://www.canlii.org/en/ca/scc/doc/2004/2004scc22/2004scc22.pdf>.
[10] 2006 BCCA 499 <http://www.canlii.org/en/bc/bcca/doc/2006/2006bcca499/2006bcca499.pdf >.

The CBABC *FRA* Working Group has identified these problems:

- the rules regarding agreements are located in various places in the Proposed Act, leading laypersons in particular to be confused or misled;
- some of these provisions contradict one another;
- the Proposed Act continues the different treatment of agreements filed in the Supreme and Provincial Courts respectively;
- it is not certain that some of these provisions serve the intended policy objective of promoting and encouraging resolution by agreement; and
- some of the private and governmental agencies that help parties research, draft, or negotiate agreements do not have the necessary training, experience or expertise to do so competently.

Chapter 2 raises an important issue: should the rules for filing and enforcement of agreements regarding support and property be any different in Supreme or Provincial Court? CBABC *FRA* Working Group sees no policy reason for doing so.

The CBABC *FRA* Working Group recommends that the procedures for and consequences from filing agreements in Provincial or Supreme Court be the same. Both courts should be free to enforce or vary. Neither court should be bound by which level of court the agreement was filed in, but should take account of any expressed intention to prefer one court over the other.

Chapter 2 raises another important issue: do sections 22, 127, and 134 of the Proposed Act serve their intended purposes? Since *Zimmerman, supra,* there is a question whether the court has any power to vary agreements. The *Divorce Act* has no such express power. This would provide an express power in the Proposed Act. We would hope that, eventually, courts would find that allowing contractual agreements to flout legislated standards, yet alone express orders, is against public policy and ought not to be enforced. But there is certainly nothing wrong with making that clear now, in legislation.

The problem is, the plain language of these sections may lead some to conclude that – notwithstanding the review standards mentioned in sections 18, 19, and 21 of the Proposed Act and the common law expressing deference to private agreements – courts are free to make whatever orders they see fit. We know this was not intended, but we think it better to simply avoid the argument.

The CBABC *FRA* Working Group recommends that sections 22, 127, 134 and subsection 17(5) of the Proposed Act be amended to read simply that either courts may vary agreements, filed or unfiled, so long as they do so in accordance with this Part.

Another compelling issue raised by Chapter 2: are the standards for reviewing agreements regarding spousal and child support appropriate? Should they also include the power to vary upon a change in circumstances under sections 129 and 154 of the Proposed Act? This issue is addressed in our submissions on support.

The CBABC *FRA* Working Group recommends that, in addition to the recommendations made in the submission on support, there is a need to link these provisions, so persons seeking to vary support arrangements contained in an agreement know to consider this part as well.

The CBABC *FRA* Working Group further recommends that sections 129 and 154 of the Proposed Act should also apply to agreements, unless and to the extent specifically addressed in the agreement.

Upon review of Chapter 2, is the "clearly unfair" standard appropriate for agreements on support and property? The CBABC *FRA* Working Group is uneasy about this standard. We understand the desire to reduce litigation on varying agreements, but the fact is some agreements are worthy of deference and some are not. Section 18 of the Proposed Act addresses the Supreme Court of Canada's concerns in *Rick, supra* about imbalance of power and lack of financial disclosure, but in our view those are not the only circumstances in which the objectives of the legislation can be undermined. The Supreme Court of Canada held in *Rick, supra* that a full, open and equally balanced negotiation is the key to a fair agreement. To that we would only add "informed."

Section 18(c) of the Proposed Act captures the *Hartshorne, supra* element required by the Supreme Court of Canada that the parties must be able to understand the "nature or consequences" of the agreement. But one can

understand what the agreement means and what the consequences are without having any idea of whether those consequences are in line with one's rights or responsibilities under the Proposed Act.

Too many people still cannot afford a lawyer, even on a duty counsel or consultation basis. They consult: the Internet, friends and family, libraries, Family Justice or Justice Access Centres, mediators, counselors, community agencies, their church and document drafting services. Increasingly, there is an emerging market for non-lawyer divorce and family negotiation and document drafting service providers. The Alberta-based Fairway Divorce Solutions franchise is an example which is becoming quite familiar to family law practitioners. The BC notaries are also seeking to be approved to provide such services.

The concern is that such providers have greatly varying knowledge, experience or expertise in such matters. Some know their limitations: they know what they don't know. Some do not. Many have wrong, incomplete or even destructive notions about family law and procedure. And some have an agenda which runs counter to the standards and objectives of the existing *FRA* and the Proposed Act. For instance, the sharia experience in Ontario is instructive not only to the remedy of arbitration, but also to family law mediation and negotiation as well.

In short, we believe that a settlement which was based upon a lack of understanding or misunderstanding of family law is just as destructive to the

values of the Proposed Act as one which took advantage of an imbalance of power or lack of financial disclosure.

CBABC *FRA* Working Group recommends that the standard for review in section 18 of the Proposed Act should include some concept of informed consent or decision making.

CHAPTER 3: LEGAL PARENTAGE

Chapter 3 describes the changes in the Proposed Act to meet the goal to modernize the law as a result of changes in social values and medical technology regarding legal parentage.

Regarding surrogacy and genetic donors, the CBABC *FRA* Working Group does not want to discourage these practices by having the Proposed Act imposing involuntary legal obligations on anyone. But if third or fourth parties make themselves parents, the CBABC *FRA* Working Group recommends that these parties must do so by contractual agreement. These agreements should make plain the financial responsibilities for the parenting involved in a surrogate or donor relationship. Since these situations are so new, and the various permutations so hard to imagine, yet alone regulate, we think the questions of the duration and amount of this financial responsibility are best left to the courts to determine.

CHAPTER 5: GUARDIANSHIP

The CBABC *FRA* Working Group has no comments regarding Chapter 4 at this time.

Chapter 5 provides for significant proposed changes to the terms used to describe those with responsibility for children and to describe time spent with children.

The CBABC *FRA* Working Group agrees with the policy objectives reflected in section 45 of the Proposed Act, but thinks that section as drafted is too confusing. Section 45(2) voids the default provision for joint guardianship if one or more guardians fail to "reside" with the child after the child's birth. This raises a number of questions. What does "reside" mean? Is it more than just having the child for parenting time? For how long must one reside with the child? Can it be any time after the birth of a child? What about where the parents were living together but have been separate for many years, and the non-resident parent has no relationship with a child?

In short, we do not think the concept of residing with a child captures the essence of the policy. Residency itself does not capture the reason for a default position of equal or shared parenting responsibilities. Rather, it is the relationship with the child that is important. In place of the test of residency, CBABC *FRA* Working Group recommends that use of the phrase in the relocation section, the concept of "ongoing relationship" with the child in section 68(2)(b) of the Proposed Act.

The CBABC FRA Working Group recommends that section 45(2) read: "despite subsection (1), if a parent of a child does not have any ongoing relationship with a child, then they are not guardians of that child."

We also have a concern about the definition of "parenting time" in section 42 of the Proposed Act. It may be appropriate for Part 4, Division 1, but it is going to cause problems for Division 5. Simply put, the phrase "whether the child is in the guardian's presence, or out of the child's presence, with the guardian's express or implied consent" may lead to much argument about whether parenting time can ever truly be denied or withdrawn in the case of joint guardianship, or whether the allegedly offending party had the other's "implied consent" to such a denial or withdrawal.

The CBABC FRA Working Group recommends that:

- either parenting time be simply defined as time with a parent; or
- that the phrase "whether the child is in the guardian's presence, or out of the child's presence, with the guardian's express or implied consent" be deleted; or
- that it be separately provided that "parenting time" does not include time when the child is in the presence of any other parent.

In the list of parenting responsibilities, we question why section 46(1)(m) of the Proposed Act should limit third party information to information "that may significantly affect the child". Neither the Master Horn nor the Master Joyce models of joint guardianship have any such restriction.

The CBABC FRA Working Group recommends the qualifier "that may significantly affect the child" be deleted from section 46(1)(m) of the Proposed Act.

Lastly, the CBABC FRA Working Group recommends that parenting responsibilities expressly include: (a) the right to apply for and administer a passport for a child and (b) the authority to permit international travel or travel with a bus, rail, ship or air carrier. These questions regularly come up, in and out of court.

CHAPTER 6: WHEN ORDERS & AGREEMENTS FOR TIME WITH A CHILD ARE NOT RESPECTED

Chapter 6 outlines the Proposed Act's goal to provide for a range of tools and remedies to address both denial and failure to exercise time with a child.

The CBABC *FRA* Working Group recommends that section 64(4)(c) of the Proposed Act be amended to replace "a doctor's note" with "evidence from a neutral professional".

CHAPTER 7: RELOCATION

The Proposed Act's goal is to reduce the need for litigation and thus reduce the costs associated with disputes over relocation.

The CBABC *FRA* Working Group does not believe it is appropriate to waive notice of relocation where there is "an ongoing risk of family violence". No one would argue against such a notice requirement where there has been significant and continuing violence and the moving spouse has to keep his or her new address secret to escape violence. But the Proposed Act promotes a fuller and more nuanced understanding of the phenomenon of family violence. That works well for the broader objectives of the Proposed Act, but not here.

Furthermore allowing this exemption begs the central questions: has the other guardian committed family violence? If so, was or is it of such a nature to disqualify him or her from having any say in the proposed move?

The CBABC *FRA* Working Group recommends that, in the case of a fear of continuing family violence, the guardian who is proposing to move should have to ask for an exemption from the court and that application could be made *ex parte.*

From an analysis of Chapter 7, do the shifting onuses in sections 70(2) and (3) of the Proposed Act strike an appropriate balance? The CBABC *FRA* Working Group is not sure that they do. We question why the onus should ever shift from the guardian proposing to move, yet alone why it should only attach where the parental time is split equally or close to equally. What about where the other guardian has a "meaningful relationship" with the child? It is hard to define, yes, but it is no less worthy of protection – and really goes to the heart of the issue.

Equal time, or nearly equal time, does not alone or even necessarily predict a meaningful relationship.

The "shared custody" provision in the Child Support Guidelines (the "CSG") already offers a perverse incentive for parents to fight over parenting time (over 40%). We would hate to see another fight here (over "substantially equal"). Fathers' rights and equal parenting advocates are already fighting over equal time presumptions. We do not need to give them more reasons to distract from the

proper focus of parenting time arrangements: what is best for this particular child in the context of this particular family.

The CBABC *FRA* Working Group recommends that section 70(2) of the Proposed Act be deleted and instead add section 70(2)(b) to the factors in the current section 70(4) of the Proposed Act.

CHAPTER 8: CHILDREN'S PROPERTY

CHAPTER 9: FAMILY PROPERTY

Chapter 8 provides that the Proposed Act will allow small trusts to be managed by a child's guardian without the need for a court order. For larger trusts, the Proposed Act suggests a trust-specific best interests test to govern the court appointment of a trustee.

Chapter 9 suggests that family property move to an excluded property model that involves less judicial discretion, particularly at the initial stage of identifying which assets are subject to division.

While the CBABC *FRA* Working Group does not all agree with it, we recognize that the policy decision has been made to move from a "family purpose" regime to a matrimonial property regime that presumptively divides the global appreciation of assets during the relationship, with some exceptions. Within this regime, however, we see some difficulties and potential inequities, including:

- where there has been an intermingling of family property and excluded property;
- whether increases and decreases in excluded property should be dealt with in the same manner;
- whether evidentiary issues will lead to unnecessary expense (a war of experts);
- the definition of family debts;

- whether using the date of separation as a triggering event will have unexpected consequences; and
- whether common law spouses will be aware of, or have adequate opportunity to prepare for, the new regime.

The new Supreme Court Family Rules, and especially the requirements for joint experts, will likely settle the evidentiary issues, so far as matters going to trial are concerned. For pre-trial negotiation or mediation, the question remains whether the government or other bodies can recommend guidelines or protocols for valuing family property and the difference in value from the time of commencement of the relationship to the time of negotiation. Perhaps this is a question that should be referred to the joint action committee proposed in Chapter 2.

The inclusion of common law spouses in the property regime that applies to married persons will come as a surprise to many common law couples. Some of these couples have previously sought legal advice, prior to the proposed changes in legislation and are relying on the current state of the law in terms of the status of their relationship. For example, some couples would not have commenced cohabitation but for different law applying to their property as compared to married persons.

The Proposed Act encourages common law couples to arrange their affairs by contract. By contrast, many legal practitioners, because of section 120.1 of the

FRA, presently discourage common law couples from engaging in written agreements. The transition between one system to the other is going to be difficult to navigate. For example, one can say that existing common law couples are free to contract into the new regime. But it has to be acknowledged as a practical matter that one or the other of the spouses is likely to be in a position of advantage as a result of the change in law.

The CBABC *FRA* Working Group recommends that the government engage in an extensive educational campaign to educate the public about the changes relating specifically to common law couples.

The CBCBA *FRA* Working Group further recommends that careful attention to the transition rules be made to ensure that one or the other common law partners will not be unreasonably advantaged or disadvantaged.

The Proposed Act recognizes and acknowledges of the existence of many different types of relationships. Because of this, we need to be even more clear regarding the definition of spouse as it applies to the property division regime. For example, the definition of spouse also does not prohibit parties from having multiple spouses. This creates potential complexities in cases where one person may be involved with two or more partners at the same time (polyamorous or polygamist relationships).

This would not be an issue in cases where an individual was married, the marriage ends and that individual commences a common-law relationship. The exclusion of pre-spousal relationship assets would delineate the assets between those two relationships.

If one relationship ended, would the division of assets need to take into consideration the possibility of additional claims on the family property?

The CBABC *FRA* Working Group recommends that if there are policy reasons for limiting the number of spouses in relation to property division, then the Proposed Act should clarify that an individual can only be involved in one marriage-like relationship at a time. Alternatively, the Proposed Act should explicitly contemplate the possibility of division of family property between more than two parties. The CBABC *FRA* Working Group prefers the former, with the definition of marriage like relationship to be made clearer along with the definition of separation.

Section 77 of the Proposed Act provides that the increase in value of excluded property is divided whether or not the excluded property was used for a family purpose or whether there was contribution by the non-owning party. Many clients who enter into marriage agreements or cohabitation agreements have strong views about preserving certain excluded property entirely for themselves. For example, persons whose extended families have intergenerational trusts to preserve wealth

for the family, persons who have received an inheritance, or those with investment interests that will never be mingled with family assets.

The CBABC *FRA* Working Group recommends that the increase in value of an excluded asset should only be subject to possible division if there was contribution towards the assets by the non-owning spouse or a family use of such assets.

Chapter 9 raises the question: how should the law address the intermingling of family and excluded property? Reapportionment addresses this issue under the current law. How do excluded property regimes address it? Candidly, the CBABC *FRA* Working Group is not sure, and it will take some time for lawyers and judges to get familiar with the new rules. Our concern is that either backing out the excluded property from division (e.g. using an inheritance to repair the family home and getting the full value of that contribution before the value or increased value of the home is divided) or, conversely, losing the contribution entirely are both inequitable results. In our view, reapportionment in some fashion is appropriate here.

The CBABC *FRA* Working Group appreciates that this continues the tension between discretion and certainty. But we suggest that some degree of discretion is essential in a subject as important as a family's life savings. Where parties seek to have more certainty, provided they are educated as to the proposed changes and have sufficient time to do so, they may enter into agreements. Such agreements,

provided they are professionally drafted and involve full and informed consent, again ought to be encouraged and respected.

The CBABC *FRA* Working Group recommends that section 81 of the Proposed Act should include the flexibility to address reapportionment based on an intermingling of family and excluded property, considering: (a) the increase in value to the family property from the contribution and (b) the time elapsed since the contribution was made.

The CBABC *FRA* Working Group did agree, however, that a court should be able to consider the decrease in value of excluded property as a factor under section 81 of the Proposed Act.

The CBABC *FRA* Working Group recommends that the decrease in value of an excluded asset can be considered as a factor under section 81 of the Proposed Act.

In our analysis, we ask: why does section 81(2)(c) of the Proposed Act apply only to business interests? We were confused by this. Why distinguish between actions which increase or decrease value generally in section 81(2)(d), and any "direct or indirect contributions, financial or otherwise" in relation to a business? Was this an attempt to re-introduce the indirect contribution through effective household management in the existing section 59(2) of the *FRA*?

We also question why section 81(2)(c) of the Proposed Act should consider any contribution, regardless of whether it affects value. Section 81(2)(d) of the Proposed Act should only acknowledge contributions that "significantly" affect value. The CBABC *FRA* Working Group recommends that section 81(2)(d) of the Proposed Act have the word "significant" removed and delete section 81(2)(c) of the Proposed Act.

Is the definition of family debt appropriate? At first glance, the definition of "family debt" seems overly simplistic. That is because the definition needs to be read with sections 81(2)(j) through (l) of the Proposed Act to make sense. This is not immediately apparent and can lead to confusion.

We are also concerned that confining "family debt" to a period of cohabitation is too restrictive. We can see instances in which what people would reasonably understand is family debt could be incurred either before cohabitation (e.g. wedding expenses) or after (e.g. moving, supporting oneself or a child, maintaining or fixing an asset for sale).

We are also concerned that the proposed exceptions are likely to lead to increased, and largely irrelevant, litigation. In our professional experience, one or both spouses frequently claim they either knew nothing about the debts incurred by the other, or claim they received no benefit from it. The former objection seems irrelevant to us, and the latter point could be captured better.

In our view, the current judge-made definition of family debt is best: a debt incurred by one or both spouses for a family purpose, to support the family or to acquire, maintain or improve family property. No matter the policy reasons for disposing of "family purpose" as a means of identifying family property, it remains the fairest test for identifying family debt.

CBABC *FRA* Working Group recommends that the definition of family debt should be that currently reflected in the case law: a debt incurred by one or both spouses for a family purpose to support the family or to acquire, maintain or improve family property.

The definition of family debt and the factors for allocating responsibility to pay it should be included in the same section or part, and be separate from the factors for dividing property.

The factors should include ability to pay and allocation of assets, if any, to which they may relate.

If the date of separation is a triggering event, should it be defined? While we think the courts should be free to define the date of separation as individual problems arise, we also thought there was no harm in providing a starting point in the legislation along the lines of existing case law. We do have a concern about the unintended consequences of using separation as a trigger for family property rights, especially as regards third party creditors or claimants.

In some relationships, spouses can separate several times, and then reconcile. Should third party interests arise irrevocably from the first separation?

The advantage here of defining the date of separation is that the law can address situations where property rights may not vest absolutely. One obvious situation is where the parties subsequently reconcile. Perhaps there should be a minimum period, to prevent wasting or alienation of property. Our suggestion here is admittedly arbitrary, though commonly used in agreements.

We are not certain whether there could be other situations where a vesting could be postponed or prevented.

CBABC *FRA* Working Group recommends that, the "date the spouses separate" be defined as including where:

- one spouse communicates to the other his or her intention to terminate the relationship; and
- that spouse takes steps to carry out the intention to terminate the marriage-like nature of the relationship; unless
- the spouses subsequently reconcile for a period of not less than 90 days.

Section 82 of the Proposed Act applies to divide or transfer excluded property. The discretion of the courts to allow for a division of excluded property dilutes the operation of the excluded property provisions. This appears contrary to the

overall intention of excluding pre-relationship assets. If excluded property is going to be divided in certain circumstances, then those circumstances should be limited.

The CBABC *FRA* Working Group recommends that, if judicial discretion is to remain in regards to the exclusion of pre-spousal relationship assets, it should be made much more clear as to when this will apply and when it will not.

In line with our concern that there be more clarity as to when excluded property will be divided, another amendment to section 82 of the Proposed Act is needed. It appears that section 82(b)(1) may be included to address long duration relationships. Yet that clause is vague as to what constitutes a long term relationship. Lay persons as well as lawyers and judges differ amongst even themselves as to what is a long term relationship.

The CBABC *FRA* Working Group recommends that, for the sake of clarity, section 82(b)(1) state the duration of the relationship ranges from short, medium, or long-term relationships. For example: zero to 5; 6 to 11; 12 and up – the CBABC *FRA* Working Group is not specifically recommending these ranges.

Another important issue is: should decreases in the value of excluded property be equally divided? In the CBABC *FRA* Working Group, there was disagreement over this. But the majority believed that decreases in the value of excluded property should not be equally divided – at least not as an inflexible rule. There

are risks to owning property. If the owning spouse is solely entitled to all pre-relationship value, he or she should primarily bear the risk of loss in that value. If that value is impaired because of family debt or because of the actions of the non-owning spouse, those considerations are specifically addressed elsewhere, for example in section 81(2)(d) of the Proposed Act.

Section 85(4)(a) of the Proposed Act provides that the Supreme Court may make an order for interim distribution of property. We welcome this section, which makes an interim distribution of property easier than currently. This section, however, appears to require that both parties be assisted by the advance, when most often it is only one spouse, namely the spouse without control of the assets or income that would be assisted by the advance.

The CBABC *FRA* Working Group recommends that section 85(4)(a) should refer to anything that may assist a party or the parties (as opposed to requiring both parties to be assisted) resolve the family law dispute.

Is the definition of common law "spouse" in section 1 of the Proposed Act adequate? We see a problem in the definition of "spouse" in section 1(b)(ii) regarding the formulation of "are together the parents of a child". "Parent" is a defined word itself. "Parent" can include step-parent. The CBABC *FRA* Working Group recommends that this definition should read: "if there is a child born of the relationship or the parties adopt a child together."

The CBABC *FRA* Working Group further recommends that "in a marriage-like relationship of some permanence if there is a child born of the relationship or the parties adopt a child together" be added to section 1(b)(ii) in the definition of spouse.

CHAPTER 10: SUPPORT

Chapter 10 sets out changes to child support in the Proposed Act. The Proposed Act eliminates the use of "maintenance" and replaces it with "support" which is used in the *Divorce Act*. The Proposed Act retains the obligation to support a child as found in the *FRA* but clarifies that the obligation does not continue if a person under 19: becomes a spouse or voluntarily withdraws from his or her parents' or guardians' care.

Obligation of Donors & Surrogates

Section 125 of the Proposed Act is a definition provision. The definition of "parent" in this section does not exclude persons who are "parents" as a result of assisted reproduction agreement under section 36 of the Proposed Act and therefore requires such persons to pay child support under section 126 of the Proposed Act. Potential problems include:

- determining the event which triggers the obligation of the donor/surrogate to pay support; there will not be a separation-type event;
- determining the quantum of support payable where an obligation is found; and
- having the potential chilling effect if a donor/surrogate is required to pay child support; if so, few donors/surrogates will take up the offer of becoming a joint parent.

The CBABC *FRA* Working Group further recommends that the current *FRA* test for step-parent's liability to pay child support (contributing to the support of the child for at least one year with application being brought within one year of last contribution) should apply to non-parent guardians to determine their liability to pay child support. The amount would be determined with reference to section 5 of the CSG.

Who is a Child?

Section 126 of the Proposed Act requires every parent and guardian to support a child. Provisions are not made for the support of underage children who have been compelled to leave home. If child support were payable under such circumstances, a similar multiple-payor scenario arises as with donor/surrogate parents.

The CBABC *FRA* Working Group further recommends that the circumstances under which a minor child is disentitled to support under section 126(2)(b) of the Proposed Act should be clarified to include: (i) a child who has unreasonably withdrawn from the parents' charge or (ii) is living an independent lifestyle.

Child Support Agreements

Section 127 of the Proposed Act permits parties to make an agreement on child support but permits a party to such an agreement to apply for a child support order. Section 19 of the Proposed Act permits the court to set aside agreements respecting children.

There are potential problems. The lack of direction to the court regarding deference to be paid to agreements suggests that such agreements offer little benefits to the payor while giving the recipient an easy route to enforcement. Also, it may discourage parties from settling out of court if settlement has no lasting effect.

The CBABC *FRA* Working Group recommends that section 127 of the Proposed Act be amended to impose the same test to uphold an agreement for child support as applies to a consent order for child support, namely if the court feels it reflects "reasonable arrangements for the support of the child". This would improve the consistency of the proposed legislation since agreements are treated as court orders for enforcement purposes.

The CBABC *FRA* Working Group further recommends that section 19 of the Proposed Act should be referenced at section 127(2) of the Proposed Act.

Child Support Orders & Multiple Payors

Section 128 of the Proposed Act allows the court to make orders for child support against more than one person. One of these persons may be a donor/surrogate parent. At present, the only analogous provisions are those relating to step-parents and for such payors their obligations are presently calculated as:

- paying the full CSG amount independent of the other payor parent;

- paying at a CSG amount determined based on the combined incomes of both payors;
- treating the step-parent's obligation as a top up to the other payor parent; or
- some other formula.

At least three likely problems arise. First, how is the child support amount determined for a donor/surrogate who may have an obligation contemporaneously with another parent? Is the amount paid the full table amount or some lesser amount? Second, is there an obligation to pay to the other two parents while their relationship subsists? Third, when that relationship breaks down, who is entitled to receive child support from the donor/surrogate? Both? The parent with the child's primary residence?

The CBABC *FRA* Working Group recommends that section 5 of the CSG should apply to determine the amount of child support obligations of donor/surrogate parents. The limitation date should also be the same as that which applies to step-parents.

Minor Child not Living with Either Parent

If an adult child is living in the home of a third party (for instance an aunt or grandparent) or on their own (away for school), section 3(2)(b) of the CSG allows the court to ascertain the financial needs of the child and apportion them between the two parents. By contrast, if the child is under 19, the court has no such power,

even when it may seem the best approach, see *Bast v. Dyck* [11] and *Sapergia v. Sapergia*[12].

As it stands, unless the third party sues, one parent would have to sue the other, on the basis that they contribute financially to the child and therefore the child remains in their "charge". But third parties rarely wish to get involved in such matters. Nor may the guideline table amounts be appropriate for one or both parents.

The CBABC FRA Working Group recommends that the British Columbia provincial guidelines be amended to allow the court to apportion between the parents the reasonable costs of a child living in the home of a third party. It would parallel section 3(2)(a) and (b) of the CSG, but without reference to the child's ability to contribute.

Variation upon Additional Evidence of Income

Section 129 of the Proposed Act allows a party to apply to vary a child support order where, apart from a material change in circumstances, there was "evidence of a lack of financial disclosure". There is a vast scope of possible non-disclosure. In most cases there is some lack of disclosure, even if of a wholly trivial nature.

[11] 1997 CanLII 10920 (SK Q.B.)
< http://www.canlii.org/en/sk/skqb/doc/1997/1997canlii10920/1997canlii10920.pdf>.
[12] 1998 CanLII 13942 (SK Q.B.)
< http://www.canlii.org/en/sk/skqb/doc/1998/1998canlii13942/1998canlii13942.pdf >.

The CBABC *FRA* Working Group recommends that section 129(2)(c) of the Proposed Act be amended to stipulate that lack of disclosure must be germane to parties' income and be of "a substantial nature," as required by section 129(2)(b).

Spousal Support: Who is a Spouse?

Section 1 of the Proposed Act extends an entitlement to support to unmarried spouses who have not achieved common-law status, but have managed to have a child together and have lived together in a marriage-like "relationship of some permanence." The potential problem here concerns the vagueness of a "relationship of some permanence."

The CBABC *FRA* Working Group recommends that this definition be amended to provide a minimum period of cohabitation subject to discretion of the court to this effect: "a minimum period of twelve months or a lesser period of cohabitation as may be appropriate in the circumstances".

The CBABC FRA Working Group is also concerned about the effect of the "With Child Support" provisions of the Spousal Support Advisory Guidelines ("SSAG") on short relationships with young children. They have the tendency to increase both the amount and duration of spousal support ranges out of proportion to what the case law would normally allow, perhaps because of the underlying assumption in the SSAG that child rearing responsibilities should outweigh the duty to be self-sufficient, at least until children enter school. Unless the government supports that policy, and we do not, the CBABC FRA Working Group

recommends either that: there be some maximum limit on duration for relationships less than 2 years (perhaps two years itself) or that the Proposed Act make clear what policy considerations pertain in such cases (e.g. the appropriate balance between child rearing responsibilities and the need to be self-sufficient).

Spousal Support & Property Division

Section 132 of the Proposed Act proposes that spousal support should be awarded to the extent that the objectives of a support order have not been met by an order dividing property. Potential problems include whether the property division qualifier applies only to final determinations of support, the effect on final orders where support has been paid on an interim basis for a significant length of time before assets are divided and whether property must be divided before spousal support is contemplated.

The CBABC *FRA* Working Group recommends that section 132 of the Proposed Act be amended to state that section 132(a) to (d) apply to interim orders, and, for final orders, that:

- property must be divided first;
- subsections (a) to (d) should then apply to the extent that these objectives are not met by the division of property and to the extent they have not been met by the payment of support pursuant to an interim order.

Determining Spousal Support

Section 133 of the Proposed Act offers a list of factors to take into account in determining quantum and duration. Section 133(f) has contributions toward household expenses as a factor. Section 133(f) seems to invite litigation in the face of the generally satisfactory nature of the existing case law and the generally confused nature of the public understanding about the effects of repartnering on support obligations/entitlements.

The CBABC *FRA* Working Group recommends that section 133(f) of the Proposed Act be deleted. Alternatively, the subsection should be clear that it creates no obligation on a new friend or partner to support the recipient spouse.

Spousal Support Agreements

Section 134 of the Proposed Act permits parties to make an agreement on spousal support but permits a party to such an agreement to apply for a spousal support order regardless of the agreement. Section 21 of the Proposed Act permits a court to vary an agreement respecting property, debt or spousal support.

The lack of direction to the court regarding deference to be paid to an agreement suggests that such agreements offer little benefits to the payor while giving the recipient an easy route to enforcement. In addition, it may discourage parties from settling out of court if settlement has no lasting effect.

The CBABC *FRA* Working Group recommends that section 134 be amended to impose the same test to vary an agreement for spousal support as applies to an order for spousal support. This would improve the consistency of the proposed legislation since agreements are treated as court orders for enforcement purposes. Section 21 of the Proposed Act should be referenced at section 134(2) of the Proposed Act.

See also our comments on agreements in Chapter 2.

Spousal Misconduct

Section 136 of the Proposed Act says that the court must not consider a spouse's misconduct in making an order for spousal support except where the misconduct aggravates a need for support or affects the payor's ability to pay it. The language is inconsistent with previous references to simple "conduct" (as opposed to misconduct) and may raise questions about the reintroduction of fault.

The CBABC *FRA* Working Group recommends that reference be made to a party's behaviour simply as "conduct" rather than "misconduct."

Variation upon Additional Evidence of Income

Section 137 allows a party to apply to vary a spousal support order where, apart from a material change in circumstances, there was "evidence of a lack of financial disclosure." Potential problems concern the enormous scope of possible non-disclosure. In most cases there is some lack of disclosure, even if of a wholly trivial nature.

The CBABC *FRA* Working Group recommends that section 137(2)(c) of the Proposed Act be amended to stipulate that lack of disclosure must be germane to parties' income or expenses (means and needs) and be of "a substantial nature," as required by section 137(2)(b).

Review of Spousal Support

Section 138 of the Proposed Act provides for review of spousal support by a court. Orders for the review of spousal support often fail to specify what is being reviewed (entitlement, quantum or duration) and what factors should be considered on the review.

The CBABC *FRA* Working Group recommends that a subsection be added after section 138(1) of the Proposed Act to this effect: "a provision for a review may identify the factors to be considered at the review and the subjects to be reviewed at the review."

Parental Support

The CBABC *FRA* Working Group endorses the recommendations in the White Paper regarding parental support.

Reducing or Canceling Arrears

Section 141 of the Proposed Act mirrors the *FRA* which, unlike the test developed by the courts for the cancelation of arrears accumulating pursuant to *Divorce Act* orders, requires a person applying to reduce arrears to prove that it would be "grossly unfair" not to allow the application. The result is this imposes a much high burden on unmarried couples to whom only the *FRA* applies other than married couples who have the choice of legislation. The Proposed Act would seem to apply the same standard to retroactive applications to vary a support obligation versus applications to reduce or cancel arrears where a payor has simply flouted an order. Section 141(3) of the Proposed Act allows the court to reduce interest accumulating on arrears where it has already reduced arrears, but only when it would be "grossly unfair" not to do so.

The CBABC *FRA* Working Group recommends that the current "gross unfairness" test for the reduction or cancelation of arrears should be abandoned and in favour of a test based on the case law interpreting the *Divorce Act*.

The CBABC *FRA* Working Group further recommends that, whether gross unfairness is eliminated from section 141(1) of the Proposed Act or not, it should be eliminated from section 141(3).

The CBABC *FRA* Working Group further recommends that applications to retroactively vary a support obligation be treated separately from applications to reduce or cancel arrears and the same test should apply to applications to retroactively reduce a support order as to applications to retroactively increase a support order. Section 141(1) of the Proposed Act should not apply to retroactive variation applications.

Support & the Payor's Estate

Section 142 of the Proposed Act allows the estate administrator to apply for a variation or termination of support. We question whether the court and the estate administrator should have additional powers here, including perhaps the ability to make an allowance from the estate in lieu of support (which may not be the same – ie less – than a lump sum would be, having regard for competing claims) or to substitute insurance or an annuity.

The CBABC *FRA* Working Group recommends that the Wills and Estates Bar be consulted as to what additional tools would be appropriate here.

The CBABC *FRA* Working Group further recommends that executors be allowed to step into the shoes of the payor and apply to vary or cancel a support order in the family law case on the payor's death, including variation to replace a periodic order with a lump-sum payment.

CHAPTER 12: PROTECTION ORDERS

The CBABC *FRA* Working Group has no comments regarding Chapter 11 at this time.

Chapter 12 proposes that existing restraining orders be replaced with a new protection order.

Existing Legislation

Under the current legislation, restraining orders are also called "K Orders" by the Crown and criminal bar. Restraining orders encompass sections 37, 38, 124 and 126 of the *FRA*. These orders are: no contact, exclusive occupancy and no entry orders. These orders are currently enforced by charges laid under section 128 of the *FRA*, which provides that it is an offence to contravene these provisions under the *Offence Act*.

Under the current legislation, there are three basic situations in which a person may request a protection order: (1) genuine use, as where there is ongoing physical abuse, (2) mistaken understanding as to the effect, so for example if a spouse just wants the other spouse to get a good talking to by the police and does not realize that charges could be laid whether they consented or not and (3) false allegations to get an advantage in family proceedings, whether to get the house or to spoil one parent's chance at substantial time with the child.
As these are often emotional responses of laypersons to difficult and sometimes dangerous situations, it is not anticipated that these will change as a result of the

enactment of new legislation.

Enforcement under the Current Act

The *Offence Act* provides that an offence created under an enactment is punishable on summary conviction (section 2), that there is a general six month limitation period to lay an information (section 3) and that on conviction, the person may be fined up to $2,000, imprisoned for not more than six months or both (section 4).

Offence Act prosecutions are very rare because the Crown rarely approves the charges and the police don't want to investigate them. Under section 25(1) of the *Offence Act*, a person may, on reasonable and probable grounds, lay an information before a judge in respect of persons within the jurisdiction of that judge, relating to the commission of an offence within the meaning of the Act. But in practical fact, the usual practice at court registries is for the Justice of the Peace at the Court Registry to refer a private person to Crown Counsel for the purpose of laying charges, the Crown to refer the person to the RCMP and the RCMP to refer the person to Court Registry. This is of particular concern for lay litigants and sends a clear message to the public that there is no concern for their safety.

Offence Act convictions do not result in a criminal record as they are not convictions under the *Criminal Code*.

Conduct Orders

The Proposed Act divides up orders for the purpose of enforcement into conduct orders and protection orders.

Conduct orders deal with the consequences for breach of orders relating to time with the children, whether it be a denial of time with the child or a failure to exercise time with the child. Section 178 of the Proposed Act sets out the purposes for which conduct orders can be made. Section 179 of the Proposed Act provides that orders that can be made for case management purposes.

Other relevant provisions of the Proposed Act are:

- section 180 property orders (Supreme Court);
- section 181 dispute resolution, counselling and programs;
- section 182 other orders such as restrictions or conditions on communications between parties; and
- section 183 orders relating to frivolous or vexatious applications.

Section 186 of the Proposed Act relates to the enforcement of conduct orders. As remedies, the court may make further conduct orders, draw adverse inferences for noncompliance, order payment of expenses arising out of non-compliance, a fine of up to $5,000 or an amount up to $5,000 for the benefit of the party, spouse or child whose interests were affected by the non-compliance, a finding of contempt (in Supreme Court) or a protection order under Part 9 where there is a failure to comply with an order for restrictions or conditions on communications.

Section 187 of the Proposed Act provides, as an extraordinary remedy, for imprisonment of up to 30 days if no other order will secure the party's compliance.

Protection Orders

The various types of restraining orders under the present *FRA* are replaced by protection orders under the Proposed Act. Protection orders do all the same things as restraining orders do now and protection orders will be an alternative remedy to obtaining a peace bond.

Additionally, there is a specific definition of "family violence" at section 1 of the Proposed Act. This definition operates to list the circumstances in which a court can grant a protection order. Section 143 of the Proposed Act will broaden the types of family members who can ask for protection orders as well.

Protection orders will be available on a stand- alone basis without being connected to other family law proceedings. This is new.

There are a number of very specific considerations that will have to be considered by the court before granting a protection order. These considerations are set out in section 144 of the Proposed Act. Section 146 of the Proposed Act provides that, unless otherwise specified, the standard duration for a protection order is one year.

The protection order has priority over other orders, so that even if there is a conflicting family order allowing contact between parent and child, if a protection order does not build in that contact, the contact is stopped until the protection order can be amended as set out in section 149 of the Proposed Act.

Out of province Canadian orders that are similar to the BC versions can be enforced here in the Province as if they were BC orders without being registered under section 152 of the Proposed Act.

Enforcement of Protection Orders

Rather than being enforced through section 128 of the *FRA*, the protection orders under the Proposed Act will be enforced under section 127 of the *Criminal Code*. Section 127 is the default enforcement mechanism that applies only where there is no other remedy available under the statute.

The major difference is that under the *Criminal Code*, section 127 may be prosecuted on summary conviction or as an indictable offence. A conviction may result in a criminal record for the offender.

A successful *Offence Act* prosecution under the present legislation must prove the offence on the criminal evidence standard. This would not change with a move under the Proposed Act to section 127 of the *Criminal Code* for the purposes of enforcement.

In British Columbia, like *Offence Act* prosecutions, the use of section 127 of the *Criminal Code* is also rare. Section 127 *Criminal Code* prosecutions are used infrequently to plead down more serious offences such as kidnapping, but it may have the advantage of being better understood and perhaps used by the police and Crown as part of their regular criminal process.

Concerns Arising from Proposed Enforcement Provisions for Protection Orders

There are significant concerns with restraining orders that will apply also to protection orders under the Proposed Act.

Mutual restraining orders are commonly made in order to persuade the aggressor spouse to comply. This could expose the non-violent spouse to criminal charges as well, particularly if they are not represented by counsel. This is one area where family lawyers would have to be particularly careful to oppose such mutual orders, particularly given that there may be greater likelihood of prosecution against our clients on these breaches by making it a more clearly criminal process.

A section 127 *Criminal Code* conviction may result in a criminal record which could negatively impact upon a spouse or parent's ability to obtain work or to otherwise provide for the children.

Significant delays presently experienced in the courts may result in an effective lack of enforcement of protection orders in the face of a clear need for it.

The higher burden of proof effectively may render the enforcement process meaningless.

The Proposed Act creates a protection order scheme that changes the current quasi-criminal enforcement process into a fully criminal enforcement process. It is unclear if the enforcement of the new resulting protection orders will be more effective than the existing regime. Court orders under the existing regime are, at best a rare occurrence, particularly in light of current regional disparities in enforcement across the Province.

These orders under the Proposed Act are clearly not meant to replace peace bonds and the like, which will take care of the most serious cases of family violence under the criminal process.

In light of the foregoing, the CBABC *FRA* Working Group recommends that:

- the enforcement mechanisms proposed for conduct orders be adopted for protection orders as well;
- additionally for protection orders, a remedy under section 127 of the *Criminal Code* be considered the last resort option if no other process is effective;
- specifically for protection orders, a fast-track mechanism be implemented to ensure that breaches of protection orders receive a "criminal prosecution-like" priority in the family court, to ensure the safety of children and their parents against others who are the subject of such orders;
- specifically for protection orders, the Proposed Act specifically set out that both levels of court may exercise those remedies, including the remedy to have the police enforce such orders;
- the form used for protection orders may include, in the discretion of the court, an explicit order for police enforcement; and
- a specific provision be added to the Proposed Act that mutual protection orders not be made unless warranted by the actions of each party, whether by consent or not.

CHAPTER 13: COURT JURISDICTION & PROCEDURAL MATTERS

CHAPTER 14: TRANSITION

Chapter 13 provides that that jurisdiction of the Provincial Court and Supreme Court remain essentially the same. The Proposed Act will carry forward jurisdictional and procedural provisions such as: concurrent proceedings, the joining of proceedings, the enforcement of Supreme Court orders in Provincial Court and appeals.

Chapter 14 provides that in general court applications made on or after the effective date of the new Act, whether these are originating applications or subsequent applications, are governed by the new Act.

Provincial Court Jurisdiction & Service *ex Juris*

The Provincial Court plays a significant role in resolving family law issues, especially for self-represented litigants, lower income families and persons in rural or remote locations. The Provincial Court is inexpensive since it has no filing fees and no costs. The Provincial Court is user-friendly using simplified forms and procedure. The Provincial Court has greater access to duty counsel or Family Justice Centre services. The Provincial Court has the primary responsibility for much of the work which commands attendance at family courts: Family Maintenance Enforcement Program, Family Maintenance Program, CFCSA, Interjurisdictional Support Orders ("ISO") and support recalculations. The Provincial Court has concurrent jurisdiction for much of the rest. There are only a handful of reasons why the Provincial Court is not used more than it is:

- it has no jurisdiction over divorce or property;
- it has no *parens patriae* powers and only limited inherent jurisdiction over procedure (e.g. no contempt powers other than for contempt "in the face of the court"); and
- it has no power to serve outside the Province.

There is nothing that can be done about the first regarding no jurisdiction over divorce or property.

Contempt has been remedied in the Act by allowing express statutory power to do that which has been all too often been left to the residual contempt powers in the past: access enforcement and conduct orders.

As for the last, service outside of British Columbia, the case law for this view is many years old and may yet be overturned. It is based on the long held notion that the Provincial Court has no inherent jurisdiction and therefore requires express statutory authority, in an Act or in the Rules of Court, to allow service *ex juris.* Since there is none, the Provincial Court cannot do it.

It is also based on a common law tradition that jurisdiction was founded upon service. If you cannot serve the requisite parties, you have no jurisdiction. This idea ignores even the common law tradition that, in matters involving the status of a person before the court (e.g. committeeship, divorce, guardianship), you did not

lose jurisdiction merely because one or more of the persons who may have an interest in such questions were not also before the court.[13]

The first notion may be out of date since *LLC and Smythe*.[14] The second notion may also be out of touch with modern notions of subject matter and territorial jurisdiction, regulated by conflict of laws principles, as expressed in The Hague Conventions, the *Court Jurisdiction and Proceedings Transfer Act* and Part 3 of the existing *FRA*.

Both ideas are also routinely ignored in *CFCSA* proceedings, where some argue there is express authority in the Act and Rules. We can find none. There are also cases which stretch the continued jurisdiction of proceedings which began in BC long after one or several parties have left the jurisdiction, sometimes to the breaking point.

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[13] In his comprehensive work, Court Jurisdiction, 1989, John W. Horn makes various recommendations for reform, many if not all of which are incorporated in the *Court Jurisdiction and Proceedings Transfer Act*. At common law, he says in most cases the court did assume jurisdiction over a party by serving them within the territory of the court, whether the individual or the subject matter had any real connection to the province. This was for matters *in personam*, where the court is asking to adjudicate rights as between parties, or to get an individual to do, or to refrain from doing a certain thing.

By contrast, in actions *in rem* the court is being asked to determine rights good as against the whole world. This would include rights of ownership of real property situate in the province. He goes on to say, however, that "many actions *in personam* result in the status of a thing or person being changed or established against persons though not joined in the action." (p.4) Such actions include the dissolution of marriage, bankruptcy, the appointment of committees or guardians and adoption (pp.4 and 89). These are also considered judgements *in rem*. As such, service – while necessary to ensure certain affected parties have notice of and an opportunity to participate in the proceedings – is not the foundation of, or necessary to establish the court's jurisdiction.

[14] *L.L.C. v P.G.* [1994] B.C.J. No. 1591; *Smythe v Bourgeois* 2008 BCSC 1847 < http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1847/2008bcsc1847.pdf>.

Nonetheless, there are many judges who believe that where one or more interested parties lie outside the Province, the Provincial Court cannot act. This is not an issue for support cases, since ISO and its counterparts in other jurisdictions are addressing that issue. It remains a problem for persons engaged in custody, access or child protection proceedings, where often-times they are forced to begin again in Supreme Court, after much delay and expense already in the lower court.

The CBABC *FRA* Working Group recommends that the Proposed Act or Rules of Court (for example under the *CFCSA* and Family Rules) specifically authorize the Provincial Court to serve outside British Columbia, in the same manner that the Supreme Court rules allow.

Concurrent Proceedings

On all issues under the *FRA* except those involving property, litigants can proceed in the Supreme Court, the Provincial Court or both at the same time. This can be an advantage, where one court is more accessible, or has more time available or can respond better in case of emergence. It can also allow parties to resolve some issues where they must-such as divorce, property-and leave other issues in the lower court where considerations of access, cost and supportive services make it the more attractive venue. But it can also result in unnecessarily and wasteful duplication of proceedings. Furthermore, it can be contribute to the all too common practice of forcing parties into higher court or multiple proceedings as a means of economic bullying.

At present, section 8 of the *FRA* provides a clumsy traffic light between the two levels of court. Section 8(1) allows a court to consolidate or defer proceedings if an issue in one court (presumably usually the Supreme Court) should be decided before or with an issue or issues in the other court (e.g. the correlation between property and spousal support; or custody and support). Section 8(2) allows the Supreme Court to temporarily join support and custody issues, where a variation of one would lead to a variation of the other. But the case law is confusing and at times contradictory.

Sections 155 to 157 of the Proposed Act are not a substantial improvement. Firstly, section 155 speaks only of application or orders in Supreme Court and how they may effect or preclude applications in Provincial Court – but not the converse. Secondly, section 156 continues the current limitation in section 8(1) of the *FRA*, that consolidation must be limited to situations in which one issue should be heard together with another. It does not allow either court to consolidate just for the sake of neatness, or to end an unnecessary duplication of proceedings. Likewise, section 157 of the Proposed Act essentially continues section 8(2) of the *FRA*, but without adding much if anything.

As things stand, where legal counsel are involved, such problems are often resolved by agreement. They discontinue the one proceeding or consolidate orders in related subjects (like custody, guardianship, access, support) into one or the other court. But where agreement is not possible, or where the parties do not

fully understand the issues or consequences, the situation can remain a hopeless muddle and the courts have limited power to do anything about it themselves.

The CBABC *FRA* Working Group recommends that a provision be added to the Proposed Act to allow judges to:

- decline jurisdiction and consolidate their action into the other court;
- accept jurisdiction and consolidate the other court action into theirs; or
- temporarily assume jurisdiction over one or more issues and then remit the matter back and have any decision made be considered as a decision of the original court.

For the benefit of laypersons, the Proposed Act should also provide that nothing in the above provisions either (a) confers a jurisdiction on the Provincial Court that it does not otherwise have or (b) allows a judge of one court to review a decision of the other which the second court would not or could not do itself.

The CBABC *FRA* Working Group further recommends that the government review the Province to find those areas where one court is being routinely preferred only because of lack of time or judicial resources in the other and to redress such discrepancies.

Parentage Orders in Provincial Court

Section 154 of the Proposed Act limits the Provincial Court's power to make parentage orders "except as necessary to determine another family matter over which the Provincial Court has jurisdiction". One area in which there may be confusion over the court's jurisdiction is section 4.1 of the *Vital Statistics Act*. Section 4.1 of the *Vital Statistics Act* allows the "court" (undefined) to change the surname of a child (a) upon making an order as to parentage and (b) where it considers that the child's best interests support it.

At present, there is nothing to oust the Provincial Court's jurisdiction to make such orders – but neither is there any section that specifically allows it. We think this jurisdiction should be specifically authorized.

The CBABC *FRA* Working Group further recommends that restrictions in section 154 of the Proposed Act be removed, to clarify that the Provincial Court can make orders as to parentage generally or clarify that it can make orders under section 4.1 of the *Vital Statistics Act*.

SUMMARY OF RECOMMENDATIONS

As a result of our submissions above, the recommendations of the CBABC *FRA* Working Group are summarized below.

The CBABC *FRA* Working Group recommends that:

CHAPTER 2: NON-COURT DISPUTE RESOLUTION & AGREEMENTS

Resources and Education

1. the government assist and encourage the BC Mediator Roster Society to hold regional practicums for training family mediators, using cases from the local family courts;

2. assist and encourage the BC Parenting Coordinators Roster Society and the BC Hear the Child Society to expand their services regionally;

3. rethink existing governmental and non-governmental resources to expand Justice Access Centres-like, or virtual Justice Access Centres entry points broadly across the province;

4. encourage consultation and co-operation across all judicial districts to alleviate regional disparities in services and wait times.

Competency

5. anyone who, for a fee, assists in the negotiation or drafting of family law agreements be considered a "family dispute resolution professional" and be subject to regulation;

6. family dispute resolution professionals should be required to advise potential clients of the need for legal information and advice about the rights and obligations in the Proposed Act and to warn that agreements which are entered into in ignorance of such rights or obligations risk being set aside or ignored by the courts;

Inter-Disciplinary Cooperation

7. the government form or encourage the formation of an action committee comprised of representatives from the:

    - Bench;
    - Bar;
    - BC Mediator Roster Society;
    - BC Hear the Child Society;
    - BC Parenting Coordinators Roster Society;
    - Family Justice Centre/Justice Access Centre;
    - psychiatrists from the College of Physicians and Surgeons of British Columbia;
    - College of Psychologists of British Columbia; and
    - British Columbia Association of Clinical Counsellors;

8. this action committee establish a working relationship on matters of family justice and to define standards and protocols for interviewing children, providing reports and acting as mediators or parenting coordinators;

Family Law Arbitration

9. section 190 of the Proposed Act be amended as follows:

"Dispute" includes a family law dispute;

"Family law dispute" has the same meaning as "family law case" in the Supreme Court Family Rules;

10. section 23(2) of the Proposed Act be amended:

(2) Despite subsection (1) and any agreement of the parties to a family law dispute, an arbitrator must adjudicate the matter before the arbitrator by reference to the *Family Law Act*, the *Divorce Act* and the common law;

11. section 23(3) of the Proposed Act be eliminated and in its place a provision that would permit a party to seek an application to stay the award pending appeal;

12. the Proposed Act be amended to ensure deference to an arbitral award as follows:

A party may appeal to the court an arbitration award with respect to a family law dispute where there has been a material error of fact or of mixed fact and law;

Agreements

13. the procedures for and consequences from filing agreements in Provincial or Supreme Court be the same;

14. sections 22, 127, 134 and subsection 17(5) of the Proposed Act be amended to read simply that either courts may vary agreements, filed or unfiled, so long as they do so in accordance with this Part;

15. in addition to the recommendations made by the CBABC *FRA* Working Group in its submission on support, there is a need to link these provisions, so persons seeking to vary support arrangements contained in an agreement know to consider this part as well;

16. sections 129 and 154 of the Proposed Act should also apply to agreements, unless and to the extent specifically addressed in the agreement;

17. standard for review in section 18 of the Proposed Act should include some concept of informed consent or decision making;

CHAPTER 3: LEGAL PARENTAGE

18. regarding surrogacy and genetic donors, if third or fourth parties make themselves parents, these parties must do so by contractual agreement. These agreements make plain the financial responsibilities for the parenting involved in a surrogate or donor relationship. Since these situations are so new, and the various permutations so hard to imagine, yet alone regulate, questions of the duration and amount of this financial responsibility are best left to the courts to determine;

CHAPTER 5: GUARDIANSHIP

19. in place of the test of residency, the use of the phrase in the relocation section, the concept of "ongoing relationship" with the child in section 68(2)(b)of the Proposed Act;

20. section 45(2) read: "despite subsection (1), if a parent of a child does not have any ongoing relationship with a child, then they are not guardians of that child.";

21. regarding “parenting time”:

- either parenting time be simply defined as time with a parent; or
- that the phrase “whether the child is in the guardian’s presence, or out of the child’s presence, with the guardian’s express or implied consent” be deleted; or
- that it be separately provided that “parenting time” does not include time when the child is in the presence of any other parent;

22. the qualifier “that may significantly affect the child” be deleted from section 46(1)(m) of the Proposed Act;

23. parenting responsibilities expressly include: (a) the right to apply for and administer a passport for a child and (b) the authority to permit international travel, or travel with a bus, rail, ship, or air carrier;

CHAPTER 6: WHEN ORDERS & AGREEMENTS FOR TIME WITH A CHILD ARE NOT RESPECTED

24. section 64(4)(c) of the Proposed Act be amended to replace “a doctor’s note” with “evidence from a neutral professional”;

CHAPTER 7: RELOCATION

25. in the case of a fear of continuing family violence, the guardian who is proposing to move should have to ask for an exemption from the court and that application could be made *ex parte;*

26. section 70(2) of the Proposed Act be deleted and instead add section 70(2)(b) to the factors in the current section 70(4) of the Proposed Act;

CHAPTER 8: CHILDREN'S PROPERTY

CHAPTER 9: FAMILY PROPERTY

27. the government engage in an extensive educational campaign to educate the public about the changes relating specifically to common law couples;

28. careful attention by government to the transition rules be made to ensure that one or the other common law partners will not be unreasonably advantaged or disadvantaged;

29. if there are policy reasons for limiting the number of spouses in relation to property division, then the Proposed Act should clarify that an individual can only be involved in one marriage-like relationship at a time. Alternatively, the Proposed Act should explicitly contemplate the possibility of division of family property between more than two parties. The CBABC *FRA* Working Group prefers the former, with the definition of marriage like relationship to be made clearer along with the definition of separation;

30. the increase in value of an excluded asset should only be subject to possible division if there was contribution towards the assets by the non-owning spouse or a family use of such assets;

31. section 81 of the Proposed Act should include the flexibility to address reapportionment based on an intermingling of family and excluded property, considering: (a) the increase in value to the family property from the contribution, and (b) the time elapsed since the contribution was made;

32. the decrease in value of an excluded asset can be considered as a factor under section 81 of the Proposed Act;

33. section 81(2)(d) of the Proposed Act have the word “significant” removed and delete section 81(2)(c) of the Proposed Act;

34. the definition of family debt should be that currently reflected in the case law: a debt incurred by one or both spouses for a family purpose, to support the family or to acquire, maintain or improve family property. The definition of family debt and the factors for allocating responsibility to pay it should be included in the same section or part, and be separate from the factors for dividing property. The factors should include ability to pay and allocation of assets, if any, to which they may relate;

35. the "date the spouses separate" be defined as including where:

- one spouse communicates to the other his or her intention to terminate the relationship; and
- that spouse takes steps to carry out the intention to terminate the marriage-like nature of the relationship; unless
- the spouses subsequently reconcile for a period of not less than 90 days;

36. if judicial discretion is to remain in regards to the exclusion of pre-spousal relationship assets, it should be made much more clear in the Proposed Act as to when this will apply and when it will not;

37. section 82(b)(1) of the Proposed Act explicitly state the duration of the relationship ranges from short, medium, or long-term relationships. For example: zero to 5; 6 to 11; 12 and up – the CBABC *FRA* Working Group is not specifically recommending these ranges;

38. section 85(4)(a) of the Proposed Act should refer to anything that may assist a party or the parties (as opposed to requiring both parties to be assisted) resolve the family law dispute;

39. the definition of "spouse" in section 1(b)(ii) of the Proposed Act should read: "if there is a child born of the relationship or the parties adopt a child together.";

40. the definition of "spouse" in section 1(b)(ii) of the Proposed Act should be added "in a marriage-like relationship of some permanence if there is a child born of the relationship or the parties adopt a child together";

CHAPTER 10: SUPPORT

Obligation of Donors & Surrogates

41. the current *FRA* test for step-parent's liability to pay child support (contributing to the support of the child for at least one year with application being brought within one year of last contribution) should apply to non-parent guardians to determine their liability to pay child support. The amount would be determined with reference to section 5 of the CSG;

Who is a Child?

42. the circumstances under which a minor child is disentitled to support under section 126(2)(b) of the Proposed Act should be clarified to include: (i) a child who has unreasonably withdrawn from the parents' charge, or (ii) is living an independent lifestyle;

43. the amount of support payable should be determined on the same basis as for children over the age of majority in section 3(2)(b) of the CSG as: "the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.";

Child Support Agreements

44. section 127 of the Proposed Act be amended to impose the same test to vary an agreement for child support as applies to an order for child support. This would improve the consistency of the proposed legislation since agreements are treated as court orders for enforcement purposes;

45. section 19 of the Proposed Act should be referenced at section 127(2) of the Proposed Act;

Child Support Orders & Multiple Payors

46. section 5 of the CSG should apply to determine the amount of child support obligations of donor/surrogate parents. The limitation date should also be the same as that which applies to step-parents;

Minor Child not Living with Either Parent

47. the British Columbia provincial guidelines be amended to allow the court to apportion between the parents the reasonable costs of a child living in the home of a third party. It would parallel section 3(2)(a) and (b) of the CSG, but without reference to the child's ability to contribute;

Variation upon Additional Evidence of Income

48. section 129(2)(c) of the Proposed Act be amended to stipulate that lack of disclosure must be germane to parties' income and be of "a substantial nature," as required by section 129(2)(b);

Spousal Support: Who is a Spouse?

49. the definition o f "spouse: in the section 1 of the Proposed Act be amended to provide a minimum period of cohabitation subject to discretion of the court to this effect: "a minimum period of twelve months or a lesser period of cohabitation as may be appropriate in the circumstances";

50. there be some maximum limit on duration for relationships less than 2 years (perhaps two years itself) or that the Proposed Act make clear what policy considerations pertain in such cases (e.g. the appropriate balance between child rearing responsibilities and the need to be self-sufficient);

Spousal Support & Property Division

51. section 132 of the Proposed Act be amended to state that section 132(a) to (d) apply to interim orders, and, for final orders, that:

    - property must be divided first;
    - subsections (a) to (d) should then apply to the extent that these objectives are not met by the division of property and to the extent they have not been met by the payment of support pursuant to an interim order;

Determining Spousal Support

52. section 133(f) of the Proposed Act be deleted. Alternatively, the subsection should be clear that it creates no obligation on a new friend or partner to support the recipient spouse;

Spousal Support Agreements

53. section 134 be amended to impose the same test to vary an agreement for spousal support as applies to an order for spousal support. This would improve the consistency of the proposed legislation since agreements are treated as court orders for enforcement purposes. Section 21 of the Proposed Act should be referenced at section 134(2) of the Proposed Act;

Spousal Misconduct

54. reference in section 136 of the Proposed Act be made to a party's behaviour simply as "conduct" rather than "misconduct.";

Variation upon Additional Evidence of Income

55. section 137(2)(c) of the Proposed Act be amended to stipulate that lack of disclosure must be germane to parties' income or expenses (means and needs), and be of "a substantial nature," as required by section 137(2)(b);

Review of Spousal Support

56. a subsection be added after section 138(1) of the Proposed Act to this effect: “a provision for a review may identify the factors to be considered at the review and the subjects to be reviewed at the review.”;

Parental Support

57. the recommendations in the White Paper regarding parental support area are endorsed;

Reducing or Canceling Arrears

58. the current “gross unfairness” test for the reduction or cancelation of arrears should be abandoned and in favour of a test based on the case law interpreting the *Divorce Act;*

59. whether gross unfairness is eliminated from section 141(1) of the Proposed Act or not, it should be eliminated from section 141(3);

60. that applications to retroactively vary a support obligation be treated separately from applications to reduce or cancel arrears and the same test should apply to applications to retroactively reduce a support order as to applications to retroactively increase a support order. Section 141(1) of the Proposed Act should not apply to retroactive variation applications;

Support & the Payor's Estate

61. the Wills and Estates Bar be consulted as to what additional tools would be appropriate regarding support and the payor's estate;

62. executors be allowed to step into the shoes of the payor and apply to vary or cancel a support order in the family law case on the payor's death, including variation to replace a periodic order with a lump-sum payment;

CHAPTER 12: PROTECTION ORDERS

63. the enforcement mechanisms proposed for conduct orders be adopted for protection orders as well;

64. additionally for protection orders, a remedy under section 127 of the *Criminal Code* be considered the last resort option if no other process is effective;

65. specifically for protection orders, a fast-track mechanism be implemented to ensure that breaches of protection orders receive a "criminal prosecution-like" priority in the family court, to ensure the safety of children and their parents against others who are the subject of such orders;

66. specifically for protection orders, the Proposed Act specifically set out that both levels of court may exercise those remedies, including the remedy to have the police enforce such orders;

67. the form used for protection orders may include, in the discretion of the court, an explicit order for police enforcement;

68. a specific provision be added to the Proposed Act that mutual protection orders not be made unless warranted by the actions of each party, whether by consent or not;

CHAPTER 13: COURT JURISDICTION & PROCEDURAL MATTERS

CHAPTER 14: TRANSITION

Provincial Court Jurisdiction & Service *ex Juris*

69. the Proposed Act or Rules of Court (for example under the *CFCSA* and Family Rules) specifically authorize the Provincial Court to serve outside British Columbia, in the same manner that the Supreme Court rules allow;

Concurrent Proceedings

70. at a provision be added to the Proposed Act to allow judges to:

- decline jurisdiction and consolidate their action into the other court;
- accept jurisdiction and consolidate the other court action into theirs; or
- temporarily assume jurisdiction over one or more issues and then remit the matter back and have any decision made be considered as a decision of the original court;

71. for the benefit of laypersons, the Proposed Act should also provide that nothing in the above provisions either (a) confers a jurisdiction on the Provincial Court that it does not otherwise have or (b) allows a judge of one court to review a decision of the other which the second court would not or could not do itself;

72. the government review the Province to find those areas where one court is being routinely preferred only because of lack of time or judicial resources in the other and to redress such discrepancies;

Parentage orders in Provincial Court

73. restrictions in section 154 of the Proposed Act be removed, to clarify that the Provincial Court can make orders as to parentage generally or clarify that it can make orders under section 4.1 of the *Vital Statistics Act* regarding a child's name.

CONCLUSION

The CBABC *FRA* Working Group would welcome the opportunity to provide further discussion with the Attorney General respecting these extensive and detailed submissions.

Any communications can be directed to:

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