The New *Divorce Act*
– A Primer

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With special thanks to David Dundee who presented on this topic to CBABC members on June 17, 2020

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VANCOUVER ISLAND FAMILY LAW SECTION MEETING

THE CANADIAN BAR ASSOCIATION
British Columbia Branch

BILL C-78

- Amends the *Divorce Act* – first substantial amendment in over 20 years and in effect as of March 1, 2021
- Amends the *Family Orders and Agreements Enforcement Assistance Act (FOAEAA)*
- Amends the *Garnishment, Attachment and Diversion of Pensions Act (GAPDA)*
- Implements the 1996 Hague Convention (re: International Child Abduction) and 2007 Hague Convention (re: International Recovery of Child Support and Other Forms of Maintenance)

CHANGES TO THE *FAMILY ORDERS AND AGREEMENTS ENFORCEMENT ASSISTANCE ACT (FOAEAA)*

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THE *FAMILY ORDERS AND AGREEMENTS ENFORCEMENT ASSISTANCE ACT (FOAEAA)*

- Allows release of income information from federal information banks to a court or provincial enforcement services to establish, vary or enforce support (s7, ss10 - 13 and s22(2))
- Also allows release of income information to child support services. (s15, s15.1 and s22(2))
  - A court officer applies to the federal Justice Department
  - The DOJ searches all relevant federal data bases and provides the prescribed disclosure, under seal
  - The court authorizes certain persons or programs access to the information.

THE *FAMILY ORDERS AND AGREEMENTS ENFORCEMENT ASSISTANCE ACT (cont)*

- Will allow more streamlined access to information for police, who no longer must have charges pending in order to get that information.
- Will also allow for the garnishment of federal funds to satisfy:
  - an order or judgment for the reimbursement of expenses for the denial of or non-exercise of parenting time (s23(1) and s24)
  - an order, judgment or agreement respecting the payment of expenses related to the exercise of parenting time after a relocation (s23(1) and s24)

CHANGES TO THE *GARNISHMENT, ATTACHMENT AND PENSION DIVERSION ACT (GAPDA)*

THE *GARNISHMENT, ATTACHMENT AND PENSION DIVERSION ACT (GAPDA)*

- Makes federal garnishment more streamlined for persons and for family maintenance enforcement programs by allowing for the interception of wages payable by the federal government to current federal employees to satisfy civil debts, and interception of pension benefits payable to former federal employees to satisfy support debts.
- Eliminates certain procedural hurdles for FMEs, including the requirement to have a certified copy of a court order and the current need to have a court certify arrears before pensions may be diverted.
- Confirms family support debts have priority over all other claims except Crown debts.

IMPLEMENTATION OF THE 1996 AND 2007 HAGUE CONVENTIONS

FEDERAL IMPLEMENTATION OF THE 1996 HAGUE CONVENTION

- The 1996 Convention deals with international enforcement of parenting or contact orders
- Canada may ratify the Convention once it is implemented federally and in at least one province or territory
- Similar rules are set out for non-Convention countries (ex. jurisdiction based on habitual residence, rules about recognition) (ss6.3 and 22.1)

FEDERAL IMPLEMENTATION OF THE 2007 HAGUE CONVENTION

- The 2007 Convention deals with international enforcement of child support orders
- A Federal Central Authority and Provincial & Territorial Central Authorities would be responsible for ensuring that Convention obligations are met
- Canada may ratify the Convention once it is implemented federally & in at least one province or territory

THE DIVORCE ACT – What is new?

- New parenting terminology
- Best interests factors
- New and expanded duties – parties; legal advisors; courts
- Family violence – defined and prioritized
- Conduct orders
- Rules for relocation
- New language for conflict of laws
- Official language protection
- REMO out; ISO in
- Transition

NEW TERMINOLOGY UNDER THE NEW DIVORCE ACT

NO MORE “CUSTODY” OR “ACCESS”

“... virtually every jurisdiction that has modernized its law in this area in the last decade or so has recognized that terms like "custody" and "access" are not appropriate. ... They have unfortunate connotations. They're not concepts that capture what parents are actually doing or should be doing, and they are concepts that tend to alienate one parent or indeed both parents.”

(Nicholas Bala, Meeting #6) – quoted in ***For The Sake of the Children,*** SJCA Committee Report, December 1998

NEW TERMINOLOGY

- Replaces terms like “custody” and “access” with terminology that focuses on parent’s responsibilities for their children.
- New terms include:
  - “parenting orders”
  - “decision-making responsibility”
  - “parenting time” “contact time”
  - “significant extracurricular activities”
  - “day-to-day decisions”
  - “parenting plan”

PARENTING ORDERS

- Deal with decision-making responsibility and parenting time
- Can also deal with conduct orders, relocation, supervision and “any other matter the court considers appropriate”
- Parenting orders can be made in respect of
  - a spouse
  - a parent of the child
  - a person who stands in the place of a parent, or intends to
- If the applicant is not a spouse, they must ask leave to be added as a party, as now

DECISION-MAKING RESPONSIBILITY

- Means the responsibility for making significant decisions about a child's well-being, including in respect of:
  (a) health;
  (b) education;
  (c) culture, language, religion and spirituality; and
  (d) significant extra-curricular activities

- Decision-making can now be sole, joint or split between parties.

- What are "significant extra curricular activities"? It isn't defined, but the context suggests these are activities both spouses will be involved in and therefore will have to discuss and agree on

PARENTING TIME

- Means the time that a child of the marriage spends in the care of a person, whether the child is physically with that person during the entire time.

- Unless the court orders otherwise, a person who has parenting time has *exclusive authority*, during that time, to make *day-to-day decisions* affecting the child.

- Does not apply to persons having contact.

CONTACT TIME

- The court shall consider all relevant factors, including *whether contact between the applicant and the child could otherwise occur*, for example during the parenting time of another persons
- Contact orders can provide for in-person visits or communication and can contain any term or restriction the court considers appropriate.
- No counterpart to s16.1(6) – family dispute resolution processes. There is for supervision and prohibition on removal of the child from a geographical area.
- When an application for a contact order is made, the Court can also vary the parenting order that is in place.

PARENTING PLAN

- Means a *documen*t, or part, that refers to parenting time, decision-making responsibility or contact to which the parties agree (ss1; 16.6(2))

- No form specified, except "document" implies in writing.

- The court *shall include* in a parenting or contact order the terms of any parenting plan submitted by the parties *unless it is not in the best interests of the child to do so* (s16.6(1))

- Plans, short of "parenting plans", shall be *considered* (s16(3)(g))

BEST INTERESTS TEST UNDER THE NEW DIVORCE ACT

BEST INTERESTS OF THE CHILD

- ***Only Consideration (section 16(1))***
  - Continues the best interests of the child as the *only consideration* for ALL parenting decisions to be made
  - Consistent with B.C.'s *Family Law Act* (s. 37) and *the UN Convention on the Rights of the Child* (art.3)

- ***Primary factor (section 16(2))***
  - "the child's physical, emotional and psychological safety, security and well-being" is the "primary consideration"
  - The same as *FLA section 37(3)*

BEST INTERESTS FACTORS (Section 16(3))

- Like the FLA, the DA now provides a non-exhaustive list of factors in determining the Child's best interests in relation to their well-being:
  - Child's needs
  - Relationship with each spouse, siblings, family members
  - Parent's willingness to support other parent's relationship with child
  - History of care
  - Cultural, linguistic, religious and spiritual upbringing
  - Future plans for child's care (parenting plans etc.)
  - Each spouse's ability and willingness to care for child
  - Ability and willingness to communicate and cooperate
  - Family violence
  - Child's views

BEST INTEREST FACTORS (Cont.)

- As well, the Courts must consider:
  - Any family violence and its impact on:
    - The ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
    - The appropriateness of making an order that would require people to cooperate on issues affecting the child.

    (section 16(4) provides guidance on what to take into account when considering the impact of family violence)

  - Any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

- Like the FLA, no single factor in the DA is determinative, and the importance that each factor plays will depend on the child.

FAMILY VIOLENCE UNDER THE NEW DIVORCE ACT

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FAMILY VIOLENCE

"Family violence means any conduct, whether or not the conduct constitutes a criminal offence, by a family member against a family member, that is *violent, threatening, a pattern of coercive and controlling behavior or that causes a family member to fear for their safety or that of another person* – and in the case of a child, *the direct or indirect exposure to such conduct*..."

FAMILY MEMBER

"Family member includes a *member of the household* of a child of the marriage or of a *spouse or former spouse* as well as a *dating partner* of a spouse or former spouse *who participates in the activities of the household*."

FAMILY VIOLENCE (*cont*)

Family Violence includes:

(a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;

(b) sexual abuse;

(c) threats to kill or cause bodily harm to any person;

(d) harassment, including stalking;

(e) the failure to provide the necessaries of life;

(f) psychological abuse;

(g) financial abuse;

(h) threats to kill or harm an animal or damage property; and

(i) the killing or harming of an animal or the damaging of property.

ASSESSING FAMILY VIOLENCE

The court shall take the following into account (section 16(4) :

(a) the nature, seriousness and frequency of the family violence and when it occurred;

(b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;

(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;

(d) the physical, emotional and psychological harm or risk of harm to the child;

ASSESSING FAMILY VIOLENCE (*cont*)

(e) any compromise to the safety of the child or other family member;

(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;

(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and

(h) any other relevant factor.

RDS PROJECT: NEW FAMILY VIOLENCE SCREENING TOOL FOR LEGAL ADVISORS

- The Government of Canada has an ongoing research project creating a new Family Violence tool to be used by lawyers to assist in screening for family violence. Lawyers from throughout Canada are testing out the tool (including the speakers), by trying out the screening tool between March and May 2021.
- Once finalized, this toolkit will be available to lawyers throughout Canada and in both official languages.
- Most provinces don't have the requirement of section 8 of the *Family Law Act* (B.C.), which requires family dispute resolution professionals to assess whether family violence is present and how it may adversely affect the safety of a party and the ability to negotiate a fair settlement
- The tentative name for the screening tool is **HELP Toolkit for Family Law Legal Advisers: Identify & Respond to Family Violence**

HELP (Cont.)

- **HELP** gets its name from:
  - **H** – Have an initial discussion about family violence
  - **E** – Explore immediate risks and safety concerns
  - **L** – Learn more about the family violence to help you determine what to recommend to your client
  - **P** – Promote safety throughout the family law case

Once released generally, Justice Canada will also be offering training on its use.

BIOC CRITERIA FOR FAMILY VIOLENCE CASES

- The court must give *primary consideration* to the child's physical, emotional and psychological safety, security and well-being (s. 16(2))

- The court must consider whether family violence may affect
  - The *ability and willingness* of a person to care for the child;
  - The *appropriateness* of any order that would require persons *to cooperate* on issues affecting the child (s. 16(3)(j))

BIOC CRITERIA FOR FAMILY VIOLENCE (*cont*)

- The court must consider any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child (s. 16(3)(k))

- The court has a duty to consider the following, unless it would clearly not be appropriate to do so:
  (a) a civil protection order or proceeding;
  (b) a child protection order or proceeding; or
  (c) an order or proceeding of a criminal nature. (s. 7.8(2))

FAMILY VIOLENCE – Remedies?

- Limitations on decision-making responsibility, parenting time or contact
- Provisions for supervised parenting time and transfers (ss 16.1(8) and 16.5(7))
- NO provision for protection orders
- BUT, provisions for conduct-type parenting orders:
  - Communications (s. 16.1(4)(c))
  - Any other matter the court considers appropriate (s. 16.1(5))
  - General terms and conditions (s. 16.1(6))
  - Directing parties to access family dispute resolution processes (s. 16.1(6)

- Justice Canada's Fact Sheet on Divorce and Family Violence: https://www.justice.gc.ca/eng/fl-df/fsdfv-fidvf.html (online training course on Family Violence coming soon)

NO PRESUMPTIONS

- Confirms that there are no presumptions about parenting arrangements

- Parliament defeated (Bill C-560) or failed to bring up (Bill C-422, Bill S-202) several private members' bills that contained presumptions of shared parenting, shared parenting time or shared decision-making

- CBA's National Family Section provided a loud, and effective voice against them:
  - Bill C-560 – ***In The Interests of Children*** (May, 2014)
  - Bill S-202 – ***Shared Parenting Act*** (December, 2017)

NO PRESUMPTIONS (Cont.)

- While the new Act does not adopt any presumptions, it does not specifically refute them, as does the *Family Law Act* (FLA s. 40(4))

- Past conduct only taken into account if relevant to the exercise of parenting time, decision-making responsibility or contact with the child (s. 16(5)).

- The "*Maximum time*" marginal note has been replaced with "*Parenting time consistent with best interests of child*" after a significant push back by the CBA's National Family Law Section (s. 16(6))

RELOCATION UNDER THE NEW DIVORCE ACT

RELOCATION

- The changes to the Divorce Act have three key aspects when it comes to changes in residence and relocation:

1. Requirement of notice of a proposed change of residence or relocation
2. Additional best interests factors that apply in relocation cases
3. Burdens of proof that apply in relocation cases

DEFINITION OF "RELOCATION"

"***relocation***" means a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility — or who has a pending application for a parenting order — that is likely to have a *significant impact on the child's relationship with*

(a) a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or

(b) a person who has contact with the child under a contact order

RELOCATION – What is familiar to us in B.C.?

- The need for notice of relocation (s. 16.9(1));
- The definition of "relocation" is substantially the same;
- The notice period is 60 days (s. 16.9(2));
- The notice must contain a proposal for continued contact between the child and the non-relocating spouse (*ibid*);
- The time to object is 30 days (s. 16.91);
- If a notice of objection is given or an application to prevent the move is made within that time, it falls to the court to approve or prohibit the relocation. If not, the relocating spouse may move according to the terms of the notice, unless an order already prohibits the move (s. 16.91);

RELOCATION – What is familiar? (*cont*)

- Before the court decides, the parties must try to resolve the issue out of court (s. 7.3);
- There are shifting burdens of proof, depending on the amount of time the parties spend with the child (s. 16.93);
- The burdens only arise where there is an existing order or agreement (s. 16.93);
- The relocating spouse may make an ex parte application to dispense with notice in cases involving family violence (s. 16.9(3));
- In making its analysis, the court cannot consider the "double bind" question: whether the relocating spouse would move without the child (s. 16.92(2)).

RELOCATION – What is new?

- To object, you do not need to file an application to prevent the move; you may simply send a notice of objection (s. 16.91);
- The notice and objection forms are prescribed;
- There is no threshold test (*see below*);
- The amount of time the relocating spouse must spend with the child before the other spouse bears the burden of proof is different; and
- The notice provisions apply to persons who have contact also (s. 16.96).

RELOCATION - EXISTING ORDER OR AGREEMENT

- Is an interim order an "order"?
  - *K.W. v L.H.* (BCCA) says … maybe
  - In most cases, it will not, BUT

    "Arguably, such an order may create legitimate expectations about existing arrangements, particularly if the order has remained in effect for an extended period of time. "

- Under s. 16.94, the court may depart from the legislated burdens in s. 16.93, if the parenting order is an interim order

RELOCATION - NOTICE OF RELOCATION

- Mandatory: any person who has a Court Order under the Divorce Act with respect to parenting time or decision-making responsibility (s. 16.9) – or contact (s. 16.96) (Note: no Court Order, no notice requirement under the DA)
- At least 60 days' notice just like the FLA notice requirements (s. 16.9(1))
- Must be in writing and must contain (s. 16.9(2))
  - Date and place of move
  - A proposal for parenting after the move
  - Any other information required by the regulations
- Is in prescribed form

RELOCATION – NOTICE OF RELOCATION

- Notice to any persons having parenting time, decision-making responsibilities, or contact (ss. 16.9 and 16.96)
- Consequences of giving notice of relocation: free to move on date in notice if:
  - court authorizes; or
  - no objection/application; and
  - no order prohibiting (s. 16.91(1))
- Objection: within 30 days, in prescribed form, *or* court application (s. 16.9(1)(b))

RELOCATION - NOTICE (*cont*)

- Consequence of not giving notice – one of the factors the court can consider (s. 16.92(1)(d))

- ***Exceptions***
  - Court may excuse or modify notice requirements (s. 16.9(3))
  - Including where there is a risk of family violence
  - Application may be made *ex parte* (s. 16.9(4))

RELOCATION - ADDITIONAL B.I. FACTORS

- ***The court shall consider*** (s. 16.92(1))

  (a) the *reasons* for the relocation;

  (b) the *impact* of the relocation on the child;

  (c) the amount of time spent with and *the level of involvement in the child's life of each person affected*;

  (d) whether the person who intends to relocate the child *complied with any applicable notice requirement* in the Act, a provincial family law legislation, order, arbitral award, or agreement

RELOCATION - ADDITIONAL B.I. FACTORS (*cont*)

(e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;

(f) the reasonableness of the proposal of the person who intends to relocate; and

(g) whether each person has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

RELOCATION - BURDENS OF PROOF (s. 16.93)

- If a person proposing to move with the child has the "*vast majority of time*" with the child, the burden lies with the other person (s. 16.93(1)).
- If the parties share "*substantially equal time*", the burden of proof lies with the person proposing to relocate with the child (s. 16.93(2)).
- In all other cases, the parties share the burden of proof (s. 16.93(3)).

Note: Court may decide not to apply ss. 16.93(1) and (2) when making an interim order (s. 16.94). As well, if the parties are not in compliance with a parenting order then the burdens are shared.

RELOCATION - THE DOUBLE-BIND QUESTION

- Codifies the Double Bind Question:

The court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate (s. 16.92(2))

RELOCATION - "VAST MAJORITY OF TIME"

- Both Professor Bala and Thompson feel the "vast majority of time" is over 85%.
- Professor Bala notes that the social science literature considers "shared parenting" as 25% or better.
- Professor Thompson also thinks 75 – 85% is reasonable, but personally pegs it at 80% or better:

  The fundamental premise is that the parent with ''the vast majority of the time" is the predominant primary caregiver of the child, the central figure in the child's life, the parent whose presence and care is critical to the child's well-being.

RELOCATION – "SUBSTANTIALLY EQUAL TIME"

- Both Professor Bala and Thompson feel "substantially equal time" should be in the range of 40% to 50%
- BUT, both note BC has two different views
  - One says the range is 40 – 50%
    - *DAM v EGM* 2014 BCSC 2019; *Hefter v Hefter* 2016 BCSC 1504
  - The other holds the range is more flexible
    - *CBM v BDG* 2014 BCSC 780:
    - Approving *HDM v SWT* 2013 BCSC 1863, which adopted a "holistic approach to the assessment of parenting time suggesting the determination is not a simple matter of calculation" (para 145)

RELOCATION - THE THRESHOLD TEST - FLA s69(4)

- Professor Thompson points out that in BC there aren't really two burdens of proof. Before a primary resident parent can take advantage, they must establish
  - That they *are* the primary resident parent
  - That they are acting in *good faith*; and
  - That they have made or are making *reasonable and workable arrangements* for the continuation of parenting time with the non-relocating guardian
- This, he says, was intended to be an easy threshold to meet but has in practice resulted in BC going from a relatively pro-move province to one of the most anti-move provinces.

THE "INVOLVEMENT" FACTOR – s. 16.92(1)(c)

But as Professor Thompson adds, the new Act has an additional factor that may keep the burden on the relocating spouse:

> " Note that it is not confined to ''time", but also includes ''level of involvement in the child's life", which makes this factor more about ''care" and other aspects of the relationship. Unlike the presumptive time measures, clause (c) is clearly intended to be qualitative in its assessment of parental roles. Thus, even if parenting time were to fall short of ''substantially equal time", this factor may militate strongly against allowing a relocation." (p248)

OTHER RELOCATION QUESTIONS

Travel costs: explicit authority to attach terms – s. 16.95

- Proof of *undue hardship* is still required if reducing child support below table amount – but is an order regarding travel costs a reduction in child support?

Change of circumstances:

- relocation "deemed" to be "change" – unless unauthorized (ss. 17.52 and 17.53)

What new forms are required for relocation under the amended Divorce Act?

- In February 2021, new Supreme Court forms were released to take into account the changes in the new Divorce Act. The following forms have been updated and will be required to be used for filings by February 26, 2021:
  - Form F3 – Notice of Family Claim
  - Form F4 – Response to Family Claim
  - Form F5 – Counterclaim
  - Form F8 – Financial Statement

  Some examples of the changes:
  - NOFC – addition in Schedule 4 of "occupation rent" claim and specific place to list excluded property and the grounds for that claim, new area in Schedule 1 to seek to deal with a written agreement,
  - Response – space to explain why you disagree with any of the terms sought by the Claimant

NEW CONFLICT OF LAWS RULES IN PARENTING CASES UNDER THE NEW DIVORCE ACT

NEW CONFLICT OF LAWS RULES IN PARENTING CASES

The general rule for determining jurisdiction is the place of "**habitual residence**" of the child

- To transfer a parenting claim, the "substantial connection" test becomes the "habitual residence" test (s. 6), in line with the 1996 Convention
- The exception is where the court is already seized of a pending application (s. 6.1)

CONFLICT OF LAWS RULES (*cont*)

For removal/retention cases, a court would have to transfer parenting applications to the court of habitual residence, except under limited circumstances

- consent/acquiescence,
- undue delay or
- the other court is better placed (s.6.2)

NEW DUTIES OF LEGAL ADVISORS AND PARTIES UNDER THE NEW DIVORCE ACT

NEW AND EXPANDED DUTIES

For parties:

- To act in the best interests of the child (s7.1)
- To protect any child from conflict (s7.2)
- To try to resolve issues through a family dispute resolution process (s7.4)
- To provide complete and accurate financial information (s.7.5)
- To comply with court orders (s7.5)
- To certify that they are ware of these duties (s7.7)

NEW AND EXPANDED DUTIES (*cont*)

For legal advisors:

- To encourage out-of-court settlement avenues and to confirm they have advised the parties of their duties (s7.7)

For the court:

- To make inquiries and to coordinate related criminal, child protection and civil protection proceedings (s7.8)

OTHER CHANGES UNDER THE NEW DIVORCE ACT

OTHER CHANGES UNDER NEW DA

- Like that of the FLA, the new Divorce Act specifically encourages the use of family dispute resolution processes and other family justice services to resolve outstanding family law matters.

Justice Canada Fact Sheet on Family Dispute Resolution:
https://www.justice.gc.ca/eng/fl-df/fsfdr-firdf.html

- The Divorce Act also promotes the use of provincial child support calculation or recalculation services in variations of child support – however, B.C. is one of the provinces that does not have this service in place (ss. 25.01 and 25.1).

OTHER CHANGES UNDER NEW DA (Cont.)

- Streamlining inter-jurisdictional processes for establishing and varying support through an application-based procedure, which is intended to be simpler, faster and less costly.
  - Meaning: REMO is dead; ISO is here to stay– provincially, federally, and soon internationally, with the implementation of the 2007 Convention (ss. 18 and 19)

- You may now seek a divorce in either official language (s. 22.1)

- The amendment to the Divorce Act does not itself constitute a material change for which to base a variation application (section 35.7)

TRANSITION AND PARAMOUNTCY

TRANSITION

- An action commenced but not yet decided continues under the new Act (s. 35.3)
- A person who had custody now has decision-making responsibility and parenting time, and a spouse who had access has parenting time (s. 35.4)
- If a person who is not a spouse has an order for access, that person now has contact (s. 35.5)
- The coming onto force of the new Act does not in itself constitute a material change of circumstances (s. 35.7)

WHEN YOU HAVE PLED BOTH THE *FAMILY LAW ACT* (B.C.) AND THE NEW *DIVORCE ACT*…

Make sure to use the ***appropriate terminology***

- Eg "parental responsibilities" from FLA for "decision-making responsibility" under the new DA
- One example is actually in the Supreme Court Family Picklist, at A5:

  The PARTYNAME and the PARTYNAME will share *joint custody* of the child(ren), pursuant to the Joyce model as follows: 1. In the event of the death of a *guardian*, the surviving *guardian*(s) will be the only *guardian*(s) of the child; … *[should be "parent" or "party" and "shall have sole custody of the child"]*

WHEN YOU HAVE PLED BOTH (*cont*)

Pick one, when you draft or speak to an order

> [19] I digress from my analysis to note that the lack of clarity as to which statute and which provisions govern a proceeding is a common problem in family cases. These are often difficult choices to make, but it is incumbent on the parties to be clear from the start whether they are seeking relief under the provincial *Family Law Act*, S.B.C. 2011, c. 25, or the federal *Divorce Act*, and to specify in any order obtained under which Act the order is made: *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403 (CanLII) at para. 15

Sandy v Sandy, 2018 BCCA 182

WHEN YOU HAVE PLED BOTH (*cont*)

- Remember, if you don't say, it is presumed to be under the *Divorce Act* – *Yu v Jordan*, 2012 BCCA 367
- But what if the terminology is incompatible with the *Divorce Act?*

> [53] …In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, *the language of the order itself*, and the circumstances in which the order was granted.

Additional Useful Resources

- Justice Canada – Information for Professionals (includes documents, training courses, live webinars and forms): https://www.justice.gc.ca/eng/fl-df/cfl-mdf/prof.html

- Justice Canada has also indicated that they have a Relocation Fact Sheet and Relocation Training Courses coming soon.