

## An introduction to the new Family Law Act, RSBC 2011: What are the major changes?

In November 2011, the Provincial Legislature of British Columbia passed the *Family Law Act*. The current legislation, the *Family Relations Act*, has been in place since April 1, 1978 and the new Act reflects many of the changes in society that have occurred since 1978.

The new Act has not yet been proclaimed and thus made effective; it will not be proclaimed until some time in 2013. This article will give you a basic overview of the changes that are coming in 2013. While it is impossible to go through all of the details of the Act in this article, I will focus on the major changes. **Much more emphasis is placed on mediation, collaborative law, and other forms of dispute resolution in the new Act in an effort to keep people out of the court system.** The *Family Law Act* has been drafted in a way that makes resolutions out of court the preferred method of resolving family disputes and **makes court the last option.**

**PARENTAGE:** The Act attempts for the first time to set out the details of “parentage” and includes definitions of who are the parents in cases of assisted reproduction and surrogacy. It also provides that in certain cases, there may be more than two parents.

**PARENTING:** The Act does away with the words custody and access, and attempts to define who are the guardians of the child. Only a guardian has **parental responsibilities** and **parenting time** and those responsibilities and time can be allocated between guardians if there is more than one. There is no presumption that if two parents separate they shall have equal parenting time.

The only test in determining **parenting arrangements** (the term for parental responsibilities and parenting time) between guardians is the **best interests of the child**, and for the first time the Act attempts to set out the circumstances which must be considered in determining those interests. A court must look at all of the children’s needs and circumstances including health and emotional well-being, the child’s views, the nature and strength of relationships between the child and significant others, history, the need for stability, the ability of guardians to exercise parental responsibilities, the impact of family violence, and whether or not the guardians can co-operate on issues respecting the child.

People who are not guardians will not have parental responsibilities or parenting time but may apply for **contact** orders. This would include grandparents who seek court ordered time with the child or other parties who have been involved in the child’s life.

**RELOCATION OF A GUARDIAN:** The legislation deals specifically with the issue of what happens when one guardian wishes to move from the area where they have been living. The legislation sets out that the reasons for the move must be considered along with the best interests of the child.

**ENFORCEMENT:** For the first time the legislation includes a provision that a person who is entitled under an agreement or an order for **parenting time** or **contact with the child** may apply to enforce that order or agreement. The Act provides **penalties for those who wrongfully deny contact or parenting time** and further provides that if the denial of contact or parenting time was not wrongful, then the person who did so with good reason will not be punished. The example that comes to mind is the situation where a child is too sick to move to another house in which case the denial of contact may be deemed reasonable.

In dealing with children, the legislation makes it clear that the views of the child can be made available and allows a court to appoint a person to assess the needs of the child or the views of the child. The Act also provides that a Parenting Coordinator may be appointed to deal with high conflict custody cases and make some of the decisions around parenting time and contact that may be impossible for the guardians to determine for themselves.

**PROPERTY:** One of the major changes in the new legislation has to do with the division of property. The Act includes as spouses anyone who has lived in a marriage-like relationship for two years or is legally married. This is a major change and puts BC in the forefront of granting property rights to “common law spouses”. Currently, common law spouses must demonstrate that they assisted in some way with the acquisition or maintenance of an asset in order to qualify for an interest in the property if their name is not on title.

The division of property under the new Act is a different regime than currently in place in British Columbia and envisions dividing all property equally between the spouses except for excluded property. **Excluded property** includes property acquired before the relationship began, gifts or inheritances, damages for personal injury, and discretionary trusts to which the spouse did not contribute.

What this effectively means is that the spouses will equally divide the property that is acquired during their relationship, including the increase in value on property owned before the relationship. For example, if the wife owned a house at the time of the marriage which was worth \$400,000 and at the end of the relationship that house is worth \$500,000 (assuming no increase in the debt against it) the spouses would share equally \$100,000 – the increase in the value of the property.

For the first time the legislation also **defines family debt** and provides that unless the Court order says otherwise, any debt incurred during the relationship or afterward for the purpose of maintaining family property, should be shared equally between the spouses. The legislation also provides that the court may make an order for an **interim distribution** of family property if required to provide money to fund family dispute resolution or a court application.

The court may still order that property be divided unequally if it would be “significantly unfair” to divide property and family debt, equally. In determining whether the equal division is substantially unfair, the court can also determine whether or not there is sufficient income to properly provide for spousal support and if there is not, can change the percentage of the division. At present, the test is only if the equal division would be “unfair”, so we could assume that the addition of the word “significantly” will make this more difficult to challenge an equal division.

**AGREEMENTS:** In keeping with the desire to have people resolve their disputes out of Court, the legislation encourages people to make agreements with respect to their property, money and debt. The court can only change the terms of a written agreement if:

- a. one of the parties failed to disclose significant property or debts;
- b. one person took advantage of the other person’s vulnerability;
- c. one spouse did not understand the nature and consequences of the agreement,  
or
- d. any other circumstance that would cause that part of the contract to be voidable at common law.

The legislation also changes the test to determine whether an agreement is valid from “unfair” to “significantly unfair” and the court will only be able to vary agreements if the agreement is significantly unfair. We will have to wait until this provision is first interpreted by the Courts to see how different “significantly unfair” is to “unfair”.

**OTHER COURT ORDERS:** For the first time the legislation has provided that the court can say who has to pay for various reports to assist the court – for example, reports about the best interests of the child or the views of the child. The court has the power to order disclosure of assets and to fine people for failing to properly disclose all of their assets and debts.

If someone has become a regular litigant in the court, and makes applications without merit, the court may make an order prohibiting them from bringing further applications and may make orders fining a person for their behaviour. The court can also order that one of the parties must participate in dispute resolution or for the first time, order that someone must attend counseling or other specified services or programs. The court can also allocate the costs for those. The court can set restrictions on communications between spouses and can make all forms of interim orders to stabilize the situation while waiting for a trial.

**CHILD SUPPORT:** Child support will still be payable by guardians and parents. The Child Support Guidelines (the Federal tables in force since 1997) will continue to apply. The one change that the new legislation brings is with respect to step-parents. A step-parent will not have a duty to provide support for a child unless he or she has contributed to the support of the child for **at least one year** and his or her duty will be **secondary** to that of the child’s parents’ and guardians and the amount ordered will only be dependent on the standard of living being experienced by the child during the time they lived with the step-parent.

**SPOUSAL SUPPORT:** With respect to spousal support, the Act has not changed substantially except in two respects: there is a provision that the court must not consider the conduct of the spouse except if that conduct prolongs or aggravates the need for spousal support or effects the ability to provide spousal support.

More importantly, a provision has been added that the court may order that spousal support and child support may continue after the payor’s death. That provision has not existed previously. This means that the payor’s estate may have to pay child or spousal support long after the payor’s death.

**CHILDREN’S PROPERTY:** For the first time the legislation provides that a court may order that a child’s property may be delivered to that child if the guardians and parents cannot agree as to who keeps the child’s belongings and property.

**PROTECTION FROM FAMILY VIOLENCE:** The legislation also has specific provisions that provide protection from family violence and provide for various protection orders and enforcement that can be made.

**TRANSITION TO THE NEW ACT:** The legislation has transition provisions which provide that if someone has **custody and guardianship** under the current legislation or agreement, under the new Act they become a **guardian and have parenting responsibilities and parenting time**. If someone only has **access** under the current legislation they will not be a guardian but will have **contact with the child**.

If a property action has been started under the current *Family Relations Act*, it will continue under the *Family Relations Act* unless the parties agree otherwise, and then the *Family Law Act* can apply.

Many of the changes in the *Family Law Act* mirror those in other jurisdictions. In particular, Alberta has introduced parenting time and parenting responsibilities in a similar fashion to what is proposed in British Columbia. It is hoped that the exclusion of the terms “custody” and “access” will deter people from fighting about those possessory terms respecting children. We will be looking to the law as it has emerged in Alberta for direction on how those terms will be used here.

With respect to property, the Province is well ahead of most other jurisdictions by recognizing the *needs* of unmarried people who live together for more than two years. These parties will now have recourse to the legislation to resolve their issues, where as before they had to meet a complicated legal test to establish an interest in property.

However, the Act also recognizes that many people, married or ‘common law’, will want to determine their own division of assets and the Act encourages them to enter into agreements which if not “substantially unfair” will allow the spouses control over their futures. These agreements are what we commonly refer to as marriage contracts, prenuptial contracts or cohabitation contracts.

This article is only a very brief overview of the proposed changes to the Act and I caution that no one should rely on it without receiving specific legal advice based on their own circumstances. Many of the new issues will not be clear until the courts have had the opportunity to review them.

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