



# Splitting Up

## The Yukon Law on Separation

**A guide for married and common-law couples**

THIRD EDITION



Yukon Public Legal Education Association



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## Contents

Read this first	ix
<b>Chapter 1 Introduction</b>	<b>1</b>
1.1 Background	1
1.2 Who is this book for?	2
1.3 What topics does this book cover?	2
1.4 Limitations of this book	2
<b>Chapter 2 Family Law</b>	<b>3</b>
2.1 Overview of family law	3
2.1.1 Caution: The law can change	4
2.2 Legislation	4
2.2.1 Canadian legislation	4
2.2.2 Yukon legislation	4
2.3 Case law	5
2.4 Rules and procedures	6
2.4.1 The Rules of Court are not the law	7
2.5 Separation	7
2.5.1 What formal separation processes are available?	8
2.5.2 Why does the separation date matter?	8
2.5.3 Common-law couples	8
2.6 Divorce	8
2.6.1 Grounds for divorce	9
2.6.2 Reconciliation: If you try to get back together	9
2.6.3 Starting the process	9
2.6.4 You need the piece of paper	10
2.7 What laws apply?	10
<b>Chapter 3 Who can help?</b>	<b>11</b>
3.1 Introduction	11
3.2 If you go to court without a lawyer	12
3.3 Getting legal information	12
3.4 Lawyers	14
3.4.1 Conflicts of interest	14
3.4.2 Legal Aid	14
3.4.3 Your first meeting with a lawyer	16
3.4.4 Hiring a lawyer	16
3.4.5 Instructing your lawyer	18
3.4.6 If you're unhappy with your lawyer	18
3.5 Mediators	18
3.5.1 The mediation process	19
3.6 Government programs	20
3.6.1 The Maintenance Enforcement Program (MEP)	20
3.6.2 The Family Justice Office	20
3.7 Community support	20

<b>Chapter 4 Custody and access</b>	<b>21</b>
4.1 What are the issues?	21
4.2 Custody	22
4.2.1 Sole custody	24
4.2.1.1 Agreements	24
4.2.1.2 Consent orders	25
4.2.1.3 Court order	25
4.2.2 Joint (shared) custody	25
4.2.3 Split custody	25
4.2.4 What if both parents want custody?	26
4.2.5 What is interim custody?	26
4.3 Access	26
4.3.1 Unspecified access	27
4.3.2 Specified access	27
4.3.3 Supervised access	27
4.3.4 How is access arranged?	27
4.3.4.1 Agreement	27
4.3.4.2 Consent order	28
4.3.4.3 Court order	28
4.4 Guardianship	28
4.5 Parenting agreements	28
4.6 Court orders for custody and access	30
4.6.1 Best interests of the child	30
4.6.2 Orders for interim custody	32
4.7 Changing custody and access	32
4.7.1 When can an order be changed?	33
4.7.2 What if the custodial parent moves?	34
4.7.3 Can a judge's order be appealed?	34
4.8 Enforcement	34
4.8.1 Is a parenting agreement enforceable?	34
4.8.2 What if a judge's order is ignored?	34
4.8.3 Is it possible to refuse access?	35
4.8.4 Leaving the Yukon	35
4.8.5 Abduction is a criminal offence	36
What the courts have said	37
<b>Chapter 5 Child support</b>	<b>38</b>
5.1 What is child support?	38
5.1.1 How is child support arranged?	39
5.2 How much child support?	40
Step 1 Which guidelines apply?	41
Step 2 How many kids and for which kids?	41
Step 3 Which parent receives child support?	41
Step 4 What tables to use	42
Step 5 What annual income?	42
Step 6 Finding the table amount	44
Step 7 Special expenses	44
Step 8 Undue hardship	45

5.3	Agreements for child support	46
5.3.1	Can we register our agreement with the court?	47
5.3.2	Can we agree to ignore child support payments?	47
5.3.3	What if I'm feeling pressured into an agreement?	47
5.3.4	Do payments have to be monthly?	47
5.4	Court orders for child support	48
5.4.1	What if the other parent says he or she won't pay?	48
5.5	Changing child support	48
5.6	Enforcement	49
5.6.1	What if the agreement or court order is ignored?	50
5.6.2	What if the paying parent leaves the Yukon?	50
5.6.3	What if the paying parent leaves the Yukon after a court order?	50
5.6.4	What if I have a support order from somewhere else?	51
5.6.5	What if I think the receiving parent is wasting the money?	51
5.6.6	What if a parent withholds income information?	51
	What the courts have said	52

## **Chapter 6 Spousal support** **54**

6.1	What is spousal support?	54
6.1.1	Terminology	55
6.1.2	Steps in determining spousal support	55
6.1.3	How is spousal support arranged?	55
6.1.3.1	Agreement	55
6.1.3.2	Consent order	55
6.1.3.3	Court order	55
6.2	Who is entitled to spousal support?	56
6.2.1	Are common-law partners entitled to receive support?	57
6.2.2	Spousal support for divorces	57
6.2.3	Spousal support for separations and common-law relationships	57
6.2.4	Other factors	58
6.3	How much spousal support?	59
6.3.1	Spousal support advisory guidelines	59
6.3.1.1	Without child support	60
6.3.1.2	With child support	60
6.4	Duration and form of spousal support	60
6.4.1	Periodic payments	60
6.4.2	Lump-sum payments	61
6.5	Agreements for spousal support	61
6.6	Court orders for spousal support	61
6.6.1	What if the paying spouse leaves the Yukon before the support claim?	62
6.7	Changing spousal support	63
6.8	Enforcement	63
6.8.1	What if the spousal support order or agreement is ignored?	63
6.8.2	What if the paying spouse leaves the Yukon after a court order?	64
	What the courts have said	65

<b>Chapter 7 Dividing property</b>	<b>67</b>
7.1 Introduction	67
7.1.1 Property law	68
7.2 Equal division of family assets	68
7.3 What are family assets?	69
7.4 Placing a value on family assets	70
7.5 The family home	70
7.5.1 Who lives in the family home after separation?	71
7.5.2 What if one spouse dies before the couple separates?	72
7.6 If unequal division of family assets is more fair	73
7.7 Non-family assets	73
7.8 How to deal with debts	74
7.9 Property division for common-law couples	75
7.9.1 Separate ownership of property	75
7.9.2 Constructive trust	75
7.10 Agreements and court orders	76
7.11 Enforcement	77
What the courts have said	77
<b>Chapter 8 Agreements</b>	<b>79</b>
8.1 Introduction	79
8.1.1 Put the agreement in writing	80
8.2 Do we need an agreement?	80
8.2.1 Is a separation or parenting agreement binding?	81
8.2.1.1 The agreement must be entered into voluntarily	81
8.2.1.2 No contract is enforceable if it was brought about by fraud	81
8.2.1.3 If the arrangements aren't in the best interests of the children	82
8.2.1.4 If a parent's circumstances change	82
8.2.2 Should a lawyer write your agreement?	82
8.3 What goes in a separation agreement?	82
8.4 What goes in a parenting agreement?	83
8.5 Sample agreements	84
<b>Chapter 9 Contacts and resources</b>	<b>85</b>
9.1 Immediate help	85
9.2 Legal information and support	86
9.3 Family law resources	87
9.3.1 Child Support Guidelines and Tables	87
9.3.2 Divorce information	88
9.3.3 Maintenance Enforcement Program (MEP)	88
9.3.4 Interjurisdictional Support Orders (ISO)	88
9.3.5 Representing yourself in court	88
9.3.6 Mediation	89
9.4 Counselling and support services	89
<b>Glossary</b>	<b>91</b>

## Read this first

The general information about the law in this book has limitations. Since each person's situation is unique, it's always advisable to get some personal legal advice at the time of separation. Before you make any final decisions — especially before you sign any agreements about yourself, your children or your property — you should consult a lawyer who works in the area of family law to make sure that you understand how the law applies to you.

This book explains the law as it stood at the time of publication (Spring 2007). The law tends to change a lot, through changes in legislation and judges' decisions. This is another reason to check with a lawyer before making any important decisions based on general legal information.

Check the glossary at the end of the book if you want to know the meaning of a particular term.

The word "spouse" in this book usually refers to someone who is legally married. The word "partner" refers to a person who was living common-law and not legally married at the time of separation. The exception to this is in chapter 6 where the term "spousal support" may also refer to support for a common-law partner.



# 1. Introduction

This chapter covers the following topics	
1.1 Background	1.3 What topics does this book cover?
1.2 Who is this book for?	1.4 Limitations of this book

## 1.1 Background

When you are part of a couple, and you split up, it's usually a stressful and overwhelming time. Not only do you have to deal with all the practical logistics of reorganizing your lives, but you're usually dealing with a lot of emotions too. It's likely that at least one person has moved, or is moving, and is probably getting settled in a new home. Everyone is feeling stressed.

Your children have a lot of extra needs right now and might be acting out of character. Almost certainly they are feeling stressed by the changes in their family life. You probably don't feel that you have the energy needed to deal with their extra needs. Yet you know that somehow you and your spouse or partner will have to do what's best for them.

You or your spouse or partner may be feeling financially stressed too. Splitting up disrupts your finances. You may have to deal with issues such as who will pay the mortgage or the line of credit or the credit card bills — not to mention the phone and electricity bills. And you'll have to figure out who gets what.

All in all, it might not seem as though it's the ideal time to be learning a whole new subject area such as family law, or the ideal time to be filling out detailed and sometimes complicated forms. You may not have any choice, however. This book can help make the process a bit easier by describing what issues you might need to deal with, who can help and what your rights and responsibilities are.

This book is written for couples — both married and unmarried — who have separated or who are considering separation and/or divorce. The hope is that this publication will help you better understand the law that applies to your situation and that it will assist you in working with lawyers, the courts, mediators and government agencies.

## 1.2 Who is this book for?

This book describes the laws that apply in three different scenarios:

1. a legally married couple who are separating but have no immediate plans to divorce;
2. a legally married couple who are separating and planning a divorce;
3. a never-married couple who are separating, including people who have a child together but who have never lived together.

Most of the issues discussed in this book apply to both same-sex couples and opposite-sex couples. However, family law regarding same-sex couples is not yet settled at the time of this book's publication. Same-sex couples should seek legal advice specific to their situation.

## 1.3 What topics does this book cover?

Most couples who are recently separated have several things to sort out. The law can help with some of the practical things that make splitting up and divorce so hard. The law can also provide guidelines for couples to reach a settlement that's fair to both of them and in the best interests of their children. This book is intended to help with both immediate and long-term planning. It describes the general law and some of the procedures that may apply when a couple separates:

- parental responsibilities, including custody and access (Chapter 4);
- child support, including payments (Chapter 5);
- spousal support payments (Chapter 6); and
- property division (Chapter 7).

## 1.4 Limitations of this book

This book provides general information about some of the legal aspects of splitting up and getting divorced. It tries to provide information about the most common issues that the average couple faces. Every person's situation is unique in some way, however. Before you sign any agreements or make any final decisions about your financial situation, your children or your property, you should consult with a lawyer knowledgeable in family law to make sure you understand how the law applies to you. You really should get legal advice specific to your situation because this book can't substitute for professional advice that's tailored to your own situation. Splitting up and/or getting divorced can affect many aspects of your life, including taxes, inheritances, pension or insurance proceeds, and even your name. Those issues are not covered in this book. If you or your spouse or partner have a business, you need to see a lawyer. The law that applies to your situation is outside the scope of this book.

### Important

A family breakdown is usually a very difficult time. The process can cause a lot of stress, anger and pain. Sometimes, it can even bring out a previously unknown side of people. This can include violent and irrational behaviour.

Seek help immediately if you have any concerns about violence or irrational behaviour from your spouse or partner or their family, or if you're being threatened, abused or pressured by anyone. If you have any concern that you might become violent, or that you might be acting irrationally, you should also seek help.

You can call any of these places for help. Contact numbers are listed in Chapter 9.

- Police (911)
- Victim Services/Family Violence Prevention Unit
- Local Transition House (for women only, 24 hours a day, 7 days a week; provides shelter for women and children fleeing abusive or violent situations)
- Law Line: a service of the Yukon Public Legal Education Association (YPLEA)
- Yukon Family Services Association: provides confidential counselling
- First Nations Court Worker
- Trusted elder or your minister/priest

## 2. Family Law

This chapter covers the following topics	
2.1 Overview of family law	2.5 Separation
2.2 Legislation	2.6 Divorce
2.3 Case law	2.7 What laws apply?
2.4 Rules and procedures	

### 2.1 Overview of family law

Canada has two levels of government that can pass laws dealing with family matters. Both the federal government in Ottawa and the Yukon government in Whitehorse have passed laws covering the issues that come up when couples separate and/or divorce.

Federal legislation is the same throughout Canada and it applies throughout Canada. Provincial and territorial legislation generally only applies within that province or territory. Different provinces and territories may have different laws. This means, for example, that a law passed by the Alberta legislature doesn't apply in the Yukon. Likewise, a law passed by the Yukon legislature doesn't apply in Alberta or any other province or territory.

The rules of law that apply to splitting up in the Yukon are found in three places:

- Canadian legislation (passed by the Parliament of Canada in Ottawa);
- Yukon legislation (passed by the Yukon Legislature in Whitehorse); and
- Case law (decisions made by judges in previous cases).

#### Common misunderstandings

- We're automatically common-law if we've lived together for six months.
- Common-law separations are treated exactly the same as divorces.
- We have to get legally separated.
- If we've been separated for a long time, I can remarry (even if we never got divorced).
- If we've already been separated for many years we don't need to get a legal divorce.

### 2.1.1 Caution: The law can change

This book explains the law as it stands at the time of publication (Spring 2007). The law tends to change a lot, both through changes in legislation and through judges' decisions. This is another important reason to check with a lawyer before making any important decisions based on the general legal information given in this book. The information here may be outdated by the time you read it!

## 2.2 Legislation

### 2.2.1 Canadian legislation

The Parliament of Canada has passed a law, called the *Divorce Act*, which deals with most of the rights and responsibilities that are involved when a legally married couple divorces. For example, the *Divorce Act* covers spousal support and parental issues such as custody, access and financial support for children.

However, the *Divorce Act* does not cover the division of a married couple's property. Since there is no other federal law dealing specifically with family property division, the rules that apply to a divorcing couple's division of property are found in Yukon legislation (see section 2.2.2).

When the *Divorce Act* applies to a couple's situation, any Yukon legislation dealing with the same issues that are covered in the *Divorce Act* doesn't apply. This is because the federal legislation trumps the Yukon legislation — in other words, the federal law takes over.

Canada's *Divorce Act* doesn't apply at all to common-law couples. The principles of law setting out the rights and responsibilities of couples who have never married are set out in Yukon legislation, or in decisions made by judges in previous cases (the common law).

### 2.2.2 Yukon legislation

The Yukon legislature has passed two important laws dealing with family law matters:

- the *Family Property and Support Act* and
- the *Children's Act*.

These two Yukon laws cover all the issues facing a married couple who have separated but aren't yet planning to divorce. The Yukon *Family Property and Support Act* sets out rules about the family home, the division of family property and belongings, support payments for a child or a spouse and what you have to do to make your separation agreement binding. Part 2 of the Yukon *Children's Act* sets out rules dealing with a parent's rights and responsibilities regarding custody and access, both before and after a separation.

The rules about support payments for children or a spouse that are set out in the *Family Property and Support Act* only apply to married couples who are splitting up until proceedings are started under the *Divorce Act* (when someone files a Petition for Divorce). This is because of paramountcy. Once somebody has started proceedings under the *Divorce Act*, the provisions of this federal Act take precedence over the Yukon Act.

#### Pension plans

While Canada's *Divorce Act* does not cover property division, other federal laws can affect the division of property between both married and unmarried couples. For example, at the time of this book's publication (Spring 2007), federal laws cover the division of most pensions in the Yukon since most Yukon pension plans are regulated by the federal government. That isn't true in other places in Canada, and it may not stay true in the Yukon. Federal law also covers the division of Canada Pension Plan benefits. The division of pensions is outside the scope of what this book covers, however. If you have questions, consult a lawyer.

Similarly, Part 2 of the Yukon *Children's Act* deals with the rights and responsibilities of married couples relating to their children before and after a separation. This Yukon law only applies until someone starts proceedings under the *Divorce Act* by filing a Petition for Divorce. Then the provisions of the *Divorce Act* take precedence.

These two Yukon laws also cover some of the issues facing common-law couples who are splitting up such as parental rights and responsibilities and support for children and spouses. For common-law parents, Part 2 of the Yukon *Children's Act* is the legislation governing parental rights and responsibilities and the *Family Property and Support Act* covers child support obligations. The *Family Property and Support Act* also governs spousal support obligations between common-law couples who are splitting up. However, the rules about the family home and the division of family property set out in the *Family Property and Support Act* only apply to married couples (separating or divorcing). They don't apply to common-law couples at all.

The rules about how common-law couples deal with property division when they split up are mostly found in case law (previous judicial decisions) and in any agreements those couples have made between themselves.

### 2.3 Case law

Legislation sets out general principles. Judges must then figure out how to apply those general principles to the specific cases that come before them. The general principles set out in legislation don't always cover every possible issue that might arise in real life. Judges sometimes need to make and apply their own more specific rules and principles as they decide how to resolve the disputes put before them.

In addition, sometimes the general principles set out in legislation can be applied in many different ways. Sometimes judges have to come up with specific rules about what should happen in specific situations. Some decisions by judges, especially those from the Supreme Court of Canada or from the various Courts of Appeal, also clarify or decide important principles of law.

#### Same-sex couples

At the time this book was published (Spring 2007), same sex couples could legally marry and legally divorce in Canada. Because the *Divorce Act* defines "spouses" as "persons" who are married to each other, the *Divorce Act* applies to same-sex couples. If married, a same-sex couple can currently get divorced and can use the rules in the *Divorce Act* to deal with child and spousal support as well as with child custody and access issues.

Divorcing same-sex couples can't, however, use the *Yukon Family Property and Support Act* to deal with property division (as opposite-sex divorcing couples can) since this Yukon Act currently defines "spouses" as "a man and a woman." Current case-law indicates that this definition is probably unconstitutional. But until the Yukon legislature changes the definitions of "spouse" in the Act, or a judge makes a decision that the current definitions are unconstitutional, this Yukon Act doesn't apply to same-sex couples.

This also means that spousal support for common-law same-sex couples can't be dealt with under the *Family Property and Support Act*. This is also likely unconstitutional under current case law, but until the Yukon Legislature changes the definitions of "spouse" in the Act, or a judge makes a decision that the current definitions are unconstitutional, this Yukon Act doesn't apply to same sex-couples.

Common-law same-sex couples can deal with child support under the *Family Property and Support Act* because child support obligations are imposed on "parents." The Act says that you can be a "parent" without being a biological parent. Common-law same-sex couples can also use the Yukon *Children's Act* to deal with custody, access and guardianship issues (although some provisions in that Act may not apply).

If you're splitting up from a same-sex relationship or marriage, you'll need to find out what the current law is.

Judges always give reasons for each decision they make. Often those reasons are published and given a unique name and number. These are called judgments. Many, but not all, judgments are published and available in law libraries and on the internet. This means that for many cases you can read a judge's entire reasons for the decision he or she made, including any rules or principles of law that were applied, and why they were applied to that particular case. Based on the principle that similar situations should be dealt with in a similar way, lawyers and judges keep track of these previous judgments and refer to them when a similar situation arises in a matter they are dealing with.

This collection of previously decided cases (precedents) is called "case law." The body of specific rules and principles applied by judges in deciding cases is called the "common law."

Judges try to follow the principle that similar situations should be dealt with in the same way. Each separating couple's situation is unique in some way, however. Although the essential facts in many cases are similar, and previously decided cases can help lawyers and judges figure out how to resolve a current dispute, no two cases are ever exactly alike. That's why different cases produce different results.

Judges apply the law to the unique facts of each case that comes before them and in this way they continue to shape the law. In looking at your case, the judge will consider all the circumstances, including those unique to your situation, to determine what should happen. That's why the law, when it's applied to your situation by a judge, might produce a different result than it did when it was applied by a judge to somebody else's situation.

### Judges' decisions

Decisions made by Yukon judges or by the Supreme Court of Canada are especially important. The principles set out in previous decisions by Yukon judges are generally binding on other Yukon judges — in other words, Yukon judges are obligated to decide a similar situation in the same way — as are decisions made by the Supreme Court of Canada. Decisions made by judges in other provinces and territories are not binding on Yukon judges although these other decisions will often be followed if they make sense in the context of Yukon law.

Remember: every province and territory has its own laws and they're sometimes different from the Yukon's. Only federal law is the same throughout Canada.

## 2.4 Rules and procedures

In order to function efficiently, smoothly and fairly, the court system requires everyone to follow very specific rules and procedures. If you find yourself going to court, and you choose not to hire a lawyer to represent you, you'll be expected to follow the same rules and procedures that lawyers follow. Failing to follow the correct rules and procedures can be very serious. In the worst-case scenario, you could even lose your entire case just on procedural grounds if you don't follow the rules properly.

Court rules and procedures aren't merely a matter of being polite or calling the judge by the correct title. Among other things, they involve what documents you must file, what the documents should look like, who you must give them to and when, and so on.

The procedures that you must follow for a family law matter are found in the Rules of Court and in the Yukon Divorce Rules. You can only get a matter in front of a judge by following the procedures set out in the Rules of Court and/or the Divorce Rules. If you don't follow those rules and procedures, you likely won't get in front of a judge. If you do, you could find your case dismissed or adjourned for non-compliance with the rules.

At the time of writing (Spring 2007), the Yukon uses most of the Rules of the Supreme Court of British Columbia (although not those dealing specifically with family law matters). At the time of writing, the Yukon is also using its own Divorce Rules. Those Divorce Rules haven't been updated since the 1980s, so they can seem a little old-fashioned and don't always fit well with the Rules of Court, which have been changed many times since the 1980s.

Correctly applying the Rules of Court and/or the Divorce Rules can be quite complicated. Depending on your situation, the rules that you'll be expected to follow may be a mixture of the rules found in the Rules of Court and/or the rules found in the Divorce Rules. Sometimes it's not very obvious — even to lawyers — how things are supposed to be done.

A committee is currently drafting “made in the Yukon” Rules of Court. By the time you're reading this, the Yukon may no longer be following the B.C. Rules. Also, by the time you're reading this, the Yukon may have new Divorce Rules. If you plan to represent yourself in court, you should find out what the current rules are before you do anything else.

**Need help?**  
Resources are available to help you find the right court forms and to follow the right procedures. Check the contact information in Chapter 9.

#### 2.4.1 The Rules of Court are not the law

The Rules of Court don't set out rules of law; they set out the rules of procedure. This means that they tell people how to prepare and argue their cases. Rules of Court don't say how the cases should be decided. The rules of law set out in legislation and the common law say how a case should be decided.

## 2.5 Separation

A couple is considered separated when one person no longer wants to be in a relationship with the other. It doesn't really matter why one of them wants to split up. As long as one member of a couple has decided to separate from the other, that couple is “legally” separated in the eyes of the law. Becoming separated doesn't require a special ceremony or paperwork in the same way that getting married or divorced do. It's something that happens because of a decision made by at least one person. Both members of the couple can of course decide or agree to split up, but it takes two to remain a couple. It only takes one to split up.

When couples split up, one of them usually moves to a different residence. It's possible to be separated and still living in the same place. For example, a couple may live in the same house but no longer share meals, the same bedroom or the same recreational or social activities. People may do this for economic reasons. For example, it may not be possible to pay for two separate residences. Sometimes a couple remains in the same home for the benefit of the children, even if they don't see themselves as a couple anymore.

Unfortunately, living separate and apart in the same residence often doesn't work out well in the long term. Often, the issues that caused the end of the relationship continue to be a problem. In those situations the tensions between you can become extremely uncomfortable for everyone, including — or especially — for the children who may be caught in the middle. However, every couple and every situation is different. You might be able to comfortably live separate and apart in the same residence without any problems at all.

### 2.5.1 What formal separation processes are available?

Couples sometimes get a declaration of separation from a judge. This is rarely done in the Yukon, but it can be common in other places, such as B.C., where a declaration is used to trigger each spouse's entitlement to a share in the other's assets.

For most couples in the Yukon, there's no practical advantage to getting a judge's declaration that you're separated. A couple who have split up, but who are still living separate and apart under the same roof, might wish to do this since it might not be obvious that they're really separated. Remember: as long as at least one of you intends to end the relationship, you're legally separated from the time you decided to end the relationship.

#### When you are not separated

If the couple just needs to live apart for a while because one person is working or going to school in another place, this isn't considered being separated in the legal sense because both spouses still want to be together in a relationship, even though they're physically separated.

### 2.5.2 Why does the separation date matter?

The date of separation matters. Couples often draw up a separation agreement in which they agree, among other things, what the actual date of their separation is or was. Occasionally, couples get into a dispute about their date of separation. This can happen because the date of separation can be advantageous or disadvantageous to one or the other person.

For example, the date of separation is usually when obligations to pay child or spousal support begin. For common-law couples, the date of separation starts the countdown on the three-month period during which an application for spousal support must be made (see section 2.5.3).

For married couples, the date of separation starts the countdown on the one-year period of separation, which is the most common ground for divorce. The date of separation also usually establishes the date of the marriage breakdown. That matters because it's usually the assets owned by each spouse at the date of the marriage breakdown that get divided. Those assets are also usually valued on the date of separation.

### 2.5.3 Common-law couples

The Yukon currently has an extremely short period (three months) during which a common-law partner must apply if he or she wants spousal support. If you don't apply for support, or make an agreement about it, within three months of your separation date, you can't get spousal support.

## 2.6 Divorce

Once you're legally married, only a judge can divorce you. This means that until you get a divorce order from a judge, you're still married even if you've been separated for a long time. And it doesn't matter how long you've been separated.

The federal *Divorce Act* sets out rules about where, how and on what basis you can get divorced. It also sets out rules about financial support for a spouse and for any children of the marriage, as well as rules about custody of and access to any children of the marriage. Since the *Divorce Act* is a federal law, passed by the Canadian parliament in Ottawa, it applies in the same way all across Canada.

The *Divorce Act* doesn't provide any rules about property division, however. If you're divorcing in the Yukon, you use the Yukon *Family Property and Support Act* to find the rules for property division.

### 2.6.1 Grounds for divorce

There are three grounds for divorce in Canada:

- you and the other spouse have lived separate and apart for one year or more;
- the other spouse has committed adultery; or
- the other spouse has treated you in a cruel manner.

If you're applying for a divorce because you and your spouse have lived separate and apart for one year or more, that year started on the date you separated. You can start the divorce process by filing your Petition for Divorce at any time after you separated, but the divorce order can't be granted until the year is up.

The second ground for divorce is adultery. This is when your spouse has a sexual relationship with another person while still married to you. If one spouse commits adultery, the other spouse can use it as a basis for obtaining a divorce, provided that he or she has not forgiven or disregarded the adultery. If you're using your spouse's adultery as your basis for a divorce, it's not necessary to wait for a year before getting divorced. You can apply at any time. You can't claim a divorce based on adultery committed by yourself. You must be able to prove that your spouse committed adultery.

The third ground for divorce is cruelty. If one spouse treats the other in a cruel manner (physically or mentally) and, because of that cruel treatment, it's impossible for the victim spouse to continue living with the cruel spouse, then the victim spouse is entitled to a divorce — provided that he or she hasn't forgiven or disregarded the cruelty. If you're using your spouse's cruelty towards you as the basis for obtaining a divorce, it's not necessary to wait for a year before getting divorced. You can apply at any time. You can't claim a

divorce based on cruelty committed by you against your spouse. To get a divorce order on this basis, you must be able to prove that the other spouse treated you in a cruel manner and that, as a result, it's impossible for you to continue to live with him or her.

#### The *Divorce Act* may change

At the time this book was published (Spring 2007), the federal government had been considering changes to the *Divorce Act* for some time. If the Act is amended, some of the concepts and rules in this book may change. Check with a lawyer to find out what the current law is.

### 2.6.2 Reconciliation: If you try to get back together

Once a married couple separates, a one-year separation period is one of the grounds for divorce. After one year is up, a divorce can be granted.

The *Divorce Act* allows a couple to try and work things out during the one-year period that they're separate and apart. If a couple tries to get back together and reconcile during this year that they're separate and apart, the one-year separation period required for divorce won't have to be restarted unless they're back together for one or more periods totalling more than 90 days. A couple can have multiple attempts at reconciliation as long as the total number of days back together is 90 or fewer. For example, if you're back together for four months, and then separate again, another one-year period of separation starting from your latest date of separation will be required before the divorce can be final.

### 2.6.3 Starting the process

The procedural rules for getting a divorce in the Yukon are set out in the Yukon's Divorce Rules. To get divorced in the Yukon you or your spouse must have lived in the Yukon for at least 12 months.

You start the process by filing a document called a Petition for Divorce in the Yukon Supreme Court. The Law Line (YPLEA) has a free “do-it-yourself” divorce kit. It helps to explain the Rules of Court and has the forms you’ll need to finalize your divorce. You don’t necessarily have to hire a lawyer to get divorced; but it’s a good idea to speak to a lawyer before you file anything with the court or sign any agreements. The procedural details of how you go about getting a divorce are beyond the scope of this book.

**Divorce guides, kits and forms are available from various places, including the internet. Yukon contact information for these resources is found in Chapter 9.**

#### 2.6.4 You need the piece of paper

If you’re legally married you need to apply to court for a Divorce Order. You can’t just agree to divorce, although you can agree not to oppose the divorce when your spouse files the Petition for Divorce.

### 2.7 What laws apply?

The rules of law that apply to you are found in a combination of federal legislation and Yukon legislation. Case law — previous relevant court decisions — will also help determine how your case is settled, regardless of which law applies.

Status	Children	Law that applies
Married couple who are separating	No	<i>Family Property and Support Act</i> (property, spousal support)
Married couple who are separating	Yes	<i>Family Property and Support Act</i> (property, spousal and child support) <i>Children’s Act</i> (custody, access, guardianship)
Married couple divorcing	No	<i>Divorce Act</i> (divorce, spousal support) <i>Family Property and Support Act</i> (property)
Married couple divorcing	Yes	<i>Divorce Act</i> (divorce, spousal and child support, custody and access) <i>Children’s Act</i> (guardianship) <i>Family Property and Support Act</i> (property)
Common-law couple separating	No	<i>Family Property and Support Act</i> (spousal support only)
Common-law couple separating	Yes	<i>Family Property and Support Act</i> (spousal support and child support)
Married same-sex couple divorcing	No	<i>Divorce Act</i> (divorce, spousal support)
Married same-sex couple divorcing	Yes	<i>Divorce Act</i> (divorce, spousal and child support, custody and access) <i>Children’s Act</i> (guardianship)
Married same-sex couple separating or common-law same-sex couple separating	No	Previous relevant court decisions
Married same-sex couple separating or common-law same-sex couple separating	Yes	<i>Family Property and Support Act</i> (child support) <i>Children’s Act</i> (custody, access, guardianship)

## 3. Who can help?

This chapter covers the following topics	
3.1 Introduction	3.5 Mediators
3.2 If you go to court without a lawyer	3.6 Government programs
3.3 Getting legal information	3.7 Community support
3.4 Lawyers	

### 3.1 Introduction

The process of splitting up inevitably requires a couple to sort out various issues. Depending on how complicated their situation is, and on how much conflict there is between them, spouses or partners will probably want and need some help in resolving those issues. Most separating or divorcing couples will have to deal with some or all of the following issues.

#### Children

- With whom will the children primarily live?
- Who will have the authority to make decisions affecting the children?
- How often, and when, will the children see the parent with whom they're not primarily living?
- How do the parents ensure that the financial needs of the children are met?

#### Support

- Will one spouse or partner pay support to the other? If so, how much and for how long?

#### Property

- Who gets what?

#### Debt

- Who pays what?

#### Common misunderstandings

- If my ex hires a lawyer it means that he or she wants a fight.
- Hiring a lawyer will cost at least \$20,000.
- Hiring a lawyer will just drag things out and prolong the agony.
- If my lawyer is loud and aggressive it means that he or she is a good lawyer.
- Hiring lawyers and going to trial is the only way to resolve our differences.

Couples have two basic ways to resolve the issues between them:

1. go to court and have a judge tell them both how things are going to be; or
2. reach an agreement.

The two methods aren't mutually exclusive — it's not necessarily either one or the other method. Both can be used. For example, the vast majority of family law cases do settle. This means that the parties eventually reach an agreement, which they set out in either a settlement agreement or in a consent order.

You can negotiate and go to court on your own, without the help of a lawyer. However, it's not recommended that you go to court on your own unless you absolutely have no choice, or unless you're confident that you understand the law and the court procedures. The court system has complicated rules and procedures and it can be very difficult for people who choose to represent themselves without a lawyer.

### 3.2 If you go to court without a lawyer

Many people who don't hire a lawyer, and who choose to represent themselves in court (called "self-represented litigants"), end up losing their case. There are two main reasons for this. First, unless you are a trained lawyer you probably don't know the correct way to present facts to a judge (in a sworn affidavit). Second, you won't be familiar with what things matter to judges.

You may try to argue about issues that judges and lawyers already know and agree about. The judges and lawyers might explain things to you, but this will take up a lot of time and energy, not to mention taxpayers' money. Here is an example of a common mistake made by people who are not represented by a lawyer:

- Imagine that you're being asked to pay child support but feel you shouldn't have to because the other parent isn't letting you visit with your kids. When looking at the child support issue, a judge will take the view that, while it's unfortunate that you're not able to see your kids, denying access is irrelevant to your obligation to pay child support. All judges and lawyers agree that the law is very clear in saying that access and child support are two totally separate issues. This is well-settled law. Asking a judge to decide that you shouldn't pay child support because you're being denied your access rights is a waste of time and money.

It's not that the issue of your being denied access to your kids doesn't matter to the judge at all. It's just that there are other accepted procedures for enforcing access and, if you use them, the judge may treat the parent who is denying access very harshly. The judge won't treat the issue as relevant, however, in deciding whether or not you should be paying child support to that other parent.

If you have no other option than to represent yourself in court, try to consult with a lawyer before the court date.

### 3.3 Getting legal information

You can hire a lawyer to negotiate and/or go to court for you (see section 3.4). You can try mediation (see section 3.5). You can try a combination of these. You can never reach a fair and reasonable result, however, if you don't understand the law that applies to your situation. To understand that law, you need legal information.

You're reading this book. That's a good start. It doesn't have all of the answers, however. It's only intended to let you know some of the questions that you may want to ask.

As shown in this table, there are several ways to get legal advice and legal information in the Yukon. The cost for these services ranges from nothing to hundreds of dollars per hour.

The Law Line	This legal information service is provided free by the Yukon Public Legal Education Association (that's us!). A lawyer answers questions and provides general information over the phone. This lawyer doesn't provide legal advice specific to your situation, however, and he or she can't act as your lawyer. You can also pick up information kits, forms and brochures at the Law Line office in Whitehorse (currently in Yukon College) or you can visit the Law Line reference library. The lawyer can help you to fill out some forms, such as the forms needed to change (vary) a child support order.
Family Law Information Centre	At the time of publication, the Yukon Department of Justice was planning to open a resource centre in the Law Centre, and to establish a telephone help-line and web site.
The internet	Many websites provide information about family law. Beware of information that's not specific to the Yukon, since different provinces and territories have different laws. For example, reading everything there is to know about Ontario's law of property division won't help you much in understanding the specifics of the law in the Yukon. The issues that arise as a result of splitting up are broadly similar right across Canada, however, and even in the United States. Although the specific rules in the Yukon may not be the same, some of the solutions that an Ontario-based website suggests may still be usable in the Yukon.
The Law Centre library	There is a good collection of legal texts and case law available at the law library in the Law Centre in Whitehorse. The law library is open to the public.
Lawyer Referral Service	This is a consultation service provided through the Law Society of Yukon and various local lawyers. You can get a list of local lawyers who can meet with you for 30 minutes and give you some summary advice for a flat fee of \$30 (as of Spring 2007). In addition to giving you some information about the law as it applies to your situation, the lawyer can advise whether or not you may need to hire a lawyer. The lawyer isn't responsible for doing any legal work for you, but you can always ask this lawyer if you can hire him or her.
Consultation with a private lawyer	You can find a lawyer who practises family law (either from the Yellow Pages or on the recommendation of someone you know) and make an appointment for an initial consultation (usually one to two hours). You'll usually pay at the lawyer's hourly rate (currently \$110 to \$300 per hour, depending on the lawyer's experience). The lawyer will interview you to clarify your situation and will usually give you some preliminary advice. If you come prepared, you can use the time far more efficiently. You may or may not decide to hire this lawyer to assist you in resolving your issues.
Hiring a private lawyer	You can find a lawyer who practises family law and hire him or her to provide advice and to look after all the procedures for settling your issues. He or she will do any negotiating on your behalf, will file all the necessary documents for you in court and so on. It's important to find a lawyer who is knowledgeable in family law matters, since many lawyers today have become specialized and family law has grown quite technical and complex. The hourly rate for more junior lawyers is usually lower than for more experienced lawyers, so hiring a more junior lawyer can be a less expensive option for you if your situation is not too complicated.
Legal Aid	If you cannot afford a lawyer, you may be eligible for free legal assistance provided by the government.

## 3.4 Lawyers

Most people who are splitting up wonder, at some point in the process, if they should get a lawyer. Lawyers can help you to negotiate a fair deal. They can go to court for you if that becomes necessary. They can explain the law to you.

Finding a family law lawyer to help you can be difficult in the Yukon, however. There are relatively few lawyers in private practice here. Many of the lawyers who are in private practice don't do family law. Some of those who do practice family law will be unable to help you because of a conflict of interest (see section 3.4.1).

You can try to find a lawyer in several ways:

- if you know somebody who has already gone through the process of splitting up, ask him or her to recommend a lawyer — a word-of-mouth referral may be the best way of getting a lawyer;
- you can look in the Yellow Pages;
- you can try looking on the internet; and
- you can call the Law Society and ask for a lawyer referral.

There are also lawyers in B.C. and Alberta (and in other places) who are entitled to practice in the Yukon. Some of them may also be willing and able to help you. If you hire a lawyer from outside the Yukon, be aware that costs may be higher and that the lawyer will likely be less accessible to you.

### 3.4.1 Conflicts of interest

Lawyers can't place themselves in a conflict of interest with their clients. Your lawyer must act in your best interests, and only in your best interests. A lawyer can't represent two clients with opposing interests except in very limited circumstances. This means that a lawyer can't represent both sides in a family law dispute.

Usually, before you see a lawyer, you have to provide some basic information to somebody in his or her office so a "conflicts check" can be done first. In a family law situation, that usually means checking that either this lawyer, or another lawyer in the same firm, hasn't already spoken with your spouse or partner.

Conflicts for lawyers can also arise from other matters that they're dealing with (or have dealt with) that aren't directly related to your separation. For example, this or another lawyer at the same firm may be involved in an estate matter and you and/or your spouse or partner may be beneficiaries. Or they may act for a company in which you or your spouse or partner have shares.

If somebody from a law firm tells you that he or she can't help due to a conflict of interest, it may mean that your spouse or partner has already seen somebody there. It doesn't necessarily mean that, however. The law firm won't tell you why they have a conflict, just that they have one.

### 3.4.2 Legal Aid

As everybody knows, lawyers can be expensive (although not necessarily as expensive as you think). If you can't afford to hire a private lawyer, you may still be able to get a lawyer through Legal Aid. Obtaining legal aid coverage means getting the services of a lawyer who is paid, in whole or in part, through public money instead of by you.

In the Yukon, legal aid is administered and paid for through the Yukon Legal Services Society, using money provided by the federal and territorial governments.

Legal aid is only available to people who are eligible for it. To be eligible, you must have a legal problem that legal aid covers, and your income and the value of your property must be below a certain limit. You may also have to demonstrate that there is “merit” to your case. This means that what you want to do is something that a reasonable person with the financial ability would pay a lawyer to do.

To apply for legal aid, you meet with the Intake Coordinator and fill out a form providing information about your financial situation. Your monthly income, your expenses and your assets will be taken into consideration in assessing whether or not you’re financially eligible for legal aid. If it’s clear that you’re not able to hire your own lawyer with the financial resources you have, then you may be eligible for legal aid.

Even if you’re above the guideline amounts, you may qualify for legal aid if there are special reasons, such as your having a lot of debt, which would make it very difficult for you to hire a lawyer. Depending on your situation, you may also be eligible if you agree to contribute to the cost of legal assistance.

Legal aid will generally help people with these issues in family law cases where children are involved:

- custody;
- access;
- family violence;
- child support; and
- exclusive possession of the family home.

Legal aid won’t usually pay for a divorce or deal with property matters or spousal support. Exceptions can be made, however, depending on your specific situation. The criteria for legal aid eligibility also change from time to time. The only way you can know for sure whether legal aid will help you is to ask them.

If you are denied legal aid then you have the right to appeal to the Board of the Legal Services Society. In most cases, decisions about eligibility are based on policies that are applied equally to all applicants. However, if there are unique circumstances or reasons why you feel you should be granted legal aid, the Board will consider your request.

At the time of writing, most legal aid services in the Yukon are delivered through staff lawyers. You don’t have the right to choose the lawyer who will represent you. However, if you’re not happy with your lawyer for some reason, you can speak to the legal aid Intake Coordinator and request that another lawyer be appointed for you. Your request will be considered. If there are good reasons, another lawyer may be assigned to your case.

If you believe that you may be eligible for legal aid coverage, you should contact the Legal Services Society of the Yukon to see if you meet the current criteria for legal aid coverage.

### Who is eligible?

To be eligible for legal aid, you must have a legal problem that legal aid covers, and your income and the value of your property must be below a certain limit.

The financial eligibility guidelines for Legal Aid are available from the Legal Services Society of the Yukon, and are posted on their website. See Chapter 9 for contact information.

### 3.4.3 Your first meeting with a lawyer

Once you hire or are assigned a lawyer, plan to use your time wisely at the first meeting. As a general rule, the more organized you are the less time you'll need with the lawyer. This means less cost since lawyers usually charge by the hour. That's true all the way through your relationship with the lawyer, right through to when everything is resolved.

Here are some tips for getting organized before you meet with a lawyer for the first time:

- Write down what happened in as much detail as you can.
- Clarify your thinking. On what issues do you want advice? If there are several, write them down so you can remember everything and not get sidetracked.
- Get your documents together and get them organized. Put them in date order, by subject.
- If there are previous court documents or agreements, send them to the lawyer for review, preferably before the first meeting.

When you meet the lawyer, try to stick to the facts and tell the lawyer all the facts, whether good or bad. A lawyer needs to know all the facts to advise you properly. The lawyer can't help you if you don't tell everything — especially anything that may reflect badly on you if not handled properly. Remember that a lawyer's job is to protect your interests and to advise you about what to do.

For example, if you want to apply for custody or for spousal support, or if you're defending or responding to your spouse's application, the lawyer's role is to objectively assess your position and tell you his or her opinion about your chances of success. The lawyer should explain the risks and costs involved in pursuing or defending the case or the issue.

If you decide to hire a lawyer, you should also discuss the following things at the first meeting:

- how you'll be charged, and how often you'll be billed (see section 3.4.4);
- the estimated total cost;
- how long it's likely to take;
- anything you can do to reduce costs or speed up the matter; and
- how you wish to be kept informed of developments in the case.

If something isn't clear to you, ask to have it explained again. It's your legal problem and you should understand what is happening with it.

### 3.4.4 Hiring a lawyer

When you hire — or “retain” — a lawyer, it means that you have entered into an agreement that the lawyer will advise you and represent your interests. In exchange, you will pay his or her bills.

When you retain a lawyer you're buying his or her time and skill. A portion of what you pay also covers the lawyer's office overhead. The usual practice in the legal profession is for you to pay a deposit, known as a retainer, to the lawyer before he or she starts work on your file. The money is then kept as a credit, in your name, in the lawyer's trust account. As the case proceeds, the lawyer will draw from that money to pay the bills. When your retainer is used up, many lawyers will ask you to replenish it. Most lawyers have a clause in their retainer agreement that allows them to stop working for you if they ask you to replenish the retainer and you don't.

#### Social assistance

If you're receiving social assistance, the Yukon Government will usually make your applications for child and spousal support. You don't need to worry about hiring a lawyer; the government will look after the application. (And if you don't cooperate, you can be cut off from social assistance.) However, if there are issues relating to custody and access you may wish to contact Legal Aid.

At the time of writing, typical retainer amounts in the Yukon range from \$1,000 to \$2,500. If you're expecting a large settlement from your former spouse or partner, and the odds of your getting it look good, you might find a lawyer who is willing to work for you without the up-front retainer money. It certainly never hurts to ask.

Whatever the financial arrangements you make with your lawyer, ask for them in writing. Then you'll both have a record of the fee or rate agreed on, which will reduce the chances of a misunderstanding later on.

Most lawyers charge by the hour. Lawyers usually charge for all time spent on the file. Typical items that you'll see on a lawyer's bill are things such as phone calls, meetings with you and others, legal research, drafting letters and so on. Beside each item or activity, you'll probably see a number, which represents the amount of time the lawyer spent multiplied by the lawyer's hourly rate. The amount of time will probably be shown in six-minute increments such as 0.1 = 6 minutes or 1/10 of an hour. For example, if the lawyer spent 18 minutes on a phone call, and if the lawyer's hourly rate is \$200, then the total cost for that phone call would be  $.3 \times 200$  or \$60. Note that many lawyers record any activity they do on your behalf at a minimum 0.1 or 0.2 of an hour (6 or 12 minutes). The lawyer's retainer agreement should spell that out.

The rate charged by family-law lawyers in the Yukon ranges from about \$110 to \$300 an hour. In family law matters, negotiations about children and money are usually what take the most time and are, therefore, the most expensive. Some lawyers might quote you a flat fee for a standard and straightforward matter such as a simple divorce that's not disputed by your spouse.

In addition, most lawyers will charge you for disbursements. Disbursements are the expenses that a lawyer incurs on your behalf in dealing with your matter. Photocopies, handing court documents to the opposing party (service) and court filing fees are typical examples of disbursements. The lawyer usually adds disbursements to your bill.

When you hire a lawyer who is with a law firm you're actually hiring the whole law firm, including the legal assistants. All the lawyers in the firm are deemed to represent you, although your lawyer is probably the only one responsible for your case on a day-to-day basis. If, for example, a lawyer is handling a separation agreement for you and a land transfer is involved, it's standard practice to have another lawyer in the firm who does real estate work complete the transfer. Also, if you're required to be in court on a certain day and your lawyer is sick, or on holidays, another lawyer in the firm will go to court instead.

Lawyers in the Yukon aren't allowed to work on a contingency fee retainer basis for family law matters. With a contingency fee you agree that your lawyer will be paid a percentage of whatever you get after everything is settled with your former spouse or partner (which obviously is nothing if you get nothing).

### Interest on the retainer

You're not normally credited with interest on your deposit held in a lawyer's trust account. This is because lawyers are obligated to give all interest generated in trust accounts to the Law Foundation of the Yukon. The Law Foundation uses this money for legal education, scholarships and so on. (In fact, funds from the Law Foundation contributed to the cost of this book.)

You have the right to ask that your funds be deposited into a separate, interest-bearing trust account. The interest would then be credited back to you. But many lawyers won't agree to take a retainer if you ask for this, due to the extra administrative costs involved. (Note that interest credited to you is taxable, even if it's not paid to you. If you've asked your lawyer to open a separate interest-bearing trust account for your deposit, then you'll be taxed on the interest that money earns.) To find out more, contact the Law Society of Yukon.

### 3.4.5 Instructing your lawyer

Your lawyer's jobs are to give you objective and unbiased advice, and to seek a resolution to your situation in accordance with your "instructions." When you give instructions to your lawyer, you're saying what you want to achieve. It's up to you, not your lawyer, to decide what it is that you want to achieve. It's then up to the lawyer to try to achieve the result you want within the framework of the law and the lawyer's professional responsibilities.

Obviously, your instructions to your lawyer must be realistic given the particular facts of your case, what the law says about those facts, and what advice you've been given by your lawyer. If you give your lawyer instructions asking for the impossible, either you won't have that lawyer for very long, or you'll find yourself very disappointed.

Remember that the most important thing you're paying for is your lawyer's best professional judgement as to what is, or is not, possible for you to achieve in your circumstances. If you're not prepared to follow his or her advice, then you should either look for another lawyer, or face the fact that you can't always get what you want.

If you have hired a lawyer you should be comfortable with him or her. You're likely going to pay your lawyer quite a bit of money, so it's important that you feel you can trust him or her and that you feel a rapport. However, be aware that a good lawyer will likely need to tell you some things that you may not want to hear.

Remember, one of the most important things that you're paying for is your lawyer's honest and objective opinion about your situation. Your own views on any given issue may not be objective or realistic. Splitting up is, after all, usually a difficult and emotional experience. People aren't usually at their best in those circumstances.

### 3.4.6 If you're unhappy with your lawyer

If you're unhappy with your lawyer's services, you always have the option of changing lawyers. If you feel that your lawyer has charged you more than he or she was entitled to, you have the right to apply to have his or her bill "taxed." This means that a court officer will review your agreement with the lawyer, what work was done for you, and decide whether to reduce or approve the lawyer's bill. The court's taxation officer is based in the Court Registry at the Whitehorse Law Centre.

If you feel that your lawyer has acted unethically, then you have the right to complain to the Law Society of Yukon. If the Law Society determines that the lawyer did act unethically, it will discipline the lawyer. Note that the Law Society doesn't deal with fee disputes between lawyers and clients.

## 3.5 Mediators

Mediation is the process of attempting to reach an agreement with the assistance of a mediator. A mediator is a neutral third person who is trained to work through conflicts with people. Mediators

### Solicitor-client privilege

Your relationship with your lawyer should be characterized by honesty, confidentiality and trust. Never hold back the truth from your lawyer. Lawyers are your source of legal advice, and they can only give proper legal advice when they know all the facts. Your lawyer has a professional duty to keep any discussions with you confidential, except to the extent necessary to carry out your instructions.

Your lawyer can never be compelled to disclose what you've said to her or him in confidence. No one, not even a court, can require your lawyer to reveal his or her conversations with you. This protection is called solicitor-client privilege and is for the benefit of the client so you can tell the lawyer the truth in complete confidence. This confidence can't be breached by the lawyer unless you give specific instructions to do so.

don't replace lawyers, but they can help separating or divorcing couples negotiate a settlement of the issues between them. Some lawyers are trained mediators. However, your lawyer generally can't be both your lawyer and your mediator at the same time.

A trained mediator can help to clarify any disputes by identifying the things that you agree about and narrowing the discussion to the things that you don't agree about. The mediator will encourage you both to discuss options, and can help you to reach an agreement that works for both.

Negotiating a settlement with the assistance of a mediator can be a cheaper alternative to hiring a lawyer to negotiate for you. When you mediate your problems with your spouse, you're negotiating directly. This means that you're not paying a lawyer to negotiate for you. Mediators usually only charge for the time spent with the parties in negotiations and their hourly rates tend to be lower than those of lawyers.

You should never negotiate without having a good idea of what the law is. Even if you plan to mediate your dispute, it's a good idea to see a lawyer first to learn what your rights are and what you could expect to happen if you went to court. Also, it's a good idea to make any agreement you reach as a result of mediation to be "subject to legal advice." This means that if you reach an agreement, you should make it clear to your former spouse or partner that you're reserving the right to change your mind after you get legal advice.

Mediation isn't counselling. People who want to get back together with their spouse or partner, or who need help in accepting that the relationship is over, should seek help from a counsellor. Counsellors are sometimes also trained mediators, but they perform different jobs. The main goal of mediation is not usually getting back together again, but helping a couple to negotiate a workable separation. If your relationship may still be salvageable, and both of you are willing to make an effort to try to do that, then you should both be seeing a counsellor. If you're the one who has been left by your spouse or partner, and you're having difficulty dealing with that reality, you should see a counsellor to help you in dealing with the situation.

Mediation often reduces the stress and conflict that can arise after splitting up, but it isn't appropriate for all couples. If the other spouse or partner has been physically or emotionally abusive towards you, you should have a lawyer representing your interests. In order to work, mediation requires a relatively equal relationship and the ability to bargain effectively, which is not the case where one spouse is controlling or pressuring the other. Neither spouse should be feeling threatened, coerced or pressured by the other.

Honesty and disclosure are important. Both parties must be willing to cooperate in revealing all the necessary facts so that they can carry out informed bargaining. Neither party should be forced to negotiate an agreement without knowing the truth. Discussions with a mediator are a private matter between you and your spouse. The mediator won't release them to others. These discussions are settlement discussions aimed at resolving your legal rights and obligations, and evidence of what was said in mediation sessions isn't admissible in court if the case later goes to court. Any agreement that's in writing, signed by both of you and witnessed by an independent person, becomes a formal separation agreement and can be enforced by going to court.

### 3.5.1 The mediation process

Mediation usually takes about four to eight meetings, depending on how complicated the issues are. Mediators should discuss the process they'd like to follow right at the beginning. They should also discuss costs and how they'll be paid. Those issues are usually set out in a contract that both parties are asked to sign.

Each mediator has his or her own approach and style. The mediator will help you and your spouse or partner define the problems that you want to solve through mediation and keep the discussion focused on moving toward solutions. The mediator has developed skills in ensuring that each person is actively listened to and can encourage both of you to identify options and consider various choices you may not have considered before. A mediator won't be able to make decisions for you, and won't pressure you into accepting any terms that you're not happy with. Mediators are also not allowed to give any advice such as legal, accounting or tax advice (unless they also have specific training and accreditation in these areas).

### If you want to try mediation

Very few people in the Yukon are trained in family law mediation. Some of them are also family law lawyers. Because of this, not many people in the Yukon end up using family law mediators.

In the Yukon, it's very common for lawyers to negotiate and settle family law matters before the dispute goes to court. You can be reassured to know that the vast majority of family law cases do settle before they get to court.

## 3.6 Government programs

### 3.6.1 The Maintenance Enforcement Program (MEP)

The Yukon Government's Maintenance Enforcement Program (MEP) can help to enforce agreements or court orders that require support payments to a spouse or child. Once you have a court order (including a consent order based on your own agreement), you can register this order with the MEP office. The MEP then accepts payments from the paying parent or spouse on behalf of the receiving parent or spouse and forwards the payments on to the recipient. The MEP helps paying parents by keeping a record of all payments made. It can work with paying parents to help them find a payment method that works best.

The MEP can't guarantee that support will be paid. It does, however, have the authority to take various steps to attempt collection of the payments if the paying parent doesn't send payments voluntarily.

The MEP also has a special agreement with all Canadian provinces, some U.S. states and some countries overseas that might help with collecting support payments from paying parents or spouses who live outside of the Yukon. This agreement can also help to enforce orders made by a court in another place if the paying person lives in the Yukon (see sections 5.6.2–5.6.4).

The MEP office is located in the Law Centre on Second Avenue in Whitehorse. See Chapter 9 for contact information.

### 3.6.2 The Family Justice Office

The Yukon Government's Family Justice Office provides various services and programs to parents during and after separation and divorce. These include an information line on child support, workshops on helping your kids through separation and divorce, and other programs that try to encourage less conflict for people going through family breakdown. The Family Justice Office is located in the Law Centre on Second Avenue in Whitehorse. See Chapter 9 for contact information.

## 3.7 Community support

If you feel that you need help, support and advice dealing with the difficult emotional and/or other non-legal aspects of relationship breakdown, there are agencies and services in the Yukon that can help. Counsellors, elders, priests or ministers, nurses, doctors and social workers are some of those who can offer help at this difficult time. Check Chapter 9 for contact information.

## 4. Custody and access

This chapter covers the following topics	
4.1 What are the issues?	4.5 Parenting agreements
4.2 Custody	4.6 Court orders for custody and access
4.3 Access	4.7 Changing custody and access
4.4 Guardianship	4.8 Enforcement

### 4.1 What are the issues?

Wondering what will happen to the children is the first concern for most parents who are splitting up. When couples separate, their roles as spouses or partners have obviously changed. Their roles as parents to their children continue to exist, however, and the law recognizes this. Even if they separate from each other, parents don't split up from their children. Most kids want to maintain a good relationship with both parents even if their parents are living separate lives.

The law encourages parents to consider children's emotional and physical needs. It also encourages them to try and find ways they can still parent their kids while living independent lives. While you were still together, it was obvious where the kids were living. You also had some method of deciding important issues affecting the kids, such as which school they went to, what church they attended, if any, when they needed medical care, and how they'd be raised and disciplined. Whatever that method was, it'll likely change once you split up.

#### Common misunderstandings

- I don't have any parental obligations if I never lived with the other parent of my child.
- If I have custody I can just move away with the kids without telling the other parent.
- I have a right to insist that my kids shouldn't be exposed to the other parent's new partner.
- If my spouse commits adultery, he or she can't get custody of the children.
- I have no rights or obligations toward my ex's kids from another relationship.
- Women always get custody.

When parents with children split up, there are always two major issues regarding the children that need to be resolved:

1. Residential arrangements — which parent will the children be staying with and when?
2. Parental rights and responsibilities — will one parent, or both, have the right to make the major decisions about the child, such as decisions about health, education, religion and discipline? Which parent is responsible for what (e.g. doctor appointments, soccer practice and so on)?

There are usually many details that have to be worked out within each of those two major issues. For example, how will birthdays or other holidays be celebrated and where? Will the kids stay with one parent on weekends and the other during weekdays? Will the kids stay with each parent for a week at a time? Who will decide if the kids should get braces? Who is responsible for getting the child to his or her piano lesson?

Obviously, the detailed issues in any specific situation depend on all the circumstances of your lives. The overriding principle is that the details should be worked out in a practical way that's best for the kids. It's usually best for everybody, especially the kids, if the details can be sorted out between the parents themselves. No outsider can know what's best for kids as well as their parents do — as long as the parents are thinking rationally about the best interests of their children.

### Applicable legislation

If parents are divorcing, custody and access rules are set out in the federal *Divorce Act*, which applies throughout Canada.

If parents were never married, or were married but are just separated, custody and access rules are set out in the Yukon *Children's Act*.

## 4.2 Custody

The term “custody” has historically referred to the exclusive right of a parent to have a child live with him or her (it's a short form of “physical custody”). Since the federal parliament passed the first version of the *Divorce Act* in 1967, it has also come to refer to the right of the parent with “custody” to make the major decisions about the child's welfare and to the obligation of that parent to ensure that the child is properly taken care of.

In recent years, there has been a growing recognition that using terms such as “custody” can be adversarial and a source of conflict between separating parents. Many people in the legal system now prefer to use more neutral terms such as “residential arrangements” and “parental rights and responsibilities” to describe those concepts.

At the time of this publication (Spring 2007), however, all the relevant legislation — the federal *Divorce Act*, the Yukon *Children's Act* and the Yukon *Family Property and Support Act* — still use the word “custody,” so that's the term used in this book. It's important to recognize that the exact meaning of the word “custody” has changed over time and that it even changes from place to place in Canada, depending on how it's defined in each province or territory.

In the Yukon, under the *Children's Act*, as long as parents live together they have “joint custody” — they share the rights and responsibilities of parenthood equally — until the children are 19, which is the Yukon's legal age. Parents with custody have these legal responsibilities:

- to financially support their children as much as they are able;
- to meet the child's needs for shelter, clothing, food, medical care and a good upbringing; and
- to provide for the education, supervision and discipline of their children.

Parents with custody have these legal rights:

- to have the physical care and nurturance of the child;
- to choose the city, province or country where the child will live (although this can be limited by the child’s right to generous access with another parent);
- to decide what religion the child will be taught;
- to make medical decisions on behalf of the child;
- to choose the school and educational program for the child;
- to discipline the child; and
- to consent to the child’s marriage or adoption.

### **If parents weren’t married**

The law relating to custody and access is the same for all children, whether their parents were married or not.

The Yukon laws that apply to parental rights and responsibilities apply to all parents, whether or not they were married, whether or not they ever lived together, and whether or not the child was adopted by one or both of them. Parental rights and responsibilities might also apply to anyone who intentionally treated the child as a member of their family. This might include a grandparent, step-parent or the same-sex partner of a biological or adoptive parent. It does not include foster parents.

When parents split up, there are usually three main options for custody of the children: sole custody, joint/shared custody and split custody.

#### 1. Sole custody

- One parent has the legal right to make all the major decisions.
- The other parent has the right to be told about such major decisions, but not to make them.
- One parent usually provides the child’s main home and the child usually has the right to spend time with the other parent (this is called “access”).

#### 2. Joint or shared custody

- Both parents generally have the right to make the major decisions affecting the long-term welfare of the kids. The details of how such decisions should be made — which parent can decide what, how to resolve disputes and so on — can all be specified in a court order or in an agreement between the parents.
- The kids may live with one of the parents full time, or may live part time with one parent and part time with the other, based on some residence schedule.
- This option requires flexibility on the part of everybody involved and good communication between the parents. It’s usually in the best interests of the kids if it can be made to work.

#### 3. Split custody

- If there are two or more kids, each parent has sole custody of one or more of them.
- This doesn’t happen very often, but in some circumstances it’s the best choice.

Within each of these three basic legal options, people organize the details of their day-to-day lives in many different ways. Every family is different and so every situation is different. Some of those details are often formalized in written agreements or in court orders. As far as the law is concerned, however, sole custody, joint/shared custody or split custody are the three basic choices available.

If none of these custody arrangements have been made, then both parents continue to have lawful custody, and neither has the right to take the child away from the other parent. Custody arrangements can be made by implied or express consent, however, without going to court or signing an agreement. This may happen when a couple first split up and one parent — with the other parent’s consent — leaves the home with the children.

A parent who takes a child from home without the consent of the other parent when the child isn't in immediate danger can be charged with abduction. Abduction is a criminal offence and the maximum punishment is ten years in jail.

#### 4.2.1 Sole custody

If a parent has sole custody of a child, whether by agreement or obtained by court order, that parent has the legal right to have the day-to-day care of the child and to make decisions about things such as education, religion, schooling, health care and so on. There's no legal obligation to consult the other parent about these decisions, although there will probably be an obligation to inform the other parent.

As far as the legal system is concerned it's possible for the child to be physically living with you, but for you to not have sole custody. Neither parent has an exclusive right to have "care and control" of the child unless one parent obtains sole custody in one of the legally recognized ways. And neither parent is allowed to take the child away without the permission of the other parent.

The one time a parent can take a child away from the home or from the other parent is if the child is in immediate danger. A parent has the right to remove a child, for example, if the child is being abused. Removing a child from the home for the child's safety doesn't, however, mean that the parent has sole custody.

There are four ways in which sole custody can be obtained:

- parents can reach an agreement together;
- one of them can apply for a court order so a judge will decide;
- they can ask a judge to approve their agreement (consent order); or
- if a divorce proceeding has been started, an existing agreement or order can be included as part of the final divorce process.

##### 4.2.1.1 Agreements

Parents can make a voluntary contract and agree that one of them will have sole custody. This could be part of a parenting agreement or part of a separation agreement that also covers things such as the mortgage, vehicles and credit cards. Written agreements can, and often do, include clauses that are not technically enforceable, but which remind both parties of what they should be doing. An example is a clause that says: "Each of the parties will always deal with the other in a civil manner." Although that's something both parties should be doing, neither party could go to court alleging a breach of such a term. Such terms are called "precatory terms" by judges and lawyers (see 4.2.1.2).

There are two other ways that a parent might consent to sole custody. You may have a mutual understanding (implied consent) or a verbal agreement (explicit consent):

**Implied consent:** If Mom leaves and takes the child with her, and Dad knows this and doesn't object, then the child is in the sole custody of Mom. Since Dad hasn't objected, it's assumed that he has consented to Mom having custody — at least for the time being. They are considered to have a mutual understanding. If Mom leaves without taking the child, it's assumed that she intended Dad to have custody for the time being. Her actions are considered an implied consent to Dad's sole custody. However, if Mom had to leave because she was escaping abuse, the law probably won't say that she gave implied consent. It's definitely not a mutual understanding if one parent takes the child without telling the other parent that he or she is leaving. A mutual understanding about who has custody can be difficult to prove. Each parent might have a different interpretation of what happened. It's better to have the written consent of the other parent, if that's possible, or a court order if it's not.

**Express consent:** If the parents verbally discuss the situation and decide where the child will live and who will make the major decisions for the child, then their oral agreement determines who has the sole custody for the time being. One of them has given express consent for the child to live with the other. It's strongly recommended that you get a written agreement to avoid misunderstandings.

#### 4.2.1.2 Consent orders

One or both parents can apply for a court order that sets out the terms of an agreement they have made with each other. This is called a consent order. This type of order might be easier to enforce than a written agreement that's not submitted to the court. Consent orders can't include precatory terms (see 4.2.1.1) because judges won't make an order that includes words and phrases that aren't legally enforceable.

#### 4.2.1.3 Court order

A parent can apply to the Yukon Supreme Court and ask a judge to grant him or her sole custody of a child. This is the only option available if the parents can't agree about custody, and if no implied consent or mutual understanding exists between them. This is usually much easier to enforce than a mutual understanding or a verbal agreement. See section 4.5 for more details on what factors a judge will consider when making a custody order.

### 4.2.2 Joint (shared) custody

Any arrangement for sharing parental rights and responsibilities can be referred to as "joint custody." This is also sometimes referred to as "shared custody" (especially when considering child support — see Chapter 5). It doesn't necessarily mean that the children live with each parent exactly half of the time, although it can and often does mean this. It's possible for parents to have joint custody, and for the child to live primarily with one parent. It's also possible, although it would be very unusual, for one parent to have sole custody and for the child to spend exactly half of his or her time with each parent. The point is that having joint custody means sharing decision-making rights and parental obligations in some way. The amount of time the child spends at the home of each parent is not the critical factor.

For an arrangement of joint/shared custody to work in the child's best interests, there has to be ongoing communication between the parents. If the parents share in the major decisions, then they'll need to consult with each other about their child's best interests, discuss the issues and find agreement. This is why arrangements between parents for joint and shared custody are usually set out in a written parenting agreement, often with the help of a mediator or lawyer. If parents can't cooperate, or aren't even talking to each other, joint custody isn't usually feasible.

Joint custody is usually settled through a written agreement between the parents or through a court order. It's also possible for parents to have a verbal agreement about joint custody. For many reasons, though, it's a very good idea to get the agreement written down so that there are no misunderstandings (see Chapter 8).

#### 4.2.3 Split custody

With split custody, families with more than one child have one or more of the children living primarily with each parent. Splitting children up in this way is not common, but it does happen from time to time. Whether it should be done in a specific case depends on whether splitting up the children is in their best interests.

#### 4.2.4 What if both parents want custody?

If both parents want sole custody of their children, they'll have two choices for arranging their parental responsibilities:

- they can try to reach an agreement with each other; or
- they can apply to the court for a judge to decide.

It's usually in the child's best interests for the parents to negotiate an agreement about parenting. Although judges will try their best, no one else can know a child's needs as well as his or her parents, and no one wants as much for their child as do the parents. An agreement usually increases the chance that conflict will be kept to a minimum over the longer term, and that the arrangements will be acceptable for everybody. It's quite possible that both parents will end up unhappy with some part of a court order simply because the judge can't know their situation as well as they do.

#### 4.2.5 What is interim custody?

"Interim custody" means temporary custody — where the kids will live and who can make decisions about their well-being until a final custody situation is agreed to by the parents or imposed on them by a judge. Sometimes it's necessary to ask a judge to make an interim custody order, which is a temporary court order made while waiting for a full hearing and a final custody order.

While interim orders are meant to be temporary arrangements, sometimes parents never get around to getting a final custody order. An "interim" order could actually be the only court order ever made — at least until somebody wants it changed. An interim custody order is just as enforceable as a final custody order. If one or both parents want the order changed, however, an interim order is more easily changed (or "varied") than a final order (see section 4.6.2).

### 4.3 Access

The term "access" has traditionally referred to the right of the non-custodial parent — the parent the child doesn't usually live with — to visit the child. In the past, this was also referred to as "visiting rights." More recently, however, many people in the legal system prefer terms such as "contact" or "parenting time." As with custody, these terms place the focus on the children's right to see their parents, and on the children's best interests. In fact, the law is now clear that it's not the non-custodial parent's right to visit the child, but rather the child's right to spend time with their non-custodial parent.

At the time of this publication (Spring 2007) the federal *Divorce Act*, the Yukon *Family Property and Support Act* and the Yukon *Children's Act* still used the word "access," so that term is used in this book. As with "custody," however, you may want to check that the words, and the legal definitions of them, haven't changed.

If the kids live with one parent, the other parent usually has access or contact with them at times and in places that are reasonable for everyone. The legal concept of access involves the right of the child to maintain a relationship with the non-custodial parent. The law recognizes that it's usually in the best interests of children to keep a relationship with both of their parents. The child deserves generous contact with the other parent unless this is clearly not in his or her best interests. Just because the parents are divorcing doesn't or shouldn't mean the kids are too.

The federal *Divorce Act*, which applies when a couple is divorcing or are already divorced, says that access includes the right to make inquiries and to be given information about the health, education and welfare of the child.

The Yukon *Children's Act* — which applies when a couple isn't divorcing — says that, in addition to the right to be informed about the health and education of the child, access also includes the rights to give consent to urgent medical treatment and to consent to the marriage or adoption of the child. (While the *Divorce Act* is less detailed in describing what access means, in practice the principles are essentially the same as the more detailed principles outlined in the *Children's Act*.)

Sometimes other people, such as grandparents or other relatives, may also apply for formal access or contact with kids. These arrangements may be included in a parenting agreement or court order. Depending on the situation — for example, if one or both parents don't agree — someone such as a grandparent may make a separate application to the court requesting the right to have access.

If the issue went all the way to a court hearing, there are three general types of access that a judge may order: unspecified access, specified access, and supervised access.

#### 4.3.1 Unspecified access

This is usually called reasonable access. No conditions or terms are placed on the access. The parents are expected to work this out in a way that's mutually convenient for all involved.

#### 4.3.2 Specified access

This is often ordered by a judge in situations where the parents can't communicate or agree. A court order will set out the details of when the non-custodial parent can see the kids and the time they must be returned to the other parent. It will also state how weekends and specific holidays will be spent, and so on. Terms setting out details of access can also be put in an agreement.

#### 4.3.3 Supervised access

This means that an authorized, neutral third party will be present throughout the time that the parent is visiting with the child. It is relatively rare but will be ordered by a judge if there's a concern about the child's safety or protection; for example, if there are questions about abuse, violence or abduction.

#### 4.3.4 How is access arranged?

Just as with custody, access details can be arranged by agreement between the parents. If that's not possible, details can be ordered by a judge (or as part of a divorce). For most people, the problem is not whether there will be access, but how that access will work: when, where, how often, special events, costs and so on.

Although it's understandable to want guidelines, the only real guideline the law provides is this: what is reasonable in the circumstances? The amount of access must be reasonable, but what's reasonable will depend on all of the circumstances of a particular case, including the nature of the child's relationship with the access parent, the child's schedule, the parents' schedules, where they live and so on. What is reasonable may also change over time.

##### 4.3.4.1 Agreement

Usually the parents will attempt to negotiate reasonable access. For example, it's usually reasonable for a parent who lives in the same town to have access at least once a week. On the other hand, a parent who lives a greater distance from the child can expect access for longer periods of time on school holidays to make up for periods without seeing the child during the school year. Parents may be able to work out the terms and details of access by themselves, or with the help of a mediator or

a lawyer. The amount of detail needed in describing the access arrangements usually depends on whether there has been cooperation between the parents in the past.

Some parents put a clause in their written agreement stating simply that the other parent will have “reasonable access at the times and places as are agreed upon from time to time.” This allows them to work out arrangements week by week or month by month. If they need to clarify a set routine later, they can write it down then or renegotiate. If there have been problems with access in the past, or with misunderstandings and arguments, it’s usually better to have a detailed arrangement in writing with the dates, times and places of access clearly spelled out.

### Changes to the *Children’s Act*

At the time of publication (Spring 2007) a new Yukon *Children’s Act* was being developed. Since this might have implications for custody, access and guardianship, check with a lawyer to ensure what the current law is.

#### 4.3.4.2 Consent order

One or both parents can apply for the terms of an agreement to be set out in a court order. This is called a consent order. An advantage to having a court order, even though it was consented to, is that it can be readily enforced in the Yukon and in many other provinces and countries if there are any problems in the future. A consent order can also be an option if the parties have started a court action and later reach an agreement about access. They can apply for the terms of their agreement to be set out in a court order.

#### 4.3.4.3 Court order

If parents can’t reach an agreement about access, one of them can apply to the Yukon Supreme Court asking a judge to decide about access. A hearing will be held and a judge will decide what reasonable access will be in their circumstances. The judge will likely make an order setting out the times and places of access as well as other conditions or restrictions that may be necessary to protect the child’s interests, such as a parent being sober during visits.

## 4.4 Guardianship

In the Yukon, the term “guardianship” means the right and responsibility to manage a child’s property (any money or assets the child may have). If a parent has custody of the child, he or she is usually also considered the guardian of the child. The term “custody” specifically refers to having care and responsibility for the person of the child; guardianship is defined as looking after the child’s property. The rules about guardianship are covered by the Yukon *Children’s Act*.

It’s important to note that in the Yukon, the guardian concept means something a little different than it does most other places. Here in the Yukon, it means only the right to manage the property of the child — not their whole person. This difference can be confusing if the child moves and a Yukon court order regarding guardianship needs to be enforced in another part of Canada.

## 4.5 Parenting agreements

If you can reasonably communicate with the other parent, the two of you might be able to work out an agreement for the care of the kids. A parenting agreement is a list of details that the parents have discussed and agreed to about how they’ll organize their children’s lives and how they’ll share their parenting responsibilities. A parenting agreement will usually address all the issues related to custody and access: where the children will live and when, which parent(s) can make major decisions about the child, what the visiting arrangements will be, how holidays will be spent and so

on. The parenting agreement will also usually include what the child support payments will be and when they'll be paid (see Chapter 5).

If both parents want to share the custody of the kids, they may consider a parenting agreement. This is a good idea even if the child is going to live primarily with one parent. A parenting agreement can be verbal or written. Where possible, couples should put their agreement in writing in case there are different interpretations about the arrangement later. Chapter 8 lists the advantages of putting your agreement in writing.

An agreement means that parents can list each of the specific parental rights and responsibilities. It also means that they don't have to keep discussing or arguing these details on an ongoing basis. If it works, an agreement usually has a great advantage over a court order. The parents have both probably had to compromise a bit and an agreement is something they've had some control over instead of something that's imposed upon them.

A parenting agreement can deal with the following issues:

- where the child will live for the school year;
- where the child will live for the summer or school holidays;
- visiting arrangements for the other parent;
- financial support;
- how major expenses such as dental care, eyeglasses or sports equipment will be dealt with;
- access to school records, medical records and so on;
- discipline and religious instruction;
- education;
- what will happen if a parent moves; and
- what will happen if there are disagreements in the future.

If you can't directly communicate with the other parent but you think that you probably agree about what you want for your kids, then a mediator or lawyer might be able to help you to negotiate an agreement.

On the other hand, if you can't communicate with the other parent because conflict means you can't be in the same room together or there's a threat of intimidation or risk of abuse, then you may want to get a lawyer's advice and you may need to get a judge to make a court order about where the kids will live. If you're feeling threatened or pressured to agree to something that you don't think is right, you should talk to a lawyer.

Usually, parenting agreements can increase the chances that conflict will lessen over the long term. They can also help to settle all the issues much faster than a long drawn-out court hearing.

There are basically three choices for preparing a parenting agreement. Parents may choose one or all three:

- do it yourselves with the help of various resources (including this book);
- get the help of a mediator to negotiate the terms of the agreement; or
- get the help of a lawyer for any or all of the following tasks: to negotiate, to help write the agreement, to double-check that it'll protect your interests in both the immediate and the longer term, and to help enforce it if that later becomes necessary.

### What type of agreement?

Agreements about parenting issues can also be included in a comprehensive separation agreement that covers issues such as the house, the car or the debts. Whether a parenting agreement or a separation agreement is better for you will depend on all of your circumstances. (Separation agreements are addressed in Chapters 6–8.)

Lawyers can offer two important services before an agreement is signed: 1) give advice about whether they think the contract is legally enforceable (whether it would stand up in court); and 2) give advice about whether the agreement is fair, according to the legal rights and responsibilities of spouses. Chapter 8 lists the advantages of having a lawyer help out with your agreement.

You may obtain a tax advantage (or disadvantage) from an agreement. A lawyer may recommend that you consult with an accountant.

## 4.6 Court orders for custody and access

If the parents can't negotiate and resolve custody and access themselves or with the help of a mediator, the only other option is for one or both to apply for a court order granting sole custody to one of them.

To apply for custody involves completing some documents and filing them with Court Registry. In these documents, you are asking a judge to make an order granting the custody of a child to you, or confirming certain terms and conditions of access. One of the documents that you file with the court will list all the facts that you believe support your application.

The application for custody may be opposed by the other parent or any other interested party (for example, a grandparent). Also, the Yukon *Children's Act* says that a person other than a parent can also apply for custody or access — this is usually a grandparent or close relative. The *Divorce Act* also says that with special permission from the judge, a person other than a parent may request custody.

When one or both parents apply for custody, they are usually seeking the right to have the child live with them. When a person obtains sole custody of a child, he or she also has the right to make all of the decisions for the child unless the judge specifically orders something different.

### 4.6.1 Best interests of the child

The most important principle applied in custody and access cases is “the best interests of the child.” This is the judge's main concern in every custody and access situation. The judge's job isn't to try and help the parents or to make the best compromise between them, but to consider and decide what would be best for the child in all the circumstances of the case. The judge will ultimately decide how the custody and access terms will be arranged.

In practice, the important factors when looking at the best interests of a child are very similar for all parents, whether they're divorcing, just separated or were never married.

If parents are divorcing, the federal *Divorce Act* says that in determining the best interests of the child the judge should consider the “condition, means, needs and other circumstances of the child.”

If parents are just separated or were never married, the Yukon *Children's Act* says that in determining the best interests of the child the judge can consider several factors:

- the bonding, love, affection and emotional ties between the child and the person claiming custody or access;
- emotional ties between the child and any other member of their family who lives with the child (e.g. brother or sister or other relatives);
- emotional ties between the child and other people involved in the care and upbringing of the child (e.g. grandparents, aunts, uncles);

#### When *not* to sign

You shouldn't sign any agreement if you feel threatened or pressured to do so. Seek advice from a lawyer.

- the child's views and wishes if the child is mature enough to talk about them (this usually means older than about age 12);
- the length of time that the child has lived in a stable home environment (taking into account a child's sense of time);
- the permanence and stability of the family unit where the child would live;
- each parent's ability and willingness to provide guidance, education, the basics such as food, clothing, shelter and any special needs;
- each parent's plan for caring for and raising the child; and
- the effect that giving custody to one parent would have on the other parent's ability to have reasonable access.

These are some of the other factors that a judge might take into account — for divorcing and separating or common-law parents — in determining the best interests of the child:

- the necessity for stability in the child's life, which includes home, neighbourhood, friends, school and relatives;
- any new family units that have been created and the child's reaction and relationship to any new members of the family;
- the child's physical, emotional and psychological needs, including his or her need for stability, taking into account the child's age and stage of development;
- the history of care for the child;
- any family violence;
- the child's cultural, linguistic, religious and spiritual upbringing and heritage, including First Nations upbringing or heritage;
- the ability of the parent to communicate and cooperate on issues affecting the child; and
- any court order or criminal conviction that is relevant to the safety or well-being of the child.

In a custody case, each parent tries to show that it would be in the child's best interests for him or her to have sole custody of the child. They do this by providing evidence through witnesses. The primary witness for each side is usually the parent. Other witnesses, such as friends or relatives, can be called to testify as well. Expert testimony is often heard in custody cases from a physician, psychiatrist or other professional person who knows the family. The court may also appoint a person to prepare a custody/access report if requested. All witnesses can be questioned (cross-examined) by the other side. Sometimes the child is also given a lawyer, called the "child advocate." A judge may recommend that a child advocate be appointed if it seems that the child should be independently represented by a lawyer.

In addition to considering the best interests of the child, several other factors may be relevant for a judge in reaching a decision about custody in both divorce and non-divorce cases:

- Being the "primary caregiver" can be a very positive factor in one parent's favour.
- The ability to support a child financially is not usually a major factor because both parents must contribute to the child's support regardless of where the child is living.
- The willingness of the custodial parent to facilitate the child's contact with the other parent so that the child will have maximum contact with both parents as long as that's in the child's best interests.
- Past conduct isn't relevant unless it specifically relates to the ability to be a good parent — being a bad husband or wife, for example, does not necessarily mean the person is also a bad parent.
- The present lifestyle of the mother or father isn't usually relevant, unless it affects their ability to parent. Some people are offended if one parent is living with another person in a common-law relationship — especially if it's a same-sex relationship. However, the law does not presume

this to be a negative factor unless the specific situation is shown to be detrimental to the child. For example, if the new partner is a person who uses force regularly and has been assaultive in the home, that would likely be seen as detrimental to the child if it can be shown that the child has been negatively affected by witnessing such behaviour.

- If one parent will need to find other child care and the other will be home most of the time.
- There is no presumption that the best interests of a child are best served by placing them with a particular parent, either because of age or gender.

#### 4.6.2 Orders for interim custody

When a parent applies to court for custody there will be a delay before the trial can be held. This delay can last several months or even many years. If the parents can't agree on where the child will live until the trial, one or both can apply for interim custody until the trial is held.

An application for interim custody can be heard very quickly, usually within a few days. Each parent files a sworn statement, called an affidavit, which sets out the facts as he or she sees them. Each parent can be cross-examined on this affidavit by the other parent (or his or her lawyer). A decision about interim custody will be made by the judge on the basis of the affidavits.

Generally, the rule of thumb is that the child stays at home until the trial. A parent who leaves the family home can't expect to take the child without some agreement or mutual understanding with the other parent. Where there is good reason to change the child's residence before the trial, however, the judge may do so; for example, if the parent at home is an alcoholic and will likely neglect the child. In such a case, interim custody might be granted to the parent who has left the home.

#### 4.7 Changing custody and access

A custody order or agreement usually continues indefinitely until something happens to change it. From a legal point of view, the longer a child has been with one parent, the harder it is to convince a judge to change that custody arrangement. The reason is that the law considers stability to be a very important factor for children's best interests. In general, "preservation of the status quo" carries a lot of weight with judges in deciding what will be in the best interests of the child and which parent should have custody. In other words, whatever the child is most used to — as long as it's stable, healthy and not abusive — is what a judge will probably order. The law considers stability to be very important for a child.

The opportunity to work out an agreement with the other parent, or to get a court order, is available to parents at any time before, during or after the separation. For example, one parent may only realize a month or two after separation that he or she would like shared custody or sole custody. As soon as the parent realizes that he or she would prefer something different, he or she should try

#### Determining best interests

Everyone has different opinions about the best interests of a child. Your definition of what's in a child's best interests will probably depend on your own values, culture, philosophy and beliefs — not to mention the personality, temperament or special needs and talents of the individual child.

But if a question about the best interests of a child comes before a judge in a custody or access dispute, the only opinion that ultimately really matters is that of the judge hearing the case. The judge's decision will be informed by all the case law and similar decisions on the best-interests principle. This may or may not match your own ideas of what is in your child's best interests.

This is one reason why it's a very good idea, if at all possible, to reach an agreement about custody and access with the other parent, rather than continuing all the way through to court.

to get an agreement with the other parent or start an application for a court order. This is because preservation of the status quo is so important for judges, and because stability is considered to be in the best interests of the child.

#### 4.7.1 When can an order be changed?

If the existing order is a final order, and if there has been a material change in circumstances since it was made, a parent can apply to change it. This is called varying the order, or a variation. This isn't an appeal. It's a new request to have the same court reconsider the case because of some big change that's happened. A material change in circumstances means a significant change that affects the best interests of the child — a change in the condition, means, needs or circumstances of the child or in the ability of the parent to meet the needs of the child. The parent applying for this change must prove that there has been this change in circumstances.

For example, if a parent obtained sole custody and later seriously neglected the child due to alcoholism, that would be a change in circumstances that would affect the child's interests. The other parent could apply for a change of custody based upon these new developments.

If the existing order is an interim order, the parent wishing to change the order must show that circumstances have changed sufficiently to justify a variation. What the judge will consider sufficient will depend on all the circumstances.

Note that there's a difference between changing an interim order and changing a final order. It's generally harder to prove the material change of circumstances that's required to change a final order. Although it's easier to prove a change of circumstances for interim orders, judges will usually be reluctant to change an interim order that's relatively new. A parent can't go back every month and ask for a change. The longer the interim order has been in place, the greater the chance that the judge will consider changing it.

#### Why court should be the last resort

Parents should consider going to court as a final option and should do so only when every attempt at reaching an agreement has failed. Going to court for a custody and/or access order has several disadvantages:

1. The court process is adversarial. The act of arguing one side against another often causes so much bitterness that it strains the relationship. The child is caught in the middle and is often stressed more than parents realize.
2. Lawyers can be expensive. Lawyers usually handle custody and access cases on a fee-per-hour basis. A custody matter that goes to trial often involves a hundred hours or more of a lawyer's time. Even if you're eligible for Legal Aid you'll probably have to repay some of the costs. Also, the losing party is usually required to pay part of the winning party's legal fees.
3. Delays are common. Negotiating between lawyers, obtaining dates for pre-trial procedures, obtaining court time and the help of expert witnesses can all take a lot of time. Months or even years can go by before a judge hears and decides your case. The child's status will be in limbo for a long time, which can be very hard on him or her, not to mention the parents.
4. The parent who "loses" often appeals. Appeals mean more time delays, more legal expense and continued uncertainty about the status of the child.
5. Some parents who "lose" abduct the child. Hundreds of Canadian children a year are illegally hidden by a parent. It's of little comfort to have a court order for custody if you can't find your spouse or your child.
6. The parent who loses a custody case can still go back to court. A court can reopen the custody issue whenever either parent applies because the child's best interests are the most important consideration. So even the "winner" of a custody case has sole custody only until a court makes a different decision, which it might do if any circumstances change and the other spouse applies for custody again.

#### 4.7.2 What if the custodial parent moves?

A common issue in the Yukon is the custodial parent wanting to move with the child to another place somewhere else in Canada or even to another country. Generous access and visiting time between the child and the non-custodial parent will clearly be affected if the child and the custodial parent are living in Europe. The non-custodial parent might want to apply to the court for a variation in the original custody order and ask for custody, or might try and prevent the move from happening at all. The main consideration for a judge in deciding such a case will be the best interests of the child. Among other things, the judge will consider the disruption of a change in custody for the child and the disruption to the child due to moving away from family, schools and community. Even if you have sole custody, if you can no longer meet the access terms you may need to go to court and vary the order.

#### 4.7.3 Can a judge's order be appealed?

If a parent is unhappy with an order or judge's decision, he or she can appeal to a higher court for it to be changed. The Court of Appeal won't usually overturn a trial judge's decision, since the Court of Appeal doesn't get to hear all the witnesses again. Most custody cases are decided on the judge's assessment of all the facts of the case. Appeals are only successful if it's decided that the trial judge made an error in law. You won't be allowed to try to change the order based on a material change in circumstances when what you really want to do is appeal the order.

### 4.8 Enforcement

#### 4.8.1 Is a parenting agreement enforceable?

Contracts about children are an exception to the general rule that contracts between informed adults are binding. If parents make an agreement that a judge later decides is not in a child's best interest, the judge can refuse to enforce it. Also, a judge can give one parent rights that are different from the contract if a child's interests are at stake.

#### 4.8.2 What if a judge's order is ignored?

People who disobey court orders can be charged with contempt of court, which is a serious matter that could lead to a fine or jail sentence. For example, a parent who doesn't return a child after an access visit can be fined or jailed for contempt of court. He or she could also be charged with abduction because it's a criminal offence to take or keep a child from the parent who has a court order for custody. It's no excuse to say that the child agreed or wanted to stay with you. You'll have to prove that the other parent said it was okay or that you're protecting the child from immediate danger. You should ask a lawyer's advice about this. If a child isn't returned after a visit, the judge may be able to order the RCMP to enter and search any place where they believe the child is being kept, and return the child to the parent who has lawful custody.

Court orders for custody and access don't usually include a provision that allows a judge to ask the police to enforce the order. If the terms are routinely ignored by one of the parents, or if there are other special circumstances, it might be best to go back to court; you can then ask a judge to make a specific order that allows the RCMP to become involved.

A lawyer can advise whether you should take the situation back to court or if some phone calls from him or her might help to clear up the problem. Lawyers might get involved again to advise their clients of the consequences of breaking a court order. If the problems are more serious, further court appearances may be necessary. Calling the police is one of the serious consequences of ignoring a court order, however; it's more common to charge the parent with contempt of court. If the situation is considered serious enough, a parent found guilty of this charge could be sentenced to time in jail.

If the judge gave the non-custodial parent access on Saturdays from 9 a.m. to 5 p.m. but the custodial parent always seems to make other plans for the child during that time, the custodial parent is disobeying the court order. The non-custodial parent will want to know how to enforce his or her access time since lack of access is not meeting the best interests of the child. The law recognizes that generous contact with both parents is usually in the child's best interests. The court may consider a parent's willingness to provide access when determining who should have custody.

Similarly, if a parent doesn't exercise the access granted in an order — if he or she fails to show up for scheduled visits — this is also disobeying the court order. It can also be disappointing and upsetting for the child. The law doesn't specifically state how non-exercise of access should be dealt with. If this situation applies to you, you may want to talk to a lawyer to find out the current law.

### Consequences of disobeying a court order

People who disobey court orders can be charged with contempt of court, which is a serious matter that could lead to a fine or jail sentence.

#### 4.8.3 Is it possible to refuse access?

A judge will deny a parent visiting time with a child only if this would be in the child's best interests. It's very rare for a parent who wants access to a child to be completely refused. The child's interests usually require lots of regular contact with both parents. The child has a right to have a good relationship with both parents and his or her needs won't be restricted by a judge without good reason. A custodial parent who wants to deny the other parent access to a child must demonstrate that the child's best interests require it. If at all possible, access will be given on specific conditions rather than being completely refused.

One reason for refusing access is a realistic fear that the child will be kidnapped and not returned. Other reasons are sexually abusive behaviour towards the child, severe alcoholism or serious neglect in the past. However, each case is considered according to its own circumstances. Instead of refusing access, the judge might decide to impose conditions. For example, if there is alcoholism, the judge might order that the parent only have access when he or she is sober. Where there has been abuse or neglect, access might be granted in the presence of an authorized person. This is called supervised access (see section 4.3.3).

Even if a parent is refused access, he or she can go back to court and ask again, as long as there has been a change in the circumstances that led to access being refused. If the court initially denied access to a parent due to a severe drug addiction, for example, that parent could reapply once the addiction problem was under control.

Sometimes a parent wants to deny access to the other parent because he or she hasn't made child support payments. The parent who has custody may feel that this is the only way to get even. Failure to make support payments does not give the custodial parent the right to deny access, however. The child has the right to maintain the contact and the child shouldn't have to worry about money. It's not the child's fault the payments aren't made. The parent must use other legal ways to collect child support payments (see Chapter 5).

#### 4.8.4 Leaving the Yukon

Custodial parents have the right to move. Sometimes, however, a move will have a serious effect on the ability of the child and non-custodial parent to visit with each other. If this is the case, the non-custodial parent can object and, if necessary, ask a judge to change the custody and access order. For example, as mentioned in section 4.7, suppose the mom has custody, the dad has regular visits with the child, and they all live in the Yukon. If the mom decides to move to Australia, this would have a big impact on the contact between the dad and the child, as well as on the costs of access. The

dad could ask a judge to vary the original custody order either to grant him sole custody, or to make different access terms. Whether or not the judge would decide to vary the custody and/or the access will depend on his or her determination of what is in the child's best interests.

Court orders often include a term that requires custodial parents to tell the other parent if they plan to move, and to give this notice a minimum of 30 days before the move.

If there's a concern that a parent might abduct the child, a custody order can include a provision that the child not be taken out of the Yukon. A judge might also order a parent to do the following:

- post a bond;
- hand over property to a trustee on the understanding that if the child is removed, the parent will lose the property; or
- hand over the parent's passport and the child's passport or other papers needed for travelling outside of Canada.

These conditions can be requested by the other parent. If the judge agrees that there's a reasonable basis for the fear of a parent abducting the child, he or she may include these conditions as part of an interim or final custody order.

If a parent illegally takes the child out of the Yukon, a Yukon custody order can be enforced anywhere in Canada. A custody order granted by another court in Canada can also be enforced here. If the abducting parent illegally takes the child out of Canada, there is help both locally and through international rules called the Hague Convention. These have been adopted in the Yukon and are found in the *Children's Act*. These rules may help if the child is in a state or country that has also adopted the Hague Convention. The Yukon Central Authority, in the Yukon Department of Justice, can help with such situations. It depends where the child is; unfortunately, not all other countries honour these rules. A lawyer's help is needed in this situation. If the parent and child can be found, the police can try to have the parent arrested in the foreign country and sent back to Canada to face criminal charges for child abduction.

**Free "For the Sake of the Children" workshops are available. The workshops help parents to understand the potential impacts of separation on their kids and how parents can help kids through this difficult time. See chapter 9 for contacts.**

#### 4.8.5 Abduction is a criminal offence

A parent who takes a child from home when the child isn't in immediate danger can be charged with abduction. Abduction is a criminal offence in Canada and the maximum punishment is ten years in jail. See the list of resources in Chapter 9.

## WHAT THE COURTS HAVE SAID

### When the custodial parent wants to move

When Janet and Robin divorced, Janet was awarded custody of their young daughter Samantha. Robin was given reasonable access and he frequently spent time with Samantha. About four years later Robin learned that Janet planned to move with Samantha to Australia. Robin objected and applied to court for full custody himself, or for an order preventing Janet from moving to Australia with Samantha. Janet asked for a change in the access provisions of the custody order, allowing her to move and for Robin's access to be exercised in Australia.

The Supreme Court of Canada said that, in this case, Samantha's best interests lay in maintaining the strong bond that she had with Janet, her custodial parent. Janet was allowed to take Samantha to Australia. Robin was allowed to visit his daughter in Canada and the extra expense of Samantha visiting her dad in Canada would be split evenly between Janet and Robin.

In this case, the relocation involved a change of the original custody order, and the moving parent (Janet) first had to show that this relocation was a material change in circumstance that justified a variation. The next question was this: what was in the child's best interests?

The importance of the child staying with the parent to whose custody he or she has become accustomed must be weighed against continuing full contact with the access parent, and his or her extended family and community. In this case, the evidence supported the conclusion that the best interests of Samantha required upholding the custody of Janet. The custody order was upheld and the access provisions were varied so Samantha could visit her dad in Canada.

*Gordon v. Goertz* [1996] 2 SCR 27

### Chapter 4 summary

Issue	Legal term	What you can do	Who can help
Where will the kids live for the time being?	Care/primary residence/custody	Negotiate an agreement Apply for a court order	Mediator Lawyer Legal Aid
Who will make major decisions about the kids?	Custody	Negotiate an agreement Apply for a court order	Mediator Lawyer Legal Aid
When will the non-residential parent visit the kids?	Access	Negotiate an agreement Apply for a court order	Mediator Lawyer Legal Aid
What if agreements or court orders aren't followed?	Enforcement	Register with the Maintenance Enforcement Program (MEP) Apply for a court order	MEP Lawyer Legal Aid
How is a custody or access agreement or order changed?	Variation	Renegotiate an agreement Apply to vary a court order	Mediator Lawyer

## 5. Child support

This chapter covers the following topics	
5.1 What is child support?	5.4 Court orders for child support
5.2 How much child support?	5.5 Changing child support
5.3 Agreements for child support	5.6 Enforcement

### 5.1 What is child support?

Child support is the money given by one parent to the other parent as a financial contribution to raising their child. All parents have a legal obligation to provide financial support for their kids until the kids reach legal age (19 in the Yukon). Parents might also be obligated to support a child who's older than 19 if the child can't support themselves — for example, if they have a disability or illness or if they're going to college or university full time. On the other hand, if a child younger than 19 is already finished with school, employed and supporting himself or herself, then child support probably won't be needed.

Both parents are equally responsible for the financial support of their kids whether or not they were married, lived common-law or never lived together at all. Also, a parent who has adopted a child has a legal obligation to provide support after a separation. If a parent starts a new relationship and a new family, he or she is still responsible for supporting the children from a previous marriage or relationship. And if a grandparent, step-parent or other person has acted as a parent to the child he or she may also be obligated to pay child support, depending on the circumstances.

Child support is important because kids continue to need the financial support of both parents. The kids have a right to the same standard of living that the parents each individually enjoy, and the same standard of living they would have if the parents

#### Common misunderstandings

- I don't have to pay child support if my ex won't let me see the children.
- I don't have to let my ex visit the children if he or she isn't paying child support.
- If my income goes up I don't have to report the increase.
- I don't have to pay child support if the custodial parent makes more than I do.
- I will never have to pay support for his or her children.
- Both parents' incomes are taken into account in determining child support.

were living together. Child support is in the child's best interests. A parent who continually fails to provide child support payments can be dealt with very seriously by the law (see section 5.6).

If a paying parent can't find work or is too sick to work, he or she may not be obligated to pay because of what's called undue hardship. This situation is usually only temporary, however. The inability to pay must be genuine and must be proved. Only a small minority of situations would fall into this category.

### 5.1.1 How is child support arranged?

The details of child support can be set in three different ways:

- by agreement between the parents (usually written);
- by consent order (a written agreement that is set out in a court order);
- by a judge's decision in a court order.

The laws explaining the rules and amounts for child support in Canada are contained in the Child Support Guidelines. These guidelines are laws passed by both the Canadian parliament and by the Yukon legislature (and also by the legislatures of all the other Canadian provinces and territories). The guidelines say how much a parent must pay, and include rules about some of the exceptions that might apply.

The Child Support Guidelines became law across Canada for the following reasons:

- they protect the best interests of the children;
- they make the calculation of child support fair, consistent and predictable;
- they establish a fair standard of support for children that makes sure kids still benefit from the financial means of both parents;
- they help to reduce conflict and tension between parents by making child support calculations more objective, and by encouraging agreements between parents; and
- they make it easier to figure out child support amounts.

In addition to a list of rules, the guidelines include financial tables that give the specific amount that most paying parents should pay. According to these tables, the amount that most parents should pay depends mostly on three things:

1. how much the paying parent earns in a year,
2. where the paying parent lives, and
3. the number of children the paying parent is responsible for supporting.

The table amounts are based on the average amount that parents spend to raise a child. Research on family spending in Canada shows that the more money parents earn, the more they tend to spend on their kids. In other words, the proportion of family income devoted to the kids tends to be the same regardless of how much money the family actually makes. The cost of raising a child depends on how much the parents make and how many kids the family has. The amounts in the tables are

#### Applicable legislation

If parents are divorcing, the federal Child Support Guidelines, a part of the *Divorce Act*, apply.

If parents are just separating, were common-law or never lived together at all, the Yukon Child Support Guidelines, which are part of the *Family Property and Support Act*, apply.

The federal and Yukon guidelines are almost identical.

If the paying parent lives in the Yukon, the Yukon tables apply.

Free copies of the tables and the Child Support Guidelines are easily available in Whitehorse and the communities. They're also posted on the Internet. Many offices and websites also have several other resources to help parents calculate child support. See chapter 9 for contact information.

based on the average amount that a parent at a particular income level would spend on his or her kids. It's also assumed that the receiving parent contributes to the children in proportion to his or her income.

## 5.2 How much child support?

The Child Support Guidelines tables tell you exactly how much money most paying parents should pay each month. If the paying parent lives in the Yukon, you use the Yukon tables. You find the paying parent's gross annual income (rounded to the nearest \$100) in the left column, and move across the row until you find the amount under the column for the number of kids. This is the monthly amount for most parents. The tables already take into account the taxes payable and so the parent's gross annual income is the amount used to determine payments. Each province and territory in Canada has a separate table to reflect different tax rates.

For example, if a paying parent lives in the Yukon and earns \$40,000 a year before deductions and the couple has two kids, then the base monthly child support payment would be \$604, according to the Yukon tables.

Of course, there are exceptions. The law considers that allowing exceptions is more fair than treating everybody the same because every family's situation is not the same. Sometimes a different amount than the one in the table will turn out to be the most fair and appropriate. For example:

- there are special expenses such as extra child care or medical expenses;
- there would be undue hardship to either parent or to a child;
- the parenting arrangement has the kids living with each parent at least 40 percent of the time; or
- the kids are older than 19.

Determining the right amount of child support can be broken down into eight steps, as Justice Canada suggests. Each of these is explained in the sections below:

Step 1. Which guidelines apply?

Step 2. How many kids and for which kids?

Step 3. Which parent receives support?

Step 4. What tables to use.

Step 5. What annual income?

Step 6. Finding the table amount.

Step 7. Dealing with special expenses.

Step 8. Dealing with undue hardship.

### Child support basics

Child support depends on the paying parent's income, where the paying parent lives and how many kids there are.

The paying parent's gross annual income is used to determine the monthly amount of child support in the tables. This is the amount of income before income tax and other deductions.

The federal guidelines were updated in 2006. The Yukon guidelines were updated in 2005. The Yukon tables were updated in 2006. Make sure that you're looking at the most recent versions of the guidelines and the tables.

### Step 1 Which guidelines apply?

The Child Support Guidelines apply to all parents in Canada. Depending on where the parents live, and whether or not the parents are getting divorced (or are already divorced), the name and some minor details of the guidelines may be different. Some of the practical details will also be different, such as which legal forms and legal procedures you use.

If you're divorced or getting a divorce, the federal Child Support Guidelines apply to you, because these are part of Canada's *Divorce Act*. If you never married, never lived together, or have just separated and are not planning to divorce, then the Yukon Child Support Guidelines apply to you because these fall under the Yukon's law.

You should also check that you're referring to the most recent version of the guidelines. The federal guidelines were updated in May 2006. At the time of this publication (Spring 2007), the most recent version of the Yukon Guidelines was done in 2005.

### Step 2 How many kids and for which kids?

The law says that you have an obligation to contribute financial support for any child in these circumstances:

- you're the biological or adoptive parent of the child and the child is under 19;
- you're the biological or adoptive parent of the child and the child is 19 or older and is unable to support himself or herself because of disability, illness or some "other cause" (e.g. attending university); or
- you treated the child as a member of your family (e.g. you are a step-parent or grandparent).

Parents sometimes disagree about whether child support should be paid for a child who is 19 or older and still living with the receiving parent. If it's agreed that a child over 19 is entitled to support, these factors should be considered:

- the age of the child;
- the child's needs, means and other circumstances; and
- both parent's financial ability to contribute.

It's usually recognized that going to college or university after high school is an "other cause" that justifies ongoing child support contributions. Some parents agree to use the amount that's in the table for such kids. A different amount can be used if that's considered more appropriate. For example, if the student also works part time or lives and works somewhere else in the summer months, then the amount can probably be reduced.

Parents don't always agree whether a post-secondary student 19 or over should be supported. Often a judge will order support to be paid for the first four years of post-secondary schooling. Some parents feel they have a moral obligation to support their children through college or university, but this is not the same as a legal obligation.

Note that the paying parent gives the child support to the other parent, not directly to the child. The assumption is that the parent where the child lives most of the time is necessarily incurring expenses such as groceries, clothing and household maintenance.

### Step 3 Which parent receives child support?

The parent entitled to receive child support — the receiving parent — is the one with whom the child usually lives. For example, if one parent has custody and the kids live with that parent at least 60 percent of the time, then he or she is entitled to receive regular child support payments from

the other parent. The receiving parent also contributes financial support, of course, but usually this parent's contributions are part of general household expenses.

If the kids live with each parent about half of the time — at least 40 percent of the time — then the Child Support Guidelines call this shared parenting. In this case, neither parent is necessarily entitled to child support if they both earn about the same income. If one parent earns quite a bit less than the other parent he or she will probably be entitled to receive some child support payments. The amount will depend on the difference between the two parents' incomes, and on other factors such as how they share any increased costs of shared parenting arrangements and the means and needs of both parents and the child. The child should have about the same standard of living in each household.

If there are more than two kids, one or more of them lives with one parent more than 60 percent of the time in the year, and one or more of them live with the other parent more than 60 percent of the time, this is called split custody. Each parent has custody of one or more of the kids. In this case, child support will depend on the incomes of both parents, and how much they'd be obligated to contribute for each child in the other's sole custody. The parent required to pay the higher amount will pay any difference between these amounts to the other parent. The amount will also depend on any special expenses and needs.

#### Step 4 What tables to use

The Yukon tables of child support amounts are used when the paying parent lives in the Yukon. As long as he or she lives in the Yukon, the same tables are used whether the couple are divorcing, separated or were never married. If the paying parent lives somewhere else in Canada, the tables to use are those for that province or territory. If one of the parents (including the custodial parent) lives in another country, the Yukon tables should be used (assuming that at least one parent lives here in the Yukon). In a shared custody or split custody arrangement, where the income of both parents is relevant, use the tables where each parent lives to determine their share.

You should also ensure that you are consulting the most recent version of the tables. At the time of writing this book, the most current tables were those released in May 2006.

#### Step 5 What annual income?

To find the monthly child support amount from the tables in the Child Support Guidelines, you need to know the gross annual income of the paying parent. In some cases, calculating annual income can be very complicated, so you may wish to consult a lawyer or an accountant. It's important that this amount be accurate.

Gross annual income is the amount (before deductions) that a person receives from employment, self-employment, rental income and income from investments. It includes all sources of income identified in a tax return (such as salary, wages, commissions, Employment Insurance and social assistance). For most people, their total annual income is on Line 150 of their income tax return or notice of assessment (or reassessment). Sometimes, though, this isn't a fair or accurate reflection of the income for various reasons (see below).

If a parent's income is needed to calculate child support amounts, he or she must provide income information for the previous three tax years. This information will be required from both parents in the following cases:

- you have a split or shared custody arrangement;
- there are special expenses;

- there is a claim of undue hardship;
- a child is 19 or older and you're not using the guidelines (as you would need to if the child were under 19);
- a paying parent earns more than \$150,000 a year; or
- one of you has acted like a parent to the other's child (e.g. a step-parent).

If, for some reason, the case does go all the way to court, the paying parent, or both parents, must provide complete and accurate income information. If they don't, the judge can order them to do so. The proof of income given may need to include copies of the following information:

- income tax returns for the three most recent tax years, and
- notices of assessment and reassessment from the Canada Revenue Agency for the previous three tax years.

If there has been an income change in the last year or since the paying parent's last income tax return, he or she might also need to provide the following:

- pay slips;
- a letter from his or her employer stating the wage or salary;
- the business's financial statement (if he or she controls a business);
- proof of any Employment Insurance, workers' compensation or disability payments;
- details of any business partnerships.

The receiving parent can ask a judge to assign an income amount if it's believed that the income tax statement isn't an accurate reflection of the total income and if it's proved that the paying parent has done any the following:

- is intentionally underemployed or unemployed (unless the reason is related to caring for a child, or reasonable education or health needs);
- isn't required to pay federal or provincial income tax (and so has more disposable income for child support);
- lives in a country where income tax rates are significantly lower than Canada's;
- gets a large portion of income from dividends, capital gains or other sources with a lower tax rate;
- receives or will receive income or other benefits from a trust;
- placed income elsewhere (such as putting it in someone else's name) to conceal it;
- doesn't reasonably use property and resources to generate income (in other words, has too much money tied up in land or business investments, which reduces the amount of cash available for child support);
- unreasonably deducts expenses from income; or
- has withheld income information.

The following factors may also be considered in determining the annual income amount to use as the basis for child support:

- income has increased or decreased over the past three years;
- your income has gone up or down a lot over the past three years (the income can be averaged);
- you've received a one-time amount of money, such as an inheritance or an employee bonus (all, some or none of this amount may be included);
- you had exceptional business or investment profits or losses during a particular year; or
- if you control a corporation, what you would earn if you were being paid for the services provided to the corporation.

If the paying parent's income is over \$150,000, the tables give an amount of child support for \$150,000, and a percentage to use for the rest of the income over \$150,000. Parents can also agree on the child support amount for the rest of the income over \$150,000, based on their circumstances, including whether the child is 19 or older and is self-supporting or earning an income.

The parents can agree on the annual income and include this in a parenting agreement. If the case ends up going to court and if the income amount seems reasonable, the judge may use that amount.

### On-line child support help

Justice Canada has easy on-line child support information at: [canada.justice.gc.ca/en/ps/sup/lookup/index.asp](http://canada.justice.gc.ca/en/ps/sup/lookup/index.asp). Just enter the annual income, select the number of kids and the province or territory of the paying parent, and the website will tell you the monthly amount of child support. This on-line service can't factor in things like special expenses or undue hardship.

## Step 6 Finding the table amount

Once you know the correct amount of annual income, using the tables is pretty easy. Using the right table (the May 2006 version — or more current if applicable — of the Yukon tables when the paying parent lives in the Yukon), find the annual income in the column on the left. Next, look to the right and find the column beneath the number of children. The box in the table where this row and column meet gives the amount of monthly child support. This is the base amount.

Although this table amount is very clear for annual incomes that are straightforward (e.g. salary from one employer) and when the child or children are under 19 and in school, determining the appropriate monthly child support payments can be quite complicated if there are other factors. Whether this is the actual amount that should be paid depends on certain exceptions and calculations (see steps 5, 7 and 8).

## Step 7 Special expenses

The child support amounts in the tables apply in most cases and are considered a starting point. Sometimes, however, children may have special expenses that could affect the child support amount. The law defines special expenses as expenses that meet the following conditions:

- necessary because they're in a child's best interests,
- reasonable because of the means of the parents and of the child, and
- consistent with the family's spending patterns prior to the separation.

When there are special expenses, parents often agree to add the expense, or a share of the expense, to the basic child support amount determined from the table. The parents can discuss and decide together if a special expense is reasonable and how much money they'll each contribute to it. Parents usually share in the special expense in proportion to their incomes, but they may agree to any other arrangement.

For example, if the paying parent earns twice as much as the receiving parent and the special expense is \$75 a month for math tutoring, the paying parent would probably contribute \$50 and the receiving parent would probably contribute \$25. The paying parent's share of \$50 would then be added on to the basic child support amount that was already determined from the tables. If the table said that the monthly amount was \$300 for one child, it would be increased to \$350. When deciding what amount should be added for special expenses, the parents should consider any financial help the custodial parent gets for the expense. For example, child care expenses can be a special expense, and the custodial parent can get a tax deduction for those expenses.

Note that these special expenses can only be factored in when parents have sole custody or split custody. They're not relevant for shared custody arrangements because both parents are usually contributing more or less equally.

Sometimes parents have a hard time agreeing about whether certain expenses should be considered special expenses, or how payment for those expenses should be divided. Determining special and extraordinary expenses can get very complicated. If there's already a lot of conflict, this issue can unfortunately make it worse. If necessary, one of the parents can apply to the court and ask a judge to make the decision.

Under the guidelines, these special expenses are included:

- child-care expenses that a residential parent spends due to his or her job, illness, disability or educational requirements for employment;
- the portion of medical and dental insurance premiums that provide coverage for the child;
- health care needs greater than \$100 per year that aren't covered by insurance (e.g. orthodontics, counselling, medication, eye care);
- extraordinary expenses for extracurricular activities;
- extraordinary expenses for school or other educational programs; and
- expenses for post-secondary education.

The term "extraordinary expenses" refers to the following items:

- any expense that's higher than the receiving parent can reasonably cover given his or her income (including any child support received), or
- expenses that are beyond what is usual, taking into account:
  - the income (including child support) of that parent,
  - the nature and number of the programs and extracurricular activities,
  - any special needs and talents of the child,
  - the overall cost of the programs and activities, and
  - any other similar factor that's relevant.

## Step 8 Undue hardship

If the monthly child support amount set out in the table could create undue hardship for either parent, or for a child, then a different amount may be more appropriate. Undue hardship is usually claimed only in cases of sole custody or split custody.

There are two main questions to answer in deciding if anyone will experience undue hardship:

1. Are there circumstances that could cause undue hardship for either parent or for the child? (See examples below.) In other words, would it be difficult to pay the usual child support amount, or be difficult to support the child on that amount?
2. Does the household of the parent asking for the change have a lower standard of living than the household of the other parent?

These circumstances could cause undue hardship for a paying parent:

- unusually high debts from supporting the family before the separation or from earning a living;
- unusually high access costs (e.g. if the parent lives a great distance away from the Yukon);
- a legal duty to support another person;
- a legal duty to support a different child (e.g. a child from a previous relationship); or
- a legal duty to support a person who, because of illness, disability or other cause (including education), cannot support himself or herself.

In comparing the households' standard of living, the law says that the financial circumstances of all members of the parents' households can be considered, including new spouses or partners. If either parent has remarried or is living with a new partner, that person's income must be taken into account. This is the only time that a new partner's income is relevant. Parents completing the "household comparison of standards of living test" can also deduct Canada Pension Plan contributions and Employment Insurance premiums when determining their annual income.

### The effect of remarriage

The only time that a new partner or spouse's income is relevant in calculating child support is when comparing the households' standard of living to determine whether there is undue hardship.

## 5.3 Agreements for child support

An agreement about child support can be part of a general separation agreement. It can also be part of a general parenting agreement that covers other issues such as custody and access. If parents can agree about child support, an agreement is probably easier, faster, less stressful and less expensive than hiring lawyers to negotiate, especially if the dispute ends up going all the way to court for a judge's decision. Both parents can also get help from a mediator or from their own lawyer at any or all of the stages in negotiating and reaching an agreement.

If parents make their own agreement about the appropriate amount of child support, they're not legally required to follow the Child Support Guidelines or the table amounts. It will probably be easier to start with the amount in the table, however. Parents can still agree on a higher or lower amount, taking into account all the other circumstances of their lives, including things such as special expenses.

An agreement for child support should include the following basic information:

- the name and birth date of each child involved;
- the income of any parent whose income is used to determine the amount of the child support order;
- the child support amount determined under the guidelines;
- the child support amount determined for a child 19 or over;
- information on special expenses, the child it relates to and the amount of the expense or the proportion of the expense to be paid; and
- the date on which the lump sum or first payment is payable and the day of the month or other time period that future payments are to be made.

A written agreement also usually includes more than the basic information. Even if you choose not to follow the Child Support Guidelines, you'll want to ensure that your agreement addresses any potential costs in the future. For example, these issues may be addressed in the child support agreement:

- How will occasional large expenses such as eyeglasses, dental expenses, sports equipment or special lessons and activities be dealt with?
- Which parent will ensure the child has adequate medical insurance coverage?
- Will the child continue to be supported after a parent's death through a life insurance policy, a will or the agreement?
- Do either or both parents wish to contribute to a trust fund that the child will receive at a certain age or for a certain purpose such as education?
- How will special expenses in the future (such as college or university tuition) be dealt with?

- When will child support payments end: at age 19? When the child moves out or is employed? When he or she is no longer a student?

You're not legally required to follow the guidelines or table amounts when agreeing on child support. It's a good idea to write down exactly what you've agreed to so that you can avoid any misunderstandings later.

### 5.3.1 Can we register our agreement with the court?

Parents can request that a judge make a child support order based on the terms of their agreement (this is called a consent order). This means that a judge will compare the agreement with the relevant Child Support Guidelines and appropriate table. The judge will also look at all the financial information that the parents have filed with the court. If the agreed amount isn't appropriate or reasonable, then the judge will either change the amount or won't grant the order and will send it back to the parents to try again.

If the judge approves the amount and the terms, an order will be granted. Once the consent order is filed and approved by a judge, it becomes as legal and official as the case that goes to court for a judge's decision after lawyers argue each side. A consent order can be registered with the Maintenance Enforcement Program (MEP). Once you do this, then if the paying parent doesn't pay at some point, the MEP will help to enforce the agreement. Also, if there are any disputes about whether or not payments have been made, the MEP will have a record of all payments.

If parents make an agreement for child support that is quite a bit less than the table indicates, and if the reasons for this aren't in the best interests of the kids, a court would not uphold the agreement. Courts don't consider agreements about kids to be as binding as other contracts or agreements (such as those for property division or spousal support).

### 5.3.2 Can we agree to ignore child support payments?

Although parents sometimes agree to ignore child support payments, they don't have the right to give up the child's support money. The obligation is owed to the child, not the parent. It's in the child's best interests that all the financial support possible is available for their care. If such an agreement ever went to court, a judge probably wouldn't allow it; if the child needed support, the court would likely order support to be paid even if the receiving parent had agreed not to ask for it.

Sometimes the parent will agree to ignore child support payments because there has been a lot of conflict and emotional pain and he or she doesn't want to have any more contact with the other parent. If this is the case, a child support agreement or order can be registered with the Yukon Maintenance Enforcement Program (MEP). Payments are then sent to the MEP office at the Whitehorse Law Centre; the MEP forwards the payment to the receiving parent. It's not necessary to send mail to or receive mail directly from the other parent.

### 5.3.3 What if I'm feeling pressured into an agreement?

If you feel pressured or threatened into an agreement by any physical, mental or emotional abuse by the other parent, you shouldn't sign. Any agreement reached this way probably won't be in the best interests of your child either. Ask for help from someone such as a lawyer (free legal advice from Legal Aid might be available; see Chapter 3). Contact information is found in Chapter 9.

### 5.3.4 Do payments have to be monthly?

The tables state the amount of child support to be paid every month, based on the income earned each year by the paying parent. Most paying parents find it easiest to make this payment each month on the same date. If it's more convenient for both parents, they can agree to change this to a different schedule; for example, six months of child support twice a year as a lump sum payment.

## 5.4 Court orders for child support

If the parents can't agree on the amount of child support, one parent will need to apply for a court order. The parent who has the day-to-day care of the child usually makes this application. A judge will consider where the children are living and the incomes of the parents and will then make a decision about what the child support amount should be. Both parents will usually need to give copies of income information to the court in case their income is needed to determine child support.

If the receiving parent is on social assistance, the Yukon government can make the application for support on behalf of the child. The amount of social assistance will then be reduced depending on the amount of child support paid.

The application for child support includes this information:

1. A petition or a Writ and a Statement of Claim (these forms can be picked up from the Law Line office or other places).
2. An affidavit (this is a list of the relevant facts and information about the case, sworn by a notary).
3. A statement of income (this is a detailed listing of your income, if your income is required to determine child support).

At the time of the hearing, you'll be asked to give evidence — to state the facts under oath as you know them. The other parent can also give evidence. Both parties can be asked questions by the other side, or by their own lawyers. The judge will then make a decision as to how much the paying parent must pay for child support.

### 5.4.1 What if the other parent says he or she won't pay?

You might have reason to think that the other parent won't pay even if the judge makes a court order. For example, the other parent may have told you this or may not have obeyed court orders in the past. You should tell the judge about this. The judge can make an order for something other than periodic payments if it would be more realistic. For example, a lump-sum payment may be preferable if the other parent has the means to pay it. Also, property that the paying parent owns, such as savings bonds or a car, can be transferred or used as security to ensure that payments are made.

### How to apply for child support

If you've chosen not to hire a lawyer, you can do the following:

Pick up some easy-to-read booklets that explain all the steps to apply for a child support order or to change an existing order. They are called Family Law Court Procedure Booklets for Self-Represented Litigants. These booklets and the required forms are also available on the Yukon government website. You can get help in using the booklets from the Maintenance Enforcement Program.

Contact the Law Line or visit the Yukon Public Legal Education Association website for guides, forms and kits, including those needed for claiming child or spousal support and changing child or spousal support.

Contact information for these resources is provided in Chapter 9.

## 5.5 Changing child support

Once you have a child support order or agreement, the amount of the payments may need to be changed at some point in the future. This might be because of a material change in circumstance, or because of new evidence that wasn't available when the existing order was made. The legal system calls this "varying" the order. You'll need to either renegotiate the agreement with the other parent, or go back to the court and make an application to change the order.

This might be a relatively easy recalculation — for example, to make an older order or agreement match the current table amounts, or because the paying parent has a new annual income. You might be able to amend your parenting agreement, or you may complete the court application on your own with the help of a "variation kit" from the Law Line or the user-friendly "Court Procedure" booklets (see Chapter 9).

Sometimes it's quite a complicated legal issue to change or vary an order, especially if the change involves calculating annual income. If this is the case, you may need a lawyer's help.

Another time that you may need to apply to change the order or agreement is if it needs to be cancelled. For example, the agreement or order may not include a term that says when child support payments should end. For example, child support orders don't automatically end when a child turns 19 or is no longer dependent.

When it comes to paying child support, parents have a legal duty to report increases in their income. It's not up to the receiving parent to initiate a variation.

Here are some of the most common reasons that a child support amount might need to be changed:

- The paying parent's income has changed.
- There's been a material change in circumstances in the child's life (e.g. if the child has new special expenses, such as expensive sports equipment or medical expenses not covered by an insurance plan).
- There's been a material change in circumstances in the paying parent's life and the payments now pose an undue hardship (e.g. if the paying parent is temporarily or permanently ill or disabled, or is now responsible for the care of an aging or disabled parent or sibling).
- The paying parent has moved to another Canadian province or territory and a different table applies.
- The child, or one of the children, is over the age of majority and no longer lives with the receiving parent and/or no longer requires financial support (or needs less support);
- The child support order or agreement was made before the May 2006 revised tables, before May 1, 1997 (if the parents divorced) or before April 2000 (if parents never married or just separated).
- The paying parent has accumulated a lot of debt from unpaid child support and wants this debt to be reduced because of a change in circumstance. (This would be refused, for example, if the paying parent tried to use something such as his or her own criminal act and subsequent imprisonment as a change in circumstances preventing him or her from paying child support or the debt.)

## 5.6 Enforcement

### 5.6.1 What if the agreement or court order is ignored?

The Yukon Maintenance Enforcement Program (MEP) is a free service provided by the Yukon government. Once a child support agreement or order is registered with the MEP, the program officers can try to enforce the required payments if the paying parent is not following the order. The receiving parent can get a registration package from the MEP which has all the necessary information.

Once the paying parent has registered with the MEP, he or she must send all payments directly to the MEP office. The MEP then forwards the payments to the receiving parent. If the payments are not made, the MEP can take action in several ways to try and collect the money:

- garnish the paying parent's wages if he or she works in the Yukon;
- have the sheriff seize land or goods owned by the person and sell them to pay the debt;
- require the person to come to court to explain the default; and
- if the person fails to appear, have him or her arrested.

The MEP can try to enforce accumulated debt (arrears) of child support that has been owed within the last ten years.

### 5.6.2 What if the paying parent leaves the Yukon?

An agreement exists between the Yukon, other Canadian provinces and territories, most of the American states, and many other countries to enforce court orders made by each other's courts. The Yukon's *Interjurisdictional Support Orders Act* covers these situations.

For example, suppose Mary is a paying parent who has moved to Newfoundland and Labrador, a "reciprocating state." The procedure is to start the claim (file your documents) in the Yukon and go to court here. The judge listens to the evidence and makes an order for child support in a certain amount. This is called a provisional order because it has no effect until it's sent to the Newfoundland court and is confirmed there. The Newfoundland court will send Mary a notice to go to court there and explain her case. If the Newfoundland court confirms the provisional order, then Mary is legally obligated to pay. This is a brief description of a process that can take several months. People using this procedure will need to consult with a lawyer.

If the paying parent is living in a place that's not on the list of reciprocating states, then it still may be possible to file a claim for support, but it can be more complicated. You'll need to consult with a family lawyer.

If you don't know where the paying parent is, a tracing agency can be hired to find him or her. A tracing agency usually only charges a fee if the person is located and an address provided. Tracing agencies generally only accept cases for lawyers, police or other agencies, not for individuals, so you'll probably need a lawyer's help to hire a tracing agency.

### 5.6.3 What if the paying parent leaves the Yukon after you already have a court order for support?

In this case, the court order will need to be enforced in the province or state where the paying parent lives. This requires filing the order in the province or state where he or she lives. The Maintenance Enforcement Program will do this if the paying parent lives in a reciprocating state (a country or state that is part of the agreement mentioned in section 5.6.2). The document must be served on the paying parent, who may dispute it by going to court in the other place. If it's not disputed, it becomes an order of that court.

If the paying parent doesn't pay voluntarily at that point, a lawyer in that province or state could try and collect. Or, depending on the place, the government there may have an automatic enforcement program similar to the MEP. Contact the MEP office to find out if they can help with enforcing a child support order against a person living outside of the Yukon. (The Yukon *Interjurisdictional Support Orders Act* also applies to this situation.)

#### 5.6.4 What if I have a support order from somewhere else?

If the paying parent lives in the Yukon, and there's a court order for child support from another place in Canada or from states or countries who are part of the agreement described in section 5.6.2, the agreement also applies. The order must be from a place that is considered a "reciprocating state," which means that it has signed the same agreement as the one signed by the Yukon. In some cases, the MEP can enforce orders made by courts outside of the Yukon. All Canadian provinces and territories, most of the American states, and many other countries are part of this agreement to enforce each other's support orders. Check with the MEP office to find out if they can enforce your individual case.

#### Legal duty to report increased income

Parents paying child support have a legal duty to report any increase in their income.

If the paying parent doesn't report increases and doesn't increase the child support amount accordingly, a court could later order that increased payments be made retroactively.

#### 5.6.5 What if I think the receiving parent is wasting the money?

Sometimes one parent doesn't want to give the child support money to the other parent because of a real or perceived fear that the other parent won't spend it on the child, or won't spend it appropriately. This is not considered a valid reason for refusing to pay child support, however. The law makes an assumption that the child's needs cost money and that the custodial parent is paying those expenses. The parent with custody is not required to show that every single dollar of the child support payment went directly to expenses for the child.

In the rare case where a parent can prove that no money is being spent on the child, other arrangements may be ordered by a judge so that the child will still receive the benefit of support from the non-custodial parent. This is not a common occurrence, however.

#### 5.6.6 What if a parent withholds income information?

If a parent withholds income information, or doesn't calculate annual income fairly or accurately, a judge can order him or her to provide any missing documents. The judge can also assign (impute) the amount of income that will be used to determine child support. The judge can impose a penalty such as awarding the costs of the legal proceedings to the other parent, or finding the parent in contempt of court. A parent whose income is involved in the determination of child support must continue to provide income information if the other parent asks. Requests for income information must be made in writing, and may only be made once a year.

## WHAT THE COURTS HAVE SAID

### **When parents share custody**

When the parents divorced they agreed to joint custody of their son, with daily residence with Mom and liberal access with Dad. They agreed on \$500 a month child support paid by Dad; six years later this increased to \$563. Three years after that, Dad applied for a variation to reduce the monthly child support since the son was now staying with Dad one extra night per week, which meant each parent had physical custody 50 percent of the time. Mom earned about \$20,000 less a year than Dad. One of the lower courts ordered that the child support amount be reduced to just \$100 per month, while the Court of Appeal ordered that it be increased to \$688 per month (the full Table amount).

After taking into account all the factors prescribed in s. 9 of the Child Support Guidelines, and applying them to the particular facts of this case, the Supreme Court of Canada decided that the monthly child support paid by Dad should be \$500. The Court also took into account the fact that this had been a long-standing child support arrangement.

The Supreme Court said that a divorced parent in a shared parenting arrangement should not automatically pay less child support. A shared parenting arrangement occurs where a parent has access or physical custody of a child at least 40 percent of the time over a year. The family's entire financial context should be taken into account to ensure an adequate standard of living for both parental homes. Time with the kids is not the only factor that should determine child support in a shared custody situation.

*Contino v. Leonelli-Contino* [2005] 3 SCR 217

### **When the paying parent's income increases**

Although the four different cases involved in this decision had different facts, in all of them the paying parent's income had increased but the child support payments had not. For example, in one of the cases the parents divorced in 1991 and the two children lived with Mom. Dad paid monthly child support. Although Dad twice increased his payments, he was still paying substantially below the amount set out in the Child Support Guidelines Table. Mom wasn't aware that Dad's income had increased dramatically since the divorce. She applied to vary the child support in 2003, and the Supreme Court of Canada ordered Dad to make increased child support payments retroactive to 1997 when the Child Support Guidelines came into force.

The Supreme Court of Canada decided that divorced parents who pay child support have an obligation to report increases in their income, and to pay increased child support in accordance with that additional income. If parents don't report an increase in income, they will be obligated to pay child support retroactive to when their income increased. A court can make a retroactive child support order (but probably not further back than three years).

The Supreme Court of Canada said that in deciding whether to make a retroactive award, a court must decide each case on the basis of its own facts. The paying parent's interest in certainty must be balanced with the need for flexibility and fairness to the child. In considering an order for retroactive support, the court should take into account the recipient parent's delay (if any) in seeking child support, the paying parent's conduct, the past and present circumstances of the child (including the child's needs at the time the support should have been paid) and whether the retroactive award might entail any hardship.

*D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra* 2006 SCC 37

## Chapter 5 summary

Issue	Legal term	What you can do	Who can help
Who pays child support and how much?	Child Support	Negotiate an agreement Apply for a court order	Family Justice Office Mediator Lawyer
What if child support isn't paid the way it's supposed to be?	Enforcement	Register with the Maintenance Enforcement Program (MEP)	MEP Lawyer
Who can help collect unpaid child support payment debt (arrear)?	Arrears	Register with Maintenance Enforcement Program (MEP)	MEP Lawyer
How do I change the amount of child support payments?	Variation	Renegotiate an agreement Apply to vary a court order	MEP Lawyer

# 6. Spousal support

This chapter covers the following topics	
6.1 What is spousal support?	6.5 Agreements for spousal support
6.2 Who is entitled to spousal support?	6.6 Court orders for spousal support
6.3 How much spousal support?	6.7 Changing spousal support
6.4 Duration and form of spousal support	6.8 Enforcement

## 6.1 What is spousal support?

Spousal support refers to the money paid by one spouse to the other spouse or partner after a relationship breakdown. In the past, it has also been called alimony or maintenance. The Canadian legal system now uses the term “support.” It refers to the financial contribution that a person may be obligated to pay — usually in regular or monthly payments, either for a certain period of time or indefinitely — to a former spouse.

The law says that every spouse has an obligation to support himself or herself and the other spouse according to need and if they’re able to provide support. This law applies after the couple has separated, as well as while they’re still living together. If you have the money and ability to help out, you’re basically not allowed to leave your former spouse to a life with a much lower standard of living.

Unmarried common-law partners who separate may also be entitled to receive, or be obligated to pay, financial support but there are more restrictions on this than there are for married couples who separate. In the Yukon, for example, the claim for support by a common-law partner must be made within three months of the separation, and the relationship must have been one of “some permanence.” Note that other Canadian provinces and territories may have different rules about this. The rules that apply here in the Yukon may not be the same as those in B.C., for example.

### Common misunderstandings

- My ex has a new partner so I can stop paying spousal support.
- Women never have to pay support.
- Spousal support is not taxable income.
- A spouse or partner who commits adultery isn’t entitled to support.
- Common-law partners aren’t entitled to support.

First it's necessary to consider whether a spouse is entitled to receive support. It's not automatic, and will depend on many things (as explained in section 6.2). If the couple agrees that one of them is dependent on the other and entitled to some support, or if a judge decides that, the next steps are to decide the amount of the support, the duration of the support and the form of those support payments. Each of those steps is discussed in this chapter.

### 6.1.1 Terminology

The terms “spouse” and “spousal support” in this chapter usually include common-law partners.

### 6.1.2 Steps in determining spousal support

Four issues need to be addressed when calculating spousal support:

- entitlement — is one of the spouses entitled to any financial support?
- amount — if there is entitlement, how much should that support be?
- duration — if there is entitlement, how long is the receiving spouse entitled to receive that amount of support?
- form — if there is entitlement, how should payments be made and how often?

### Applicable legislation

If a married couple is divorced or in the process of divorcing, the laws covering spousal support for people in the Yukon are found in the federal *Divorce Act*. If a married couple has just separated, or if they were never married (in other words, if they had a common-law relationship), the laws covering spousal support are found in the Yukon's *Family Property and Support Act*. The principles covering spousal support — for all couples — are also found in case law (the previous judgments of courts in similar cases) mostly from the Yukon or from the Supreme Court of Canada.

### 6.1.3 How is spousal support arranged?

Couples who separate have three choices for arranging spousal support: agreement, consent order or court order.

#### 6.1.3.1 Agreement

If you're able to communicate and negotiate with your former spouse or partner, you can prepare a written separation agreement that includes the amount of spousal support one of you will pay to the other, the length of time this will be paid and how payments will be paid (for example, \$200 on the first of each month for two years). This agreement can also be included with any divorce order. A mediator or lawyer can help you prepare the agreement.

#### 6.1.3.2 Consent order

A consent order is an agreement made by the spouses that's filed with the court. The terms of the agreement are set out in a court order (if a judge agrees that it's legally enforceable).

#### 6.1.3.3 Court order

A court order is a decision made by a judge who hears all the facts of each person's situation and orders a certain amount of spousal support for a particular duration (or indefinitely), and how and when those payments should be made. A court order may also be part of a divorce order.

## 6.2 Who is entitled to spousal support?

A spouse is entitled to support payments if the couple agrees, or if a judge determines, that he or she needs support and that the other spouse can pay it. It's a bit more complicated than that, of course.

Not surprisingly, the issue of whether one spouse needs the financial support is often not straightforward or easy to agree on. The concept of “need” means different things to different people. Some might say that “need” means just the basic necessities of life — food, shelter and clothing. Others might say that “need” means maintaining whatever standard of living the couple enjoyed while they were living together.

The law considers several things when determining whether a spouse needs support. For example, the law says that a spouse has an obligation to pay support if the other spouse is experiencing economic need when the couple separates, even if that need isn't a direct result of the marriage or its breakdown. The person might be experiencing that need because of illness or disability that prevents him or her from working and earning enough income to support himself or herself.

In considering need, one of the most important principles is the effect of the relationship and the relationship break-up on each person's economic situation. In other words, are you financially worse off or better off? The law says that the longer the marriage lasted, the more the individuals should be left in financial positions after the marriage that are approximately similar to each other.

It won't usually be fair or appropriate if one spouse has a huge amount of income or overall wealth after the relationship ends, and the other spouse has a very small amount of income or wealth. This is particularly relevant if the lower-earning spouse gave up the opportunity to earn income in order to maintain the couple's household and/or take care of the couple's children (although this principle may not be followed if the marriage was short-lived).

If one spouse doesn't earn an income during the marriage, he or she will almost always be at an economic disadvantage once the marriage ends. For example, he or she probably won't have developed the skills and experience to get a job that pays as well as the other spouse who worked throughout the relationship. The longer the couple were together, the more likely this is.

The law encourages the dependent spouse to achieve financial independence if at all possible, rather than relying on the former spouse for an indefinite time. This isn't the most important principle, however. For example, a person might achieve a certain basic level of financial independence, but still be economically disadvantaged compared to the standard of living he or she had when the couple were married.

The law says that all of the circumstances of a couple's situation need to be considered in determining entitlement to spousal support.

### Effect of divorce application on a spousal support order

If a spousal support order was made while you were separated, and you later get divorced, the first order will be replaced if a new spousal support order is included with the divorce. If the divorce doesn't include a new order for spousal support, then the separation's spousal support order continues to apply.

### 6.2.1 Are common-law partners entitled to receive support?

Common-law partners may apply for spousal support, but their right to it is more limited than it is for married spouses. First, a right to support exists only where the parties have lived together in a “relationship of some permanence.” The law doesn’t define what this term means, though, so the facts of your case will be looked at by a judge to see if it was a relationship of some permanence based on the way that courts have interpreted and decided this in the past. These are some of the factors that the judge might consider:

- the length of time you lived together;
- your original intentions (perhaps you initially planned to marry); and
- how dependent you were on each other and how involved you were in each other’s lives.

The second important difference that applies to common-law partners is that the partner must apply for support either while the couple are still living together or within three months after they separate. This is a very short time period and it’s unlikely that an extension will be granted.

All of the rules and factors to be considered about needs, the partner’s ability to pay, and so on, will be applied in the same way as for married couples who have separated.

### 6.2.2 Spousal support for divorces

The federal *Divorce Act* sets out four goals of spousal support. While these goals apply specifically to divorces, the law is very similar for separations:

- to recognize any economic advantages or disadvantages of the marriage or divorce;
- to fairly distribute the costs of raising the couple’s children, in addition to any child support obligations;
- to relieve any economic hardship caused by the divorce; and
- to, as much as possible, promote the economic self-sufficiency of each spouse within a reasonable period of time.

In trying to achieve these goals when determining spousal support for divorces, the judge will consider all the needs, resources and circumstances of each spouse including:

- the length of time the couple lived together;
- the roles performed by each spouse while they lived together; and
- any order, agreement or arrangement relating to support.

### 6.2.3 Spousal support for separations and common-law relationships

When looking at the support needs of a separating spouse or common-law partner, the Yukon *Family Property and Support Act* states that a judge can consider all the circumstances. Although the Yukon Act is more detailed than the federal *Divorce Act* in its list of relevant factors, in practice the principles are usually very similar for divorces.

These are the circumstances that can be considered:

- the assets and income of both partners, including any benefit or loss of benefit under a pension plan;
- the dependent’s ability to provide his or her own support (earning power, including education, special training or any skills he or she could use for employment);
- the ability of the paying spouse to provide support;
- the age and physical and mental health of both;
- length of time they lived together;

- actual needs (this can include their accustomed standard of living before the separation);
- what steps could be taken for the dependent to become financially independent, including how long this would take and how much it would cost (e.g. retraining or a college program);
- any legal obligations to pay support to any other person, such as a child from a previous relationship;
- the desirability of a parent staying home to care for a child;
- their conduct;
- a contribution by the dependent to the other's achievement of career potential and success;
- if married, the effect on the dependent's earning capacity because of the responsibilities he or she assumed before separation;
- if married, whether the dependent cares for a child who is 19 or older but unable because of illness, disability or other cause to support himself or herself;
- if married, any housekeeping, child care or other domestic service performed by the dependent for the family;
- any legal right of the dependent to support (other than public money); and
- if the dependent remarries or lives common-law with someone else.

#### 6.2.4 Other factors

Here is more detail about some of the factors that a court may consider in deciding whether a married spouse or common-law partner is entitled to support.

**Need and ability to pay:** A dependent spouse is entitled to maintain a similar standard of living as during the relationship but only if the paying spouse has the ability to pay.

**Conduct:** Determining whether a spouse is entitled to support doesn't usually involve consideration of any misconduct. The court does, however, have the discretion to consider a spouse's behaviour, conduct or actions, or other intervening factors, when awarding support. For example, if the dependent spouse hasn't been able to achieve self-sufficiency because he or she is emotionally devastated by the other spouse's adultery, then a court can consider this in determining whether the dependent spouse is entitled to support.

**Length of relationship and roles in the marriage:** Usually, the longer a couple live together and the more traditional their roles within the marriage, the more likely that the economic consequences of the marriage and its breakdown will be greater. One spouse will probably be more dependent on the other spouse in these situations.

**Illness and disability:** If one spouse is disabled or sick during and after the relationship, this might be a factor in whether and how much spousal support would be ordered by a judge. This is particularly true if the sick or disabled spouse also has financial need because of the work that he or she did in the relationship (for example, looking after children and maintaining the household).

**Second families:** A spouse's support obligations to his or her first family usually take priority over his or her subsequent families. Although a court won't look at a new partner's income when considering the paying spouse's ability to pay, a new partner or family usually affects the paying spouse's current living expenses. A receiving spouse may still be entitled to support even if he or she remarries or lives with someone else, but the court can take this into account in determining need.

#### Common-law partners

Common-law partners in a relationship of some permanence may apply for spousal support but must apply within three months of separation.

**Separation agreements:** The law treats a mutual agreement between two adults of equal bargaining power very seriously and usually won't order something different unless a child's best interests are at stake. If, however, a judge decides that the couple's separation agreement doesn't reflect both of their intentions or expectations, or doesn't meet certain requirements of the law, then he or she can set aside what the parties agreed to and order something different. Even if what the couple agreed to is a bit different than what the law says, the judge will probably still uphold the agreement unless it's very unfair.

## 6.3 How much spousal support?

Once it's agreed by the spouses or determined by a judge that one spouse is dependent and entitled to receive some money from the other spouse, the next questions are how much the support should be, and for how long the paying spouse should pay it.

The amount and duration won't necessarily be one amount for one set period of time. A judge may order (or the couple may agree) to set one amount for the first year or two, then a lower amount for another year or two. The judge may also set one amount for an indefinite period of time.

How much money a dependent spouse is entitled to depends on all the circumstances of the particular case. These are some of the factors that are considered appropriate and relevant to consider when establishing the amount of support:

- the ability of the spouse to support himself or herself;
- any immediate needs for education or retraining to enhance employability skills;
- any child care responsibilities which might restrict employment opportunities;
- difficulties of maintaining or taking on employment if the spouse has sole custody of any children;
- any need to move away due to factors such as a reasonable fear of the other spouse or his or her family; and
- any increased expenses relating to employment such as clothing, transportation and compulsory employee deductions (not including pension and income tax).

### 6.3.1 Spousal support advisory guidelines

The law has no set rule about the amount of spousal support someone will get. The real test is how much is needed and how much the other spouse is able to pay. Spousal support guidelines have recently been introduced in Canada to assist judges, lawyers and divorcing couples with determining the amount and duration of support.

The advisory guidelines have been developed specifically under the federal *Divorce Act* and at this time (Spring 2007) may not be relevant to couples who are not divorcing (couples who are covered by the Yukon *Family Property and Support Act*). They may not even be relevant for divorcing couples in the Yukon. The guidelines are very new, and a revised version is expected to be released later in 2007. The guidelines in their current form are described below. You should check with a lawyer to find out if these spousal support guidelines are being used in the Yukon, and whether they have been revised.

The guidelines are currently very different from the Child Support Guidelines (see Chapter 5) because the spousal support guidelines are not legally binding. They are just a tool that couples, lawyers and judges may or may not choose to use. The hope is that the guidelines will bring more certainty and predictability to spousal support. They might help to reduce the conflict and stress that often goes along with settling this issue.

The draft guidelines incorporate the basic principles of compensation and need that the Supreme Court of Canada has identified as the foundation for spousal support for divorcing couples. The advisory guidelines provide mathematical formulas that determine spousal support as a percentage of spousal incomes. The formulas are intended to apply to initial orders and to the negotiation of initial agreements; at this point, they're not intended to apply to changes to orders (variations).

The proposed guidelines offer two basic options: the “without child support” formula and the “with child support” formula. Which of these to use depends on whether child support is also being paid or ordered at the time of the original spousal support order. These formulas produce ranges — not a specific number — for the amount and duration of support. The precise number chosen within that range will be something that the couple can negotiate, or that a judge can order, depending upon the facts of a particular case.

#### 6.3.1.1 Without child support

This formula relies on the length of the relationship, including periods of living together before marriage, to determine both the amount and duration of support. Both amount and duration increase with the length of the relationship.

Basic formula: The amount of spousal support is between 1.5 and 2 percent of the difference between the spouses' gross incomes for each year of marriage. The duration is .5 to 1 year of support for each year of marriage, with duration becoming indefinite after 20 years of marriage.

#### 6.3.1.2 With child support

If there are dependent children and child support obligations as well as entitlement to spousal support, child support must be calculated first and given priority over spousal support.

Basic formula: The amount is what will leave the recipient spouse with between 40 and 46 percent of the spouses' net incomes after child support has been taken out. The duration depends on both the length of marriage and the age of the kids when the couple separated.

### 6.4 Duration and form of spousal support

The law says that spousal support can be granted for a definite period or an indefinite period. For example, if the judge determines that the dependent spouse is likely to achieve self-sufficiency within one year, then the order may be for one year only. Spousal support can be ordered as periodic payments (such as regular monthly payments) or a lump-sum payment (one time only).

#### 6.4.1 Periodic payments

Most people think of support as monthly payments because this type of arrangement is the most common. Payments can be ordered for any period of time, however. They can be every week, twice a month, once a year and so on. How long the payments continue will depend on what the court decides in your circumstances. They can be for a definite period such as three years, or until a specific event occurs such as remarriage. Payments may be ordered to continue indefinitely for as long as the paying spouse lives. Normally, a person's obligation to provide support ends at his or her death. There are exceptions, however. If you want to claim against the estate of the other spouse or if you want to ask the judge that a spousal support order be continued after your spouse dies, you should consult with a lawyer.

### 6.4.2 Lump-sum payments

A lump sum may be preferable if there is a fear that a spouse will be unable or unwilling to make regular payments in the future. Support can be given all at once in the form of a cash settlement, which can be invested to earn interest. A lump sum might be held in trust until a specific event takes place. A judge can also order support payments retroactively if it's appropriate in your circumstances.

These two different forms of payments have different tax implications, so you'll want to check the current law on this with a lawyer or accountant. In terms of income tax, spousal support is usually tax deductible for the paying spouse, and the dependent spouse must claim the support as income. Lump-sum payments of spousal support don't usually result in a tax deduction for the paying spouse and aren't usually considered taxable income to the receiving spouse.

### 6.5 Agreements for spousal support

Couples might be able to negotiate the amount of spousal support and include this in a written separation agreement. Prenuptial or marriage agreements sometimes include a provision about whether or not spousal support will be paid if the couple separates. Agreements made between common-law partners when they move in together might also include such a clause.

Once a spouse or partner agrees to give up the right to spousal support entirely, or to accept a certain amount of money as spousal support, the courts generally make him or her honour that agreement. You should consult with a lawyer before signing any agreement where you're agreeing to a limited amount of spousal support, or giving up your right to spousal support altogether.

As a general rule, an agreement made by a couple about spousal support will be binding. The Supreme Court of Canada has ruled, however, that in determining whether to uphold a divorcing couple's separation agreement two questions need to be asked about it. First, was it negotiated and carried out free of oppression, pressure or other vulnerabilities? Second, does it still represent the original intentions and expectations of both spouses, and does it comply with the general objectives of the *Divorce Act*?

In addition, for separation agreements made by spouses who aren't divorcing, or by partners in a common-law relationship, the Yukon law lists three reasons that a court may decide to ignore a couple's agreement about spousal support:

- the results would be very unfair;
- the dependent spouse is receiving social assistance; or
- the paying spouse has failed to make the payments agreed to under the agreement.

Generally, the court will be reluctant to order something different than the spouses knowingly and willingly agreed to — even if the agreement is different than what the law would provide — unless one of the spouses was coerced, pressured or somehow manipulated into signing the agreement.

### 6.6 Court orders for spousal support

If one spouse needs support and the other spouse won't negotiate or sign an agreement, and won't pay voluntarily, the dependent spouse can apply to the court for a court order. To apply for spousal support, the following documents are filed with the court registry:

- Petition or Writ and Statement of Claim (forms that you can pick up at the court registry);
- Affidavit (a list of facts about your situation and what you believe to be the facts about your spouse's situation that you sign and swear to be true in front of a notary); and
- Financial Statement.

The judge may order any of the following terms or conditions as part of a spousal support order:

- that an amount be paid periodically, whether annually or otherwise and whether for an indefinite or limited period, or until a specified event occurs;
- that a lump sum be paid or held in trust;
- that some property be transferred into the dependent spouse's name, whether for life or just for a certain period;
- that exclusive possession of the family home be given to the dependent spouse, where this would be in a child's best interests;
- that all or any of the spousal support be paid into court or to any other appropriate person or agency (such as MEP) for the benefit of the dependent;
- that the payment of support be made for any period before the date of the order (retroactive);
- that expenses be paid for the prenatal care and birth of a child;
- that the obligation and liability for support continue after the paying spouse's death and be a debt of their estate for any particular period of time;
- that a spouse who has a life insurance policy designate the other spouse or a child as the irrevocable beneficiary; and
- that payment be secured under the order by a charge on property or otherwise.

If needed, a court can also order interim spousal support, which is paid while waiting for a negotiated settlement, or for a trial and judge's decision.

### 6.6.1 What if the paying spouse leaves the Yukon before the support claim?

To help people claim or change support orders across borders, an international agreement has been signed by the Yukon, all other Canadian provinces and territories, most of the states in the United States and many other countries. Places that have signed the agreement are called "reciprocating states." The Yukon *Interjurisdictional Support Orders Act* sets out the rules and procedures for this situation. To find out if the place where the other spouse is living is covered by this arrangement, contact the Maintenance Enforcement Program (MEP) office.

Once you make your application here, the judge listens to your evidence. If your spouse should be supporting you, the judge will make an order for support in a certain amount. This is called a "provisional" order because it has no effect until it's sent to the court in the place where the other spouse lives and is confirmed there. The court here will send the court order to the appropriate court where your spouse lives. That court will send your spouse a notice to come to court and explain why the provisional order should not be confirmed. If the second court confirms the provisional order, then the spouse is legally obligated to pay. For more information, contact the MEP office.

If you don't know where the former spouse is, a tracing agency can be hired to find him or her. A tracing agency will usually charge a fee only if the person is located and an address given to you. A tracing agency will usually only take cases for lawyers, police and other agencies, and not for individuals, however. You'll probably have to hire a lawyer so he or she can then hire the tracing agency.

#### What if I don't hire a lawyer?

Some of the procedures and forms required when applying to court for a spousal support order are the same as those required when applying for a child support order. A series of easy-to-read booklets called *Family Court Procedure Booklets for Self-Represented Litigants* describes what's required in the Yukon to apply for child support, but they can also be helpful if you need to claim spousal support, or answer a claim for spousal support (see Chapter 9).

## 6.7 Changing spousal support

If you have an agreement with your former spouse or a court order about spousal support, you may be able to renegotiate the agreement or ask for a change in spousal support. Changes usually can't be made until an original court order has been in place for six months. A hearing in which a spouse asks to change a court order for support — to either reduce or increase the amount — is called a variation hearing.

As a general rule, the courts are reluctant to change (vary) a spousal support order. If you can prove that one of the following things has happened, however, you may be able to get a variation:

- there has been a material change in circumstances since the first order;
- the recipient has not taken reasonable steps to improve self-sufficiency (the law encourages spouses to become financially independent); and
- new evidence comes up that wasn't available at the time the original agreement or order was made (for example, if it's learned that one spouse lied about income or assets, the other spouse can go back to court and apply for a change).

If the paying spouse loses his or her job, or becomes ill or disabled, this would probably be considered a material change of circumstances justifying a change in spousal support. If the dependent spouse wins a lot of money in a lottery, this might be a material change of circumstances justifying a change since he or she may no longer be able to show need.

At the time this book was published (Spring 2007), the spousal support advisory guidelines didn't apply to the full range of issues that can arise when spousal support needs to be changed. Consult a lawyer to find out the current law on this and whether the advisory guidelines have been revised to include variations. See section 6.3.1.

## 6.8 Enforcement

### 6.8.1 What if the spousal support order or agreement is ignored?

If the paying spouse refuses or neglects to pay what the court has ordered, or what you both agreed to, this is called defaulting on the order. The money owed accumulates in debt called arrears. If your spouse lives in the Yukon, the Maintenance Enforcement Program (MEP) can help to enforce a court order for spousal support. The MEP office will also enforce a separation agreement that includes terms of spousal support if you have filed the agreement with them.

A court order for spousal support, or a separation agreement that includes spousal support, may be filed in the office of the MEP at any time. If you don't want to file the agreement when you first sign it (or the court order when it's first made), you can change your mind and file it later if the other person is not honouring the agreement or order.

### Claiming and enforcing support across borders

It's possible to claim and enforce support orders between the Yukon and other places in Canada or certain other countries that have signed the same international agreement. This is called the Interjurisdictional Support Orders agreement, or ISO. The Interjurisdictional Support Orders agreement doesn't apply to support orders made under the federal *Divorce Act*, however; different rules apply. Check with the Law Line or ask a lawyer.

You can pick up forms and information guides at the MEP office, print them from the Yukon government website, or visit Justice Canada's website for more information. See Chapter 9 for contact information.

To register a court order with the MEP, these are some of the forms that may be required:

- separation/maintenance/alimony/paternity agreement(s);
- divorce papers;
- court order for support;
- orders that change the terms of an original support order or agreement;
- enforcement orders resulting from any court action taken to enforce payment; and
- any other documents.

Once you've registered, the paying spouse sends all spousal support payments to the MEP. The MEP then forwards each payment to the dependent spouse. If payments aren't made on time, then the MEP will try to collect them by following up with the paying spouse.

If the paying spouse still neglects to send payment, the MEP can enforce the order or agreement by one or more of the following methods:

- garnish wages if the person works in the Yukon;
- have the sheriff seize property (such as a vehicle) from the person and sell this to pay the debt;
- require the person to come to court and explain the default (if the person fails to come to court, he or she can be arrested and brought to court to answer questions concerning the default).

In some cases, the MEP can also enforce orders made by courts outside of the Yukon. See section 6.6.1.

### Maintenance Enforcement Program

To be enforceable by the Maintenance Enforcement Program (MEP), the spousal support agreement or court order must first be registered with the MEP office. A paying spouse may also wish to register with the MEP so that there'll be a record of all payments made.

Pick up a registration package from the MEP office that contains all the necessary information needed to file. See Chapter 9 for contact information.

#### 6.8.2 What if the paying spouse leaves the Yukon after a court order for support?

This applies to separated or common-law couples only, not to divorced couples. If you get an order for support while your spouse is still living in the Yukon, and then he or she leaves and doesn't pay, you'll have to enforce the order through the province or state where your spouse now lives. The Yukon *Interjurisdictional Support Orders Act* covers this situation. Contact the MEP for more information. See also section 6.6.1.

## WHAT THE COURTS HAVE SAID

### **When a spouse is economically disadvantaged**

The husband and wife were married in the 1950s, separated in 1973 and divorced in 1980. The wife had a grade 7 education and no special skills or training. During the marriage, she cared for their house and their three children, and usually also worked six hours in the evenings at a cleaning job. After separation, she received spousal support. When she was laid off from her job, she applied to vary the spousal support and received an increase. She later obtained other part-time cleaning work and the husband applied to stop all spousal support payments. The question was whether the wife was entitled to ongoing spousal support for an indefinite period of time. The Supreme Court of Canada decided that continuing support for an indefinite period was appropriate in this case. The objectives of the *Divorce Act* had been met in order to achieve equitable sharing of the economic consequences of marriage and its breakdown: the wife had sustained a substantial economic disadvantage from the marriage and its breakdown; the wife's long-term responsibility for the children's upbringing after the separation had an impact on her ability to earn an income; she continued to suffer economic hardship as a result of the marriage breakdown; and despite conscientious efforts, she wasn't yet economically self-sufficient.

*Moge v Moge* [1992] 3 SCR 813

### **When a separation agreement releases spousal support obligations**

The husband and wife separated after about 14 years of marriage. A year later, they signed a separation agreement that included a spousal support release clause (they agreed that spousal support would not be sought or claimed). After the divorce, relations became acrimonious. Four years after the separation agreement was signed, the wife applied for spousal support. The Supreme Court of Canada denied her application, deciding that the agreement should be given significant weight. The wife's evidence at the time of her support application didn't show that the agreement should not still be in effect. The court should only set aside the wishes of the parties as expressed in a separation agreement where the agreement is not in compliance with the overall objectives of the *Divorce Act*, where the agreement was made under any oppression or pressure, or where it does not reflect the parties' original intentions.

*Miglin v. Miglin* [2003] 2 SCR 303

### **When a dependent spouse is sick or disabled**

A couple lived together for seven years, including three years of marriage. They divorced in 1995, three years after separating. The wife had health problems, and became disabled and unable to work and support herself. During the first two years of the relationship she had paid the majority of the household expenses because she earned more income (and her two kids from a previous relationship lived with them). The couple later shared expenses equally. He had covered the wife's needs in the early stages of her illness. Initially the wife received monthly spousal support, which the husband later applied to stop. The Supreme Court of Canada clarified that the wife was eligible for support based on four factors: the length of time they lived together; the economic hardship that marriage breakdown imposed on her; her palpable need; and the husband's financial ability to pay.

*Bracklow v. Bracklow* [1999] 1 SCR 420

### **When spousal misconduct is relevant**

The Supreme Court of Canada decided that for divorcing couples a failure to achieve self-sufficiency due, in part, to the emotional devastation caused by the other spouse's misconduct (adultery), was a valid factor to consider in deciding entitlement to spousal support. In this particular case, there were also a number of other factors unrelated to misconduct, including the wife's age at the time of the marriage break-up and her health problems.

*Leskun v. Leskun* [2006] 1 SCR 920

### Chapter 6 summary

Issue	Legal term	What you can do	Who can help
Can I get financial support from my spouse or partner?	Entitlement to spousal support	Negotiate an agreement Apply for a court order	Mediator Lawyer
How much should be paid, when and for how long?	Spousal support quantum and duration	Negotiate an agreement Apply for a court order	Mediator Lawyer Accountant
What do I do if an agreement or order isn't paid?	Enforcement	Register with Maintenance Enforcement Program (MEP) Apply for court order	MEP Lawyer
How do I change the spousal support amount or terms of payment?	Variation	Renegotiate an agreement Apply to vary a court order	Mediator Lawyer

## 7. Dividing property

This chapter covers the following topics	
7.1 Introduction	7.7 Non-family assets
7.2 Equal division of family assets	7.8 How to deal with debts
7.3 What are family assets?	7.9 Property division for common-law couples
7.4 Placing a value on family assets	7.10 Agreements and court orders
7.5 The family home	7.11 Enforcement
7.6 If unequal division is more fair	

### 7.1 Introduction

Most couples share property and debts. When they separate, they have to decide how to divide all of these things between them. The term “property” doesn’t just refer to land. Family property might also include a house or condo, a car, some furniture, large appliances, small appliances, artwork, china and silver, recreation equipment, a chequing account, a savings account and so on. These things are all property.

In addition to forcing decisions about who gets what property, separation also disrupts all of your finances. You may need to decide issues such as who will pay the mortgage or the line of credit or the credit card bills — not to mention the phone and electricity bills. The bank may not want to give the lower-earning spouse or partner any credit without a guarantee from the higher-earning spouse or partner, or without an agreement or court order showing that he or she has a legal entitlement to some money from the other.

This chapter summarizes the main principles of law that apply to the average couple who need to divide up property because of separation or divorce. This can be quite a complicated area of the law, not to mention complicated arithmetic and

#### Common misunderstandings

- If we’re common-law, I automatically get half of the property.
- If my spouse commits adultery, he or she isn’t entitled to a share of the assets.
- Property is always divided 50/50 when people separate.
- If it was mine before we got together my ex has no right to it.

accounting. A lot is at stake if you don't find out all your rights and responsibilities. General legal information such as the material provided in this publication can't cover all situations. Although you can include all the details about your property division in a separation agreement, you should get some professional advice from a family law lawyer and/or an accountant before you sign anything, to ensure that all your financial interests are protected.

### 7.1.1 Property law

Property law offers a good example of how both Canadian and Yukon legislation might apply to your situation. Canadian law recognizes two fundamental types of property: "real property" and "personal property." Real property is basically land (and the buildings on it). Personal property is every other kind of property that is not real property (for example, jewellery, furniture and bank accounts). See Chapter 2 for an explanation of the applicable legislation.

Real property can generally only be dealt with under the law and by the courts of the place where it's located. If you own real property in B.C., for example, the Yukon Courts generally can't deal with it. The law that generally governs the division of real property located in B.C. is B.C. law.

Personal property, however, can generally be dealt with by the Yukon Courts, in accordance with Yukon law, no matter where the property is located. If you have an account at a bank branch in B.C., the Yukon Courts generally can deal with it and Yukon law can be applied in dividing the money held in that account. (This will also depend on whether you're able to get a Yukon court order enforced in another province — a topic that's beyond the scope of this book.)

There are often exceptions to these general principles. They are not absolute. If you or your spouse or partner own property of any sort located outside the Yukon, you should speak to a lawyer.

#### Applicable legislation

Although most of this chapter applies only to married couples, family property laws aren't contained in the federal *Divorce Act*. The Yukon *Family Property and Support Act* sets out the rules about property division for Yukon married couples whether they divorce or just separate.

Unless common-law couples sign a cohabitation or separation agreement agreeing to be covered by the Yukon *Family Property and Support Act*, or agreeing to treat their property with the same rules as a married couple, the property division laws in this chapter don't apply. Some of the general principles may be the same for common-law couples, however; refer to section 7.9.

## 7.2 Equal division of family assets

The major principle of law affecting the property of married couples who are separating and divorcing is equal division of family assets. This means that each spouse is entitled to 50 percent of the family possessions and belongings that are owned at the time of marriage breakdown.

The rule is that when a married couple split up, each spouse can get half of all the family assets the couple owned at the time they separated. It usually doesn't matter whose name a particular possession is in, or who actually bought it, or even whether the property was bought or received before the marriage.

The principle behind this rule is that the law considers marriage to be a partnership. There are three basic responsibilities within a marriage partnership: financial support for the family; care of the children; and management of the household. The law assumes that both spouses share these three responsibilities in a way that's more or less equal, although not necessarily the same.

Every rule has exceptions if following it would result in a situation that's unfair. There are some situations where an unequal division of property will be the most appropriate way of dealing with things (see section 7.6). If a case goes to court, the main thing that a judge considers in dividing the assets is what's most fair.

The legal position of each spouse changes dramatically at the time of marriage breakdown. Up until marriage breakdown, each spouse is entitled to deal with his or her property as he or she sees fit (except in the case of the family home). At that time, each of them becomes entitled to have the family assets divided in half. Neither of them has the right to treat any family assets as his or her exclusive property.

As far as the law is concerned, a marriage breakdown exists if one of the following things has happened:

- a separation;
- a divorce judgement;
- a marriage annulment; or
- one spouse applies to court for a division of the family assets (which can be done even if the spouses are still living together).

For most couples, the marriage breakdown occurs at the time of separation. Technically, however, even if a separation doesn't occur, either spouse can apply for a division of the assets, and the law then considers a marriage breakdown to have occurred.

The principle of equal division of family assets raises a number of practical questions and these will be addressed in this chapter.

### 7.3 What are family assets?

As a general rule, any property or possession used for family purposes is a family asset. It's the use of the item that's relevant, not who bought it or whose name it's registered in or whether it was owned by one spouse before the marriage.

For example, the family home is a family asset. Since there are special rules that apply to the family home, it's covered separately in section 7.5.

Any other item owned by either spouse will be considered a family asset in the following circumstances:

- it has been ordinarily used or enjoyed by both spouses (and/or their children) while they were living together; and
- it has been used or enjoyed for shelter or transportation for the family, or for household, educational, recreational, social or aesthetic purposes.

Some examples of things that are usually family assets are a car, camping equipment, washer, dryer, stereo, freezer, TV, dishes and all household items. In addition, the law says that these items may be considered family assets:

- money in a bank account if the account was used for family purposes;
- shares in a company or an interest in a partnership or trust owned by one spouse;
- other property that a spouse might have power of appointment over (such as an elderly parent's house);
- property sold or given away by a spouse but which the spouse can still get back (in other words, if you gave your sister the entire CD collection);

- pension plan benefits or payments received after retirement; or
- contributions to a pension plan, or to a retirement or investment plan.

Examples of things that aren't usually family assets include clothing, jewellery or a personal hobby such as a coin collection. There have been cases in which jewellery and hobby collections have been found to be family assets, however, so it ultimately depends on whether or not the assets were used for a family purpose. Although most of the time cars are considered to be family assets, a car might not be considered a family asset if it was usually used by only one spouse and not used for transporting the whole family.

There are different ways for couples to split their family belongings in half. One common way of dividing everything is to make lists of all the belongings and their values, and then allocating things so that each spouse receives about the same total value.

## 7.4 Placing a value on family assets

In order to divide the family property equally, the couple (or their lawyers or accountants) will need to determine the value of all the possessions that are considered family assets. This can be a complicated process.

Spouses often disagree about the actual value that's placed on a particular family possession. There are two aspects of valuation with which people might disagree:

- the method of valuing the asset; and
- the date used to determine the value.

The first problem is the method chosen to find the asset's value. The value of the asset isn't usually the amount that was paid for it, of course, because used items aren't worth as much as new items. The usual way of setting a value is using the present market value — what the item would sell for now if somebody wanted to buy it. Arguments about value can often be settled by having the item appraised by someone who works in the business of selling that type of used item.

The second problem is the date for placing a value on the asset (valuation date). There will often be a time lag between the date of separation and the date of dividing the assets. The value of the asset might increase or decrease during that time. In the Yukon, the law says that the value of family assets should be assessed on the earliest date that the marriage breakdown actually happened — usually this is the date that the couple actually separated. (The rule about this differs in other territories and provinces.)

If the value of the asset increases a lot between separation and trial, the judge could consider this if asked to depart from the usual 50/50 sharing rule and make an unequal division (see section 7.6). In other words, the court will try to ensure that the ultimate division is as fair as possible.

## 7.5 The family home

The family home is a family asset, so the concept of equal division of family assets applies to it. Both spouses have equal rights to the home when the marriage breaks down; it doesn't matter if only one name is on the title. For legal purposes, the family home is any shelter used by both spouses as a family residence. The family home may be a house, a cabin, an apartment, a condominium, a trailer or even a houseboat. It must be located in the Yukon; a cabin in B.C. doesn't qualify.

### Equity in assets

An asset generally means the "equity" in the asset. The equity is the difference between the value of the asset and the amount of the debt owing on it. The equity is what will actually be divided.

You can have more than one family home at the same time. If, for example, you own a house in town and a cabin on the lake where you go in the summer, they are probably both family homes because you use them both as residences at different times of the year. Another example is if you buy a new house and rent out the old one; both of them would be family homes. The house you used to live in continues to be a family home for legal purposes as long as it's still owned by either or both spouses.

For most people, the family home is their most valuable possession or asset, and there are special rules in law to protect it. These rules apply both during the marriage and after the separation. Unlike other family assets, spouses aren't free to deal independently with the home while they're living together. One spouse can't sell or put a mortgage on the family home without the other spouse's written permission. This is particularly important where the house is in one person's name only.

There are two ways that spouses can protect their 50 percent interest in the family home before it's sold: caveats and designations.

**Caveat:** This is an official notification to any potential buyer that the person whose name is on the legal title is not the only person who has a legal right to the property. It states that the house is a family home and can't be sold without the other spouse's written permission. The caveat is a warning to any potential buyers and those who ignore it are taking a big risk.

**Designation:** This procedure isn't often used. It involves both spouses signing a document that states the house is a family home and then filing the document at the Land Titles Office in Whitehorse. Some couples who own more than one house might want to designate only one of them as their family home.

A caveat can be placed on the property by just one spouse. It's the more usual method of protecting a spouse's interest in property where only one name is on the title. The caveat offers better protection in cases where you can't get the other spouse's consent to designate a home as a family home.

For example, if a house is in just the husband's name, and he sells the house without the wife knowing about it, the wife can apply to a judge to cancel the sale. A sale won't be set aside, however, if the person who buys the house acted honestly, gave a fair price for it and didn't know that the property was a family home. All the judge can do is to order the husband to pay half of the money he received from the improper sale to the wife. If the wife had put a caveat on the house she could have prevented this situation from happening.

#### Date for valuing assets

In the Yukon, the date for valuing family assets is the earliest date of marriage breakdown, which is usually the date that the couple separated.

### 7.5.1 Who lives in the family home after separation?

Since each spouse is entitled to half of the family home, both spouses have a right to be there after separation. This is called the right of possession. The law says that each spouse is entitled to possession of the family home both before and after the separation. This means that neither spouse can order the other to leave, or change the locks on the door. And a spouse doesn't lose his or her 50 percent interest in the house by leaving first.

When couples separate, it's usually impossible for them to share the house as a residence. They can make an agreement that one will have possession of the house and the other will leave. This means that, as long as one spouse stays in the house, the other person is denied his or her one-half interest. The only thing that can usually be shared is the cash value of the residence. The couple has at least four options for dealing with this:

- one person can buy out the interest of the other;
- the house can be sold and the net proceeds split in two equal shares;
- one person can give up his or her one-half interest in exchange for other property; or
- one person can pay occupation rent to the other.

If the home is mortgaged in the names of both spouses, the bank is sometimes reluctant to relieve the transferring spouse of the mortgage obligation. It's wise to check with the bank first. If one spouse stays in the house just for the interim period while all the other matters are settled, a separation agreement will need to include a clause about how mortgage payments and other house expenses will be dealt with.

If one spouse wants the sole use or possession of the house and the other doesn't agree, it's possible to go to court and ask for the exclusive possession of the family home. A judge has the discretion to order that one spouse alone be allowed to live in the house. Before a judge will make an order for exclusive possession, however, you must prove the following things:

- suitable accommodation elsewhere is impossible to find, or
- the best interests of a child or children require you to continue to live in that house with the children.

Only if one of these conditions is met will a judge make an order giving exclusive possession of the home to one spouse for a certain period of time. The courts are reluctant to give exclusive possession of the house to one spouse unless there's a very good reason, because it's usually not fair to the other spouse.

If a judge grants an order of exclusive possession he or she could also do one or more of the following things:

- put a time limit on the order;
- make an order regarding the furniture (for instance, that the furniture stay in the house for a certain period of time); and
- make an order regarding the payment of the mortgage, taxes, household repairs and other expenses.

The law concerning division of the family home can be quite complicated, especially if the family home is only one part of a bigger property where a business is also conducted; or if one spouse holds shares in a company that entitles him or her to occupy a housing unit (such as a time share). It's best to consult with a lawyer who can advise you of your rights and responsibilities.

### The family home

This section applies only to legally married spouses. The detailed rules about the family home in the *Yukon Family Property and Support Act* don't apply to common-law partners. The general law that applies to the property of common-law spouses is discussed in section 7.9.

#### 7.5.2 What if one spouse dies before the couple separates?

The right to apply for a 50 percent interest in the family home is a personal right and can't be exercised against the estate if a spouse dies. This means that if the house is in the name of one spouse alone, and that spouse dies before a separation, the other spouse doesn't automatically obtain a half interest in the home unless the claim was filed before the death. The death of a spouse is not considered to be a marriage breakdown that entitles the other spouse to 50 percent of all

family assets. The surviving spouse may still have a legal entitlement to the house through other means, however. This will depend on whether his or her name is on the title, if there is a will and if there are any children.

## 7.6 If unequal division of family assets is more fair

In some cases, one spouse may feel it's unfair to divide the family assets equally. He or she may try to get the other spouse's consent to an unequal division. If the other spouse agrees, there's no reason why the assets can't be divided in whatever manner they agree on. If no agreement is possible, one spouse may apply to the court to divide the assets in unequal shares.

The spouse who doesn't want to share the family property equally must, unless the other spouse agrees, go to court to try and prove to a judge that a 50/50 split would not be fair. A judge has discretion to divide family assets unequally if an equal division would be unfair. In deciding if a 50/50 split is unfair, a judge may consider the following factors:

- any agreement made between the spouses (other than a marriage contract or separation agreement) to divide the family assets in unequal shares;
- the duration of the marriage;
- the period of separation;
- when the property was obtained;
- if the property was acquired by one spouse by inheritance or gift;
- the date of valuation of family assets;
- any non-family assets and how they're divided; and
- any other relevant factors concerning how the property was acquired, used or maintained.

Factors such as these won't necessarily mean that the court will divide the property in unequal shares. The bottom line is fairness. For example, if a couple was married for only a very short time, it probably wouldn't be fair for one of them to get a half-interest in all the property the other one owned before the marriage. Or if there were some unusual circumstances that would make it unfair for one spouse to benefit from a particular gift or inheritance, then the judge might order that it not be divided.

## 7.7 Non-family assets

A non-family asset is any property that's owned by either or both spouses that hasn't been used by both of them or by the children for a family purpose. The general rule is that non-family assets are not shared equally upon separation. Like most rules, this one has some exceptions. A spouse may claim a share of a non-family asset in the following cases:

- the other spouse has unreasonably impoverished the family assets (for instance, through gambling);
- an equal split of the family assets would not be fair in all the circumstances (see section 7.6);
- the spouse contributed "work, money or money's worth" to the acquisition of the non-family assets.

For example, a spouse might work in a business owned by the other without being paid for the work. If so, that spouse may be able to claim a share of the other spouse's business assets (which would normally be non-family assets).

If “money’s worth” was contributed to the business, a person may have a claim as well. For example, if the family lived on your income while your spouse’s earnings were invested back into the business, you may claim that you contributed money’s worth to the other spouse’s ability to acquire those business assets.

Couples can negotiate and include these matters in their separation agreement. If the issue went to court, the judge might divide the non-family assets between the spouses. The share each is entitled to will depend on how much was contributed in work, money or money’s worth. This won’t necessarily amount to one-half of the value of the asset. For example, the judge might decide that the non-family asset should be divided 75/25.

## 7.8 How to deal with debts

Debts include money owed on credit cards, mortgages, car loans and any other loans you might have. The normal rule of law is that whoever incurred the debt is responsible for paying it back. A spouse isn’t automatically responsible for the debts of the other spouse.

In the case of a bank loan, for example, if a spouse co-signs the loan, he or she would be responsible to the bank for the debt too. This is because he or she signed for the bank loan, however, not because he or she is the spouse. A bank might repossess an asset if loan payments aren’t made. They can do this even if an asset is a family asset.

One spouse can become responsible for the debts of the other in two ways. First, one spouse might be an agent for the other. In other words, if one spouse has the authority to acquire debts in the name of the other, and has done this in a way that a third party is relying on that arrangement, the other spouse may become responsible.

Second, the law states that each spouse is required to support the other on the basis of need and in accordance with his or her ability (see Chapter 6 on spousal support). This principle is often interpreted by lawyers to mean that the couple should split those debts incurred for family necessities (clothing, transportation, household supplies) in proportion to their incomes. In other words, whoever earns more income should share proportionately more of the debts.

There’s no hard-and-fast rule about who must pay the debts on the family assets. Couples arrange for the payment of debts in many ways depending on their financial circumstances, the amount of the debt, why the debt was incurred and who wants to keep the item.

These are the two most common ways of dealing with debts:

- **Compensation:** one spouse keeps the possession (for example, a car) and gives the other spouse the money that represents half of the equity in the possession.
- **Sale:** The assets are sold, the money from the sale is used to pay off the debt, and any money that remains is divided equally between the spouses.

Another method for dealing with debts and dividing up responsibility is to vary the 50/50 division of family assets. The allocation of debt payments is usually made in conjunction with the division of assets. The whole arrangement becomes a package deal, settled while negotiating the terms of a separation agreement or court order.

## 7.9 Property division for common-law couples

There's no general law that property is split equally when an unmarried common-law couple separate. The property division sections of the Yukon *Family Property and Support Act* apply only to legally married persons. It's possible, however, for partners in a common-law relationship to make a written cohabitation agreement in which they agree to follow the property division rules outlined in the Act if they ever separate. In other words, they can make a contract with each other to treat their property as if they were married. Their separation agreement can also agree to this.

Such an agreement must be in writing and must be witnessed by an independent third person in order to be binding. Otherwise, people living in common-law relationships can't assume that they're entitled to one-half of the family assets such as the house, the furniture, the appliances or the car when they separate.

### 7.9.1 Separate ownership of property

For common-law couples who haven't agreed to follow the property division rules outlined in the Act, the first relevant principle of law is separate ownership of property. This means that whoever bought the asset owns it. It helps to think of these individuals as two people who just live together. Generally, the same rules that would apply to roommates sharing an apartment will apply to a common-law couple. Their property remains separate, unless they buy something together, in which case they both own it because they both bought it. In that case, one could buy out the interest of the other if they go their separate ways or they could sell the asset and split the money.

Although the principle of "whoever bought it, owns it" is the general rule for common-law couples, there are other ways to acquire an interest in property besides buying it. For example, a gift gives ownership to the recipient; therefore, a common-law spouse doesn't have the right to take back gifts upon a separation.

### 7.9.2 Constructive trust

Another important principle for the property division of common-law couples is found in the law of trust. The legal concept of constructive trust means that you may have a right to a part of the property if you contributed to it. Just as with married couples, you can contribute to it indirectly through your labour, or through money that covered living expenses for the other partner so that his or her money was freed up to invest or save.

The law recognizes that it's sometimes unjust for one common-law partner to receive all of a certain property. One partner shouldn't be able to get rich at the expense of the other. This might happen where one partner contributes a lot of work to the household and to the other partner's business, or if a couple lived on one partner's earnings while the other partner put all his or her earnings in the bank. A court might say that even though the property was in one partner's name, the law considers that one-half of it was held "in trust" for the other partner.

If one partner can prove to a judge that the other partner has been unjustly enriched, that he or she has been correspondingly deprived, and that there's no good reason for a judge to allow that enrichment or deprivation, then the judge may order that the property be divided in equal shares, or in some other proportion.

Even if there's no specific oral or written contract made by the couple to share things, the courts will sometimes infer such an agreement when two people work together towards the same goal and contribute their time and money over a substantial period of time.

This area of law is not as clear as the rules respecting married couples. No two cases are ever exactly alike, and the courts will look to all the circumstances of a case to determine what's fair.

Because of the time and expense involved in using the courts to decide disputes, it's a good idea for common-law partners to make a clear cohabitation agreement with each other about the things they own. They might want to seek legal advice before buying any major assets together. These preventative measures can save both partners a lot of unhappiness and expense if the relationship ends.

## 7.10 Agreements and court orders

Couples can make agreements about how to divide property. This can be done in a prenuptial agreement or marriage contract before they marry or cohabit. It can also be done in a separation agreement during or after separation. In a separation or marriage agreement, the spouses can agree that certain items won't be treated as family assets and, therefore, that they won't be divided 50/50.

Although this might sometimes result in a situation that seems unfair if the couple separates, courts will be very reluctant to overrule an agreement between two adults who willingly participated in it, especially if they had independent legal advice and the results of the agreement were what they expected.

The Supreme Court of Canada has said that the courts shouldn't second-guess the agreements made between couples. Even if an agreement provides for a division of assets that's different than what the legislation says or that a court would order, that doesn't necessarily mean it's unfair enough to be disregarded.

If a court application is made for the division of property, both spouses must submit a statement to the court, as well as to the other spouse, that affirms the following facts:

- the property that they each owned at the time of the marriage breakdown;
- each family asset that would cost more than \$100 to replace that they might have discarded in the year before the couple separated; and
- their gross income before taxes for the three most recent tax years before they separated.

The judge can declare that a spouse has an interest in property even though he or she technically doesn't have any legal or financial interest in it. For example, the judge can order the following:

- that property title be transferred from one spouse to the other;
- that a property be sold;
- how proceeds from a sale of property are divided;
- the transfer of property to, or in trust for, a child that the spouse owes an obligation to support financially; or
- a compensation payment to the other spouse if one spouse has already sold property.

### Common-law couples

The general principle for property division with common-law couples is that whoever bought it, owns it — unless the couple signed a cohabitation or separation agreement agreeing to be covered by the *Family Property and Support Act's* property division rules for married couples.

If one partner contributed a lot of work or money to the relationship, however, making it possible for the other partner to invest or acquire property, a court might order a 50/50 division of property.

## 7.11 Enforcement

Although each spouse is entitled to half of the family assets upon separation, the division isn't automatic. Often there are disputes about whether certain assets are family assets and about the value of them. Sometimes each spouse will want the same asset. In the end, each couple must either reach an agreement as to what's fair in their particular case, sometimes with the help of a lawyer or a mediator. If they can't, they must go to court and have a judge decide how the assets should be divided.

In the meantime, both spouses are free to deal with their separate property in any way they choose, unless of course there is a court order prohibiting this. The other spouse's consent is not required, with the exception of the family home to which different rules apply (see section 7.5). If it later turns out that what one spouse thought was their separate property was in fact a family asset, a court can order that compensation be paid to the other spouse.

If one spouse is worried that the other spouse might sell family assets and run off with no reasonable hope of ever getting compensation, it's possible to apply for a court order to prevent the sale of assets. A lawyer's help should be sought immediately for this.

### WHAT THE COURTS HAVE SAID

#### **When common-law couples should split property 50/50**

A couple lived together for about 20 years without being married. For the first five years, they lived on the woman's earnings while the man put all of his money in the bank. He later used this money to buy a farm. They both worked on the farm and eventually started a beekeeping business. The business did well and soon the man bought more land and built a home. Eventually he sold the farm and put all the money in his bank account. The relationship fell apart and the woman claimed half of everything.

The Supreme Court of Canada awarded her half of what her common-law partner owned. This was because she had helped to start the business and had worked for many years to make it successful. It wouldn't be fair to allow him to keep the entire proceeds of the business for himself. That would make him a rich man at her expense. The court said that even though the property was in his name, he held one-half of it "in trust" for her.

*Becker v. Pettkus* [1980] 2 SCR 834

## Chapter 7 summary

Issue	Legal term	What you can do	Who can help?
Who will live in the residence? What do we do with it?	Family home	Negotiate an agreement Apply for a court order	Mediator Lawyer
How do we divide up all our possessions?	Family assets	Negotiate an agreement Apply for a court order	Mediator Lawyer
How do we figure out the value of possessions and property?	Valuation	Negotiate an agreement Apply for a court order	Mediator Lawyer Accountant
Who is responsible for any debts?	Debts	Negotiate an agreement Apply for a court order	Mediator Lawyer Accountant
What if an agreement or order about property division isn't followed?	Enforcement	Negotiate an agreement Apply for a court order	Mediator Lawyer

# 8. Agreements

This chapter covers the following topics	
8.1 Introduction	8.4 What goes in a parenting agreement?
8.2 Do we need a separation agreement?	8.5 Sample agreements
8.3 What goes in a separation agreement?	

## 8.1 Introduction

Couples can make several types of agreements or contracts depending on their circumstances:

- a marriage contract (or prenuptial agreement) is signed by a couple before they get married;
- a cohabitation agreement is signed by common-law partners when they move in together and often includes terms about separation and property division;
- a parenting agreement is signed by a separating or divorcing couple (or by parents who have never lived together), and includes terms about custody, access and child support; and
- a separation agreement is signed by a married couple who are divorcing or just separating, or a common-law couple who are separating.

This chapter focuses on separation agreements and parenting agreements. Marriage contracts and cohabitation agreements are not covered by this book.

A separation or parenting agreement is a written contract between spouses or partners who have decided to live apart. It deals with the specific terms and conditions for settling all their issues. In their agreement, the couple can define how they're going to arrange things in light of their rights and obligations under the law.

Couples may sign a separation agreement that includes a parenting agreement as well as separate agreements about property division or spousal support. Or, couples may choose to sign two different agreements: one that sets out their parenting agreement, and one that sets out how they'll resolve all the other issues.

If a couple makes a written agreement they don't usually need to go to court. They're free to negotiate their rights and obligations. The agreement then resolves their mutual issues and a judge isn't necessarily involved until or unless one of them applies for a divorce. At that time, a judge will

look at any agreement they made, especially one about children, and ensure that the best interests of the children are met. A judge might also become involved if the couple applies for a consent order, which is a court order that sets out all the terms of their agreement.

When a couple first separates, it might feel at first as if no agreement is possible. Often people are very hurt and it takes a while to think clearly or think as a single person again. In most cases, however — especially if they get help from a lawyer or mediator — the couple is able to draw up a separation agreement. Even if one spouse makes an application to the court to decide an issue they can't agree on, it's still possible to carry on negotiations with the hope they'll settle before the court date. One way or another, the majority of cases are resolved through negotiation and agreement without the need to go to court for a judge's decision.

### 8.1.1 Put the agreement in writing

There are several reasons to put an agreement in writing:

1. It reduces the chance of misunderstandings, especially during separation when communication may be difficult and painful.
2. It's more likely to be honoured. People don't feel as obligated to follow a verbal agreement.
3. Circumstances change. Financial obligations might arise that weren't expected at the time of separation, a new relationship might start, or a new job with different hours, and so on. These changes may affect a person's original intentions. Having the original intentions in writing can be a reminder of each person's commitment.
4. It allows the couple to think through the long-term consequences of parenting, which they may not have time or energy to consider at the time of separation; for example, up to what age or educational level they'll both support the child.
5. It helps people focus on long-term possibilities and it's a clear statement of how things will work for the future. It gives each of them a stable base on which to plan their independent lives. For example, what if one parent wants to move?
6. It's probably enforceable in the legal system, and it can be filed with the court for a consent order. A verbal agreement may not be. In addition, the terms of a verbal agreement are often difficult to prove.

## 8.2 Do we need an agreement?

People sometimes refer to a separation agreement as a “legal separation.” Strictly speaking, you are legally separated from the time you live apart whether or not you have an agreement. You won't hear lawyers referring to these agreements as legal separations — they call them “separation agreements.” Some couples have these agreements and others don't. Whether you want to make a separation agreement with your spouse or partner is up to you.

A written agreement can provide a clear statement of how things will work for the future. It can provide peace of mind for both spouses and give them a stable base on which to plan their independent lives.

It's particularly important to have a written agreement where there are young children involved or major assets such as a house. With kids, a practical long-term plan covering where they will live, how they will be supported and so on is usually in the best interests of both kids and parents.

There are other advantages to having a written separation agreement. A person paying spousal support under a written separation agreement can claim it as a deduction for income tax purposes. A person paying under a verbal arrangement can't. Also, if one spouse later applies for a divorce, the separation agreement can be included with the divorce petition to show the judge what

arrangements have been made. If a couple has negotiated and settled things between them and adequate arrangements have been made for the kids, it's quite likely that the divorce will proceed quickly and be considerably cheaper.

### 8.2.1 Is a separation or parenting agreement binding?

A separation agreement is a legally binding contract between separating spouses or partners. It's enforceable, which means that if one party breaks the agreement the other party can use the court system to enforce the contract.

There are four exceptions to the general rule that a separation agreement is binding:

1. the agreement was not entered into voluntarily;
2. it was brought about by fraud;
3. the arrangements aren't in the best interests of the children; or
4. the parent's circumstances change.

Aside from the exceptions noted in 8.2.1.1–8.2.1.4, the general rule is that a contract entered into by spouses or partners is binding. The agreement must be in writing, it must be signed by both parties and it must be witnessed by an independent third party. One person can witness both of your signatures or a different person can witness each signature. The agreement does not have to be signed by both parties at the same time. It should be dated on the day that the second spouse or partner signs it since that's when it becomes an agreement. The agreement doesn't have to be notarized (sworn before a notary public). As a precaution, lawyers generally will have the witness to the agreement swear to the fact that he or she was present and did witness the signing of the agreement.

The Yukon government's Maintenance Enforcement Program (MEP) can help to enforce the child support or spousal support terms of an agreement. For more information about the MEP and how they can help, refer to sections 3.6.1, 5.3.1, 5.6.1 and 6.8.1.

#### 8.2.1.1 The agreement must be entered into voluntarily

By definition, an agreement is something you both agree on. One party can't force another to sign an agreement through pressure or threats. If that happens, the agreement may be set aside by a court. If both parties get independent legal advice before they sign the agreement, it's unlikely that one of them could later say it wasn't voluntary. Getting legal advice protects both parties. It's the reason your lawyer will suggest that your spouse get legal advice on the agreement before signing it.

#### 8.2.1.2 No contract is enforceable if it was brought about by fraud

A person can't intentionally deceive someone in order to get them to sign an agreement and then take advantage of that dishonesty. If, for example, a spouse hides assets from the other spouse, the agreement may be set aside later.

Ignorance, though, is different from fraud. Anyone unwise enough to sign an agreement giving up rights to family property, for example, without knowing exactly what the assets are and how much they're worth, can't get out of the agreement just because he or she was foolish enough to sign it. There must actually be fraud by the other person for it to be set aside.

If you're concerned about the exact nature and extent of your spouse's assets, a lawyer will usually require your spouse to make an affidavit swearing what the assets are and what their value is. Your spouse must disclose this information under oath. If your spouse isn't willing to do this, an application can be made to the court compelling him or her to disclose all income and assets.

### 8.2.1.3 If arrangements aren't in the best interests of the children

Any arrangements parents make about kids in a separation or parenting agreement might not be binding if it later turns out that the arrangements aren't in the best interests of the kids (or if circumstances change so that the arrangements are no longer in their best interests). In this case, a parent can go to court and ask that the judge make an order overriding those terms of the agreement.

### 8.2.1.4 If a parent's circumstances change

An arrangement for support in a separation agreement may also be changed by a court if the parent's circumstances change; for example, if the parent loses his or her job and can't pay, or if the child's needs change.

## 8.2.2 Should a lawyer write your agreement?

There's no legal requirement that a lawyer prepare your separation or parenting agreement. You're free to write it up yourself as long as it's signed by both of you and each signature is witnessed by an independent third person. There are many potential pitfalls in writing your own agreement, however. If possible, it's better to have a lawyer write it or review the one that you write before you sign it.

Lawyers can carry out two important functions before you sign a separation agreement. First, they can ensure that your contract is legally enforceable, or at least give you a professional opinion about this. Second, they can also advise you on the fairness of the agreement within the general principles of family law.

The value of taking your agreement to a lawyer for a consultation is that you can better understand any possible problems in your agreement. If the lawyer points out things that you're not worried about, you can of course ignore the advice and take those risks if you want to. A separation agreement is a legal contract, though, and you should be fully aware of the legal implications of whether to include certain provisions. Ultimately your decisions about the separation agreement are up to you.

### Check with a lawyer first

There are several reasons why it's a good idea for a lawyer to check your parenting agreement before you sign:

1. The agreement should be legally enforceable. If one person breaks it, the other should be able to enforce the contract in court. A judge may not enforce a contract if the language is too vague. Lawyers are trained to use very precise language so that there are no misunderstandings.
2. Lawyers are trained to consider various situations that may happen in the future that you may not have considered, such as the death of a spouse or somebody moving out of the Yukon. It's better to deal with these in the agreement to avoid complications later on. Including these possibilities in the agreement reduces the potential for conflicts if circumstances change.
3. A lawyer can advise whether the terms of the agreement are fair for you.
4. Lawyers know about current updates in law and things such as tax issues that the parents or the mediator may not have current information about.
5. If both parents get independent legal advice before signing, neither of them can later say they didn't understand what they were signing or that they signed it under threats or duress.
6. It'll be cheaper if a lawyer checks the agreement before it's signed, than having to hire a lawyer later to represent you all the way through a court trial if you later have a hard time enforcing the agreement.

### 8.3 What goes in a separation agreement?

A separation agreement usually first sets out personal details such as the names of the couple, their addresses, the date of separation, and so on. More specifically, a separation agreement usually has preliminary paragraphs (clauses) that state these facts:

- the legal names and addresses of the parties;
- the date of the marriage, or, in the case of a common-law couple, the start of cohabitation (living together);
- the date of separation (for most couples, this will be the date one of them moved out);
- an acknowledgement that they have separated and want to live independent lives;
- an acknowledgement that neither of them will interfere with the other;
- an acknowledgement that their agreement is a separation agreement as defined by the Yukon *Family Property and Support Act* and is binding on both of them.

After that, the terms differ, depending on the couple's circumstances and the issues they want to include in their agreement. For example, a separation agreement can include the following terms (the terms about children could also go into a parenting agreement):

- living arrangements for the children;
- provisions for the support of the children until a certain age, including the amount of support, when and how it is to be paid, and responsibility for major expenses;
- provisions about spousal support, such as “until the children are in school”, or “until the spouse completes a certain training program”;
- an arrangement to review the support amount at some point in the future;
- arrangements regarding the family home, such as responsibility for mortgage payments, maintenance and repairs, or the terms on which the house will be sold;
- division of other family assets such as furniture and appliances;
- division of other assets that may or may not be family assets;
- responsibility for debts;
- release of each spouse from any further claims;
- provision for the estates of each spouse if either of them dies without a valid will before a divorce;
- an acknowledgement that the terms negotiated are binding even after a divorce;
- an acknowledgement that the terms will be binding on the estates and heirs of the parties;
- a clause that says the agreement is void if the couple lives together again for a certain period, such as three months; or
- an acknowledgement that the separation agreement was voluntarily signed by each party.

#### What if I'm feeling pressured into an agreement?

If you feel pressured or threatened into an agreement by any physical, mental or emotional abuse by the other spouse or partner or their family, you shouldn't sign. Any agreement reached this way probably won't be in the best interests of your kids either. Ask for help from someone such as a lawyer (free legal advice from Legal Aid might be available; see Chapter 3). Contact information is in Chapter 9.

See chapters 4–7 for more details about separation agreements.

### 8.4 What goes in a parenting agreement?

A parenting agreement is a list of details that the parents have discussed and agreed to about how they'll organize their children's lives, share their parenting responsibilities and pay child support. Agreements about parenting issues can also be included in a comprehensive separation agreement that covers issues such as the house, the car or the debts. Whether a parenting agreement or a

separation agreement is better for you will depend on your situation and preference. Refer to Chapters 4 and 5 for more details about agreements for custody, access and child support.

An agreement means that parents can list each of the specific parental rights and responsibilities. It also means that you don't have to keep discussing or arguing these details on an ongoing basis. If it works, an agreement usually has a great advantage over a court order. It's likely that both parents have compromised a bit so an agreement is something you've had some control over instead of something that's imposed upon you.

A parenting agreement can include these types of things:

- where the child will live for the school year;
- where the child will live for the summer or school holidays;
- visiting arrangements for the other parent;
- financial support;
- how major expenses such as dental care, eyeglasses, or sports equipment will be dealt with;
- access to school records, medical records, and so on;
- discipline and religious instruction;
- education;
- what will happen if a parent moves; and
- what will happen if there are disagreements in the future.

**Refer to Chapter 4 (section 4.5) and Chapter 5 (section 5.3) for more information on agreements about custody, access and child support.**

The agreement for child support should include the following basic information:

- the name and birth date of each child involved;
- the income of any parent which is used to determine the amount of the child support order;
- the child support amount determined under the guidelines (see section 5.2);
- the child support amount determined for a child 19 or over;
- information on special expenses, the child they relate to and the amount of the expense or the proportion of the expense to be paid; and
- the date on which the lump sum or first payment is payable and the day of the month or other time period that future payments are to be made.

The following types of issues may be addressed in the child support agreement:

- How will occasional large expenses such as eyeglasses, dental expenses, sports equipment or special lessons and activities be dealt with?
- Which parent will ensure the child has adequate medical insurance coverage?
- Will the child continue to be supported after a parent's death through a life insurance policy, a will or the agreement?
- Do either or both parents wish to contribute to a trust fund for a child to receive at a certain age or for a certain purpose such as education?
- How will special expenses, such as college or university tuition, be dealt with?
- When will child support payments end: at age 19? When the child moves out or is employed? When he or she is no longer a student?

## 8.5 Sample agreements

See YPLEA's website ([www.yplea.com](http://www.yplea.com)) for a sample separation agreement and a sample parenting agreement. Although these won't necessarily apply exactly to your situation, they'll give you an idea of what a legally enforceable agreement looks like in the Yukon.

## 9. Contacts and resources

This chapter lists contacts for the following topics	
9.1 Immediate help	9.3 Family law resources
9.2 Legal information and support	9.4 Counselling and support services

### 9.1 Immediate help

#### **Police/RCMP**

Emergency

phone 911 or 667.5555  
or dial community prefix, then 5555

#### **Victim's Services and Family Violence Prevention Unit**

Victims Services (Whitehorse)

phone 667.3581  
toll-free 1.800.661.0408, extension 3581

Kwanlin Dün Victim Services Coordinator

phone 633.7852

Dawson City Victim Services Coordinator

phone 993.5831

Watson Lake Victim Services Coordinator

phone 536.2541

Kwanlin Dün Community Wellness Program

phone 633.6149

#### **Transition homes**

Kaushee's Place (Transition Home, Whitehorse)

phone 668.5733

Dawson City Women's Shelter

phone 993.5086

Help and Hope for Families (Watson Lake)

phone 536.7233

Carmacks Safe Home

phone 863.5918

Magedi Safe Home (Ross River)

phone 969.2017

Note: The prefix for all phone numbers is 867 unless otherwise noted.

**Child abduction (within Canada)**

Child Find Canada: Emergency phone 1.800.387.7962  
web www.childfind.ca  
e-mail childcan@aol.com

**Child abduction (international abductions)**

Yukon Authority phone 667.8056  
Emergency: Consular Affairs Bureau phone 1.800.387.3124  
(24 hours a day, 7 days a week) or 1.800.267.6788

The publication *Abduction: Stealing Children* phone 668.5297  
is available from the Law Line

Yukon Public Legal Education Association  
Yukon College Library  
e-mail yplea@yukoncollege.yk.ca  
web www.voyage.gc.ca/main/pubs/child\_abductions-en.asp  
(a Government of Canada website on international child abductions)

## 9.2 Legal information and support

**Family Law Information Centre**

At the time of publication, the Yukon Department of Justice was planning to open a resource centre in the Law Centre and to begin operating a telephone help-line and web site.

**Law Library**

Ground Floor, Law Centre, 2134 Second Ave, Whitehorse  
phone 667.3086, toll-free 1.800.661.0408, extension 3086  
e-mail yukon.law.library@gov.yk.ca  
web www.justice.gov.yk.ca/prog/cs/library.html

**Law Line**

Yukon Public Legal Education Association, Yukon College library  
phone 668.5297, toll-free 1.866.667.4305  
e-mail yplea@yukoncollege.yk.ca  
web www.yplea.com

**Lawyer Referral Service**

Law Society of the Yukon  
302 Steele Street, #201, Whitehorse  
phone 668.4231 (call collect if outside Whitehorse)  
e-mail lsy@yknet.yk.ca  
web www.lawsocietyyukon.com/referral.php

**Legal Aid**

Legal Services Society of the Yukon  
2131 Second Ave, #203, Whitehorse  
phone 667.5210, toll-free 1.800.661.0408, extension 5210  
e-mail administration@legalaid.yk.ca  
web www.legalaid.yk.ca  
www.legalaid.yk.ca/eligibility (financial eligibility guidelines)

**Court Registry**

Ground Floor, Law Centre, 2134 Second Ave, Whitehorse  
 phone 667.5441, toll-free 1.800.661.0408, extension 5441  
 e-mail courtservices@gov.yk.ca  
 web www.justice.gov.yk.ca/prog/cs/registries.html

**First Nations Court Workers and Legal Support**

Kwanlin Dün Justice Program (Whitehorse)	phone	633.7850
First Nations Court Workers (Whitehorse, Carcross, Teslin, Haines Junction, Burwash, Beaver Creek)	phone	667.3781
Tr'ondëk Hwëch'in (Dawson City or Old Crow)	phone	993.5385
Liard First Nation (Watson Lake)	phone	536.2131
Ross River Dena Council (Ross River)	phone	969.2279

**Legislation**

Yukon legislation (*Family Property and Support Act* and the *Yukon Children's Act*):  
 Copies available (\$5 per statute) at the front desk, Government Administration Building, Second Avenue, Whitehorse.

Also available at the Law Library or on the internet:

web www.canlii.org

Federal legislation (*Divorce Act*) is available at the Law Library or on the internet:

web www.canlii.org

## 9.3 Family law resources

### 9.3.1 Child Support Guidelines and Tables

**Yukon Government: Yukon and Federal Child Support Guidelines and Tables**

Pick up or download copies of the Child Support Guidelines, the Yukon Tables and easy-to-use materials that explain child support and how to calculate it.

Family Justice Office or Maintenance Enforcement Program (MEP)

Ground Floor, Law Centre, 2134 Second Ave, Whitehorse

phone 667.3066, toll-free 1.800.661.0408, extension 3066

e-mail courtservices@gov.yk.ca

web www.justice.gov.yk.ca/prog/cs/mep/csguidelines.html

**Justice Canada**

phone 1.888.373.2222 (toll-free number for information on federal guidelines)

web www.justice.gc.ca/en/ps/sup/grl/pdfstab.htm (Child Support Tables)  
 canada.justice.gc.ca/en/ps/sup/lookup/index.asp (Child support look-up)

### **Applying for or changing a child support order**

Family Law Court Procedure Booklets for Self-Represented Litigants  
Pick up from Maintenance Enforcement Program (MEP)  
Ground Floor, Law Centre, 2134 Second Ave, Whitehorse  
phone 667.5437, toll-free 1.800.661.0408, extension 5437  
download [www.justice.gov.yk.ca/prog/cor/vs/family\\_law\\_court\\_booklets.html](http://www.justice.gov.yk.ca/prog/cor/vs/family_law_court_booklets.html)

Law Line, Yukon Public Legal Education Association (see section 9.2)  
Pick up or download the guides, forms and kits required when applying for or changing a child support order.  
phone 668.5297  
web [www.yplea.com](http://www.yplea.com)

## 9.3.2 Divorce information

### **How to Divorce brochure and divorce kit**

The Law Line, Yukon Public Legal Education Association, Yukon College Library  
phone 668.5297, toll-free 866.667.4305  
e-mail [yplea@yukoncollege.yk.ca](mailto:yplea@yukoncollege.yk.ca)  
download [www.yplea.com/](http://www.yplea.com/)

### **Guide to Family Law booklet**

Available at Yukon libraries  
phone 667.3066, toll-free 1.800.661.0408, extension 3066  
e-mail [justice@gov.yk.ca](mailto:justice@gov.yk.ca)  
download [www.justice.gov.yk.ca/](http://www.justice.gov.yk.ca/)

### **Divorce Kit**

Available at Court Registry, Ground Floor, Law Centre, 2134 Second Ave, Whitehorse  
phone 667.5937, toll-free 800.661.0408, extension 5937  
e-mail [courtservices@gov.yk.ca](mailto:courtservices@gov.yk.ca)

### **Divorce Laws: Questions and Answers (Justice Canada)**

Available at the Family Justice Office, Law Centre, 2134 Second Ave, Whitehorse  
phone 667.3066, toll-free 1.800.661.0408, extension 3066  
download [justice.gc.ca/en/ps/pad/resources/divorce/index.html](http://justice.gc.ca/en/ps/pad/resources/divorce/index.html)

## 9.3.3 Maintenance Enforcement Program (MEP)

Ground floor, Law Centre, 2134 Second Ave, Whitehorse  
phone 667.5437; toll-free 877.617.5347  
e-mail [justmep@gov.yk.ca](mailto:justmep@gov.yk.ca)  
web [www.justice.gov.yk.ca](http://www.justice.gov.yk.ca)

## 9.3.4 Interjurisdictional Support Orders (ISO)

Information, forms and guides available  
Maintenance Enforcement Program (MEP), Law Centre, 2134 Second Ave, Whitehorse  
phone 667.5437, toll-free 877.617.5347  
web [www.justice.gov.yk.ca/prog/iso/forms.html](http://www.justice.gov.yk.ca/prog/iso/forms.html)  
web [canada.justice.gc.ca/en/ps/sup/enforcement/reciprocity\\_contacts.html](http://canada.justice.gc.ca/en/ps/sup/enforcement/reciprocity_contacts.html)

### 9.3.5 Representing yourself in court

#### **Family Court Procedure Booklets for Self-Represented Litigants**

User-friendly booklets for people who choose to represent themselves at court. While they focus specifically on the procedures for claiming and changing child support, their general information about court procedure and forms may also be useful if you need to file or respond to other family law claims.

Available at the MEP office

phone 667.5437 or toll-free 1.877.617.5347

e-mail [justmep@gov.yk.ca](mailto:justmep@gov.yk.ca)

download [www.justice.gov.yk.ca/prog/famjust/family\\_law\\_court\\_booklets.html](http://www.justice.gov.yk.ca/prog/famjust/family_law_court_booklets.html).

The series includes booklets on the following topics:

- Representing Yourself in Court
- General steps to a court order for child support
- Applying for an order for child support
- Changing a child support order
- Opposing an application for child support
- Questions and answers about child support

The forms required in these procedures, such as affidavit, financial statement, notice of hearing, notice of intention to act in person, response form and so on, are also available.

### 9.3.6 Mediation

#### **Mediation Yukon**

phone 667.7910

e-mail [secretary@mediationyukon.com](mailto:secretary@mediationyukon.com)

web [mediationyukon.com](http://mediationyukon.com)

#### **Law Line**

Copies available of the publication *Another Way: Mediation in Divorce and Separation*

## 9.4 Counselling and support services

#### **Alcohol and Drug Services**

phone 667.5777

web [www.hss.gov.yk.ca/programs/alcohol\\_drugs/](http://www.hss.gov.yk.ca/programs/alcohol_drugs/)

#### **Child Abuse Treatment Services**

phone 667.8227

web [www.hss.gov.yk.ca/programs/family\\_children/](http://www.hss.gov.yk.ca/programs/family_children/)

#### **Family Violence Prevention Unit**

phone 667.3581, toll-free 1.800.661.0408, ext 3581

web [www.justice.gov.yk.ca/prog/cor/vs/](http://www.justice.gov.yk.ca/prog/cor/vs/)

#### **Kids Help Line**

phone 1.800.668.6868

#### **Les EssentiElles**

phone 668.2636

**Mental Health Services**

phone 667.8346

**Parents Help Line**

phone 1.888.603.9100

**Partners for Children**

phone 668.8794

**Skookum Jim Friendship Centre**

3159 Third Avenue, Whitehorse

phone 633.7680

e-mail [sjfcfriends@northwestel.net](mailto:sjfcfriends@northwestel.net)

web [www.skookumjim.com](http://www.skookumjim.com)

**Victoria Faulkner Women's Centre**

503 Hanson Street, Whitehorse

phone 667.2693

e-mail [vfwc@northwestel.net](mailto:vfwc@northwestel.net)

web [www.vfwc.net](http://www.vfwc.net)

**Yukon Family Services Association**

4071 Fourth Avenue, Whitehorse

Confidential counselling

Free "For the Sake of the Children" workshops are offered through the Yukon Family Services Association and the Yukon Department of Justice. These workshops help parents to understand the potential impacts of separation on their kids and how parents can help kids through this difficult time.

phone 667.2970 (phone collect outside Whitehorse)

e-mail [yfsa@yfsa.yk.ca](mailto:yfsa@yfsa.yk.ca)

web [www.yfsa.org](http://www.yfsa.org)

**Yukon Government Employee Assistance Program**

Confidential counselling for eligible government employees

phone 667.3277

web [www.psc.gov.yk.ca/workplacehealth/eap.html](http://www.psc.gov.yk.ca/workplacehealth/eap.html)

Abuse	this includes mental and emotional as well as physical harm or the threat of harm.
Access	the contact or visiting time that children have a right to with the parent they're not living with (their non-custodial or non-residential parent).
Abduction	when a child is not returned to the custodial parent according to the terms of a court order or agreement, he or she may be considered abducted. This is a criminal offence and the maximum sentence is ten years in jail.
Affidavit	a document, sworn on oath to be true, that lists the facts that the person making the affidavit believes to be true. An affidavit must be sworn in front of an authorized person, such as a lawyer, justice of the peace, commissioner or notary public.
Applicant	the person who starts an application in court, such as an application for child support.
Application	asking the court to make an order.
Arrears	the outstanding debt that accumulates if a person falls behind in making child or spousal support payments.
Best interests of the child	the fundamental principle or test that the judge uses to make custody and access decisions about children.
Case law	the collection of relevant court decisions made by judges; these decisions form the principles that future cases will follow.
Caveat	an official notification to any potential buyer that the person whose name is on the legal title is not the only person who has a legal right to the property.
Certificate of Divorce	the document stating that a divorce is final.
Child Advocate	a lawyer appointed by a judge or hired by the parents to represent the child's interests in a high conflict custody or access dispute.
Child support	money paid by one parent to the other parent for the support of their child or children.
Child Support Guidelines	rules and tables for calculating how much child support a parent will pay.
Claimant	a person who applies for support, such as for child or spousal support.
Common-law relationship	when a couple live together in a marriage-like relationship but they are not legally married to each other.
Contempt of court	this is a charge against a person that might happen if the person intentionally doesn't follow the terms of a court order (such as for custody or access). If found guilty, the person can be fined or sentenced to time in jail.
Court order	a judge's decision that the people involved must follow.
Custody	The custodial parent (also called the residential parent) is the one who the children live with most of the time. The parent with custody has the right and responsibility to the day-to-day care of the child and to make major decisions involving the child such as education, religion and health care. Note that the meaning of the term changes from place to place and is different under the federal <i>Divorce Act</i> and the Yukon <i>Children's Act</i> .

Default	if the paying spouse refuses or neglects to pay what the court has ordered, this is called defaulting on the order (or default) and the money owed starts to accumulate in debt called arrears.
Dependent spouse	the spouse or common-law partner who is eligible for spousal support after relationship breakdown.
Divorce	the legal ending of a marriage.
Divorce judgement	an order from the court that says two people are divorced.
Equal division of family assets	the principle that, after marriage breakdown, all of the property that is considered “family” assets should be split half and half between the spouses, regardless of who paid for the item or who brought it into the relationship.
Exclusive possession	where one spouse or partner has the legal right to use a residence or other asset, usually the family home or its contents.
Extraordinary expenses	see special expenses.
Family assets	any property or possession owned by one or both spouses or partners and used for family purposes while the family is living together.
Family home	any shelter used by both spouses as a family residence; this may include a summer cottage that is used regularly by the family.
File	submitting a document (usually the original and some copies) to the court clerk at the court registry.
Garnish	when support payments are automatically deducted from the paycheque of a person who is obligated to pay spousal support or child support under an agreement or court order, but who has not paid it.
Guardian	in the Yukon, a person who has the right and responsibility to manage a child's property (assets, money). This is usually, but not necessarily, the person who has custody.
Grounds	legally recognized reasons for getting a divorce.
Household comparison of standards of living test	a test used to help decide whether someone will suffer undue hardship if the applicable child support amount in the Child Support Guidelines Table is applied. The question is whether the household of the parent asking for the change has a lower standard of living than the household of the other parent.
Interim order	a temporary order that is in place until the final decision of the court (such as for custody or child support).
Interjurisdictional support orders (ISO)	when child support or spousal support orders need to be claimed, changed or enforced across territorial, provincial or national borders. An international agreement signed by reciprocating states means that if the paying spouse or parent lives in the reciprocating state, a court order can be enforced there.
Legal Aid	services of a lawyer provided to eligible applicants who contribute what they can for the costs of the lawyer.
Legislation	laws made and passed by the Parliament of Canada in Ottawa or by the Yukon legislature in Whitehorse (or by the legislature of any other province and territory).

Lump-sum payment	when a child support or spousal support payment is made altogether in one large amount, rather than in smaller amounts paid in a regular schedule; a lump sum is usually paid in advance of when it's owed, unless it's for outstanding debt.
Maintenance Enforcement Program (MEP)	a service provided by the Yukon government that is authorized to collect child or spousal support on behalf of the person entitled to receive them.
Material change in circumstances	a significant change that affects the best interests of the child and may result in a change of custody or access; a change in the condition, means, needs or circumstances of the child or in the ability of the parent to meet the needs of the child.
Mediation	a meeting or series of meetings between spouses, partners or parents and a trained, neutral person (the mediator) that are designed to help the people reach an agreement and as an alternative to going to court to resolve issues or disputes.
MEP	see Maintenance Enforcement Program.
Non-exercise of access	when the non-custodial parent does not exercise the access or parenting time provisions of a court order or agreement; for example, when the parent doesn't show up for scheduled visits with the child.
Non-family asset	any property that's owned by either or both spouses that hasn't been ordinarily used by both of them or by the children for a family purpose (such as golf clubs that were just used by one spouse or partner).
Paramountcy	when federal law takes precedence over territorial or provincial law.
Parenting agreement	a contract between parents that states how they will arrange the details of their child's life, such as where the child will live, the times the child will visit with the non-residential parent, the amount of child support and how special expenses will be dealt with.
Paying parent/spouse	the person who pays child or spousal support; sometimes called payor, debtor or respondent.
Periodic payments	when a child or spousal support payment is made at regular intervals, such as once or twice a month, or once every six months.
Petition for Divorce	the court application that starts a divorce; either spouse can file the petition for divorce.
Precatory	a clause in a written agreement that's not legally enforceable but is included as a reminder to the parties of what they should be doing (such as dealing with each other in a civil manner).
Preservation of the status quo	the law considers stability to be a very important factor for children's best interests so whatever the child is most used to, as long as it's stable, healthy and not abusive, will probably be what a judge orders.
Property	everything owned by one or more spouses or partners.
Provisional order	when a judge in one jurisdiction makes an order for something such as child support that must be paid by a person who lives in a different jurisdiction. This provisional order has no force or effect until it's sent to the court in the other place and is confirmed by that court.
Receiving parent/spouse	the person who receives child or spousal support; sometimes called the payee, creditor or recipient.

Reciprocating state	a state that has signed the same international agreement that the Yukon has signed, allowing people to claim, change or enforce court orders for child or spousal support when the paying parent or spouse lives in that other state.
Relocation	when the custodial parent wants to move out of the Yukon with the child.
Retainer	the deposit paid to a lawyer in payment for the work that he or she will do for you.
Right of possession	since each spouse is entitled to one-half of the family home, both spouses have a right to be there after separation. Neither spouse can order the other to leave, or change the locks on the door.
Rules of Court	procedures that must be followed and forms that must be used when filing documents with the court.
Self-represented litigants	people who go to court without a lawyer and represent themselves before the judge.
Separation	when a couple no longer lives together as a couple; no official document is required for separation.
Separation agreement	a contract between spouses or partners that states certain terms and conditions of their separation; it usually deals with things like spousal support, how people divide property and debt, custody and access and child support.
Service	when legal or court documents, such as a claim for spousal support, are delivered or given to a person. There are technical rules about the way that certain documents must be served and the time frame that they must be served within.
Solicitor-Client privilege	your lawyer has a professional duty to keep any discussions with you confidential.
Special expenses (extraordinary expenses)	additional expenses relating to a child that are deemed to be necessary for the child's best interests and reasonable. An appropriate proportion of the special expenses may be added to the Table child support amount in determining child support payments.
Spousal support	money paid by one spouse or common-law partner to the other spouse or partner after separation or divorce as a contribution to the living expenses of the dependent or receiving spouse.
Spousal support advisory guidelines	optional guidelines that judges, lawyers and divorcing couples across Canada can use to help determine the appropriate amount of spousal support that should be paid to an eligible dependent spouse or partner.
<i>Stare decisis</i>	the principle that similar situations should be dealt with in the same way.
Undue hardship	when a court decides it would cause too much difficulty for one or the other parent if the court required that the Child Support Guidelines Table amount (or the Table amount plus special expenses) be paid.
Valuation date	in family law, this is the date when the values for a separating couple's property are determined or agreed to.
Variation	a change to an existing court order; you must apply to the court to vary a court order.



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