Splitting Up

The Yukon Law on Separation

A guide for married and common-law couples

FOURTH EDITION

Yukon Public Legal Education Association

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The Yukon Public Legal Education Association (YPLEA) wishes to thank all those who made this book possible.

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Contents

Read this first

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

This book explains the law as it stood at the time of publication (March 2020). The law tends to change a lot, through changes in legislation and judges' decisions. This is another reason to check with a family law lawyer before making 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 was not legally married at separation. The exception to this is in Chapter 6 where the term "spousal support" may also refer to support for a common-law partner.

At the time this book was published (March 2020), Parliament had given Royal Assent to amendments to the *Divorce Act*. It is expected that many of the amendments will come into force on March 1, 2021.

1. Introduction

1.1 Background

When you are part of a couple, and you split up, it's usually a stressful and overwhelming time for everyone involved. Not only do you have to deal with all the practical logistics of reorganizing your life, but you're usually dealing with a lot of emotions too. It's likely that at least one person has moved out of the house, or is moving, and one or both of you may be getting settled into a new home.

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 to deal with their extra needs. Yet you know that somehow you and your spouse or partner must do what's best for them.

There are financial stresses too. 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 also have to figure out who gets which assets and where the children are going to live.

All in all, it might not seem as though it's the ideal time to be learning family law, or to be filling out detailed and sometimes complicated forms. The reality is that you are being thrust into the thick of things. This book can help make the process a bit easier by describing your rights and responsibilities, the issues you may need to deal with, and who can help.

This book is written for couples — 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 will assist you in working with family law lawyers, courts, mediators, collaborative practitioners, government agencies — and, ultimately, each other — as you separate.

1.2 Who is this book for?

This book describes the laws that apply to four different scenarios:

1. a legally married couple, separating with no immediate plans to divorce;
2. a legally married couple, separating and planning to divorce;
3. a never-married couple, separating and needing to divide assets;
4. a never-married couple who have a child together and have never lived together.

The issues discussed in this book apply to same-sex and heterosexual couples.

1.3 What topics does this book cover?

Most couples who are recently separated have several things to sort out. The law can 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 immediate and long-term planning. It describes family law in a general way and provides some of the procedures that usually apply when a couple separates:

- parental responsibilities, including custody (decision-making responsibility) and access (parenting time) (Chapter 4);
- child support obligations and entitlements (Chapter 5);
- spousal support obligations and entitlements (Chapter 6); and
- property division (Chapter 7).

Important

Separating is difficult. It can cause stress, anger and pain. Sometimes, it can even bring out a previously unknown side of a person you thought you knew well. Unfortunately, separation can sometimes trigger violent and irrational behaviour.

Seek help immediately if you have any concerns about violence or irrational behaviour from your spouse or partner or your spouse or partner's family, or if you're being threatened, abused or pressured by anyone.

If you have concerns that you may become violent or act irrationally or if you see signs of violence or irrational thinking in your spouse or partner, seek help from a trained professional immediately.

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

- Police
- Victim Services VictimLinkBC
- 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)
- Private counsellor/therapist
- First Nations Court Worker
- Trusted elder
- Minister/priest
- Women's Legal Advocate (for women only, at Skookum Jim Friendship Centre)

1.4 Limitations of this book

This book provides general information about some of the legal aspects of splitting up and getting divorced. It discusses the most common issues that the average couple faces. However, every person's situation is unique and requires specific guidance. Before you sign an agreement or make any final decisions about your children, your financial situation or your property, you should consult with a family law lawyer to make sure you understand how the law applies to you, your spouse and your children.

It's important for you to know that this book can't substitute for professional advice that's tailored to your particular 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 family law lawyer. The law that applies to your situation is outside the scope of this book.

Chapter 2

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. The federal government in Ottawa and the Government of Yukon in Whitehorse have passed laws covering the issues that arise when couples separate and/or divorce.

Federal legislation is passed by the Parliament of Canada in Ottawa and is the same throughout Canada. Federal legislation applies in every province and territory.

Provincial and territorial legislation applies only within that province or territory. Different provinces and territories often have different laws. This means 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.

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 obtain a "legal separation" when we separate.**
- **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 divorce.**

The rules of law that apply to separating 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, particularly those decided in the Yukon and by the Supreme Court of Canada).

2.1.1 Caution: The law can change

This book explains the law as it stands at the time of publication (March 2020). The law tends to change a lot, both through changes in legislation and judges' decisions. This is another important reason to check with a lawyer before making important decisions based on the general legal information in this book. The information here may be outdated by the time you read it, so please be careful and seek additional information from the resources outlined in Chapter 9.

2.2 Legislation

2.2.1 Canadian legislation

The Parliament of Canada has passed a law called the *Divorce Act* that 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 (decision-making), access (parenting time) and financial support for children.

At the time of writing, long-awaited amendments to the *Divorce Act* have received Royal Assent from Parliament, and many of the provisions are planned to come into force on March 1, 2021. The changes include new terminology and specific considerations for determining issues related to children of separated and/or divorcing parents. Of particular importance, the terms "custody" and "access," thought by many to be emotionally charged words, are being replaced by the terms "decision-making responsibility" and "parenting time."

The *Divorce Act* does not cover the division of a married couple's property. Since there is no federal law that deals 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 a couple is married, the *Divorce Act* applies. Yukon legislation dealing with the same issues that are covered in the *Divorce Act* doesn't apply. This is because the federal legislation supersedes the Yukon legislation — in other words, the federal law is followed when both federal and territorial laws apply to the couple's situation (this is called "paramountcy").

Pension plans

While Canada's *Divorce Act* does not cover property division, other federal laws can affect the division of property between married and unmarried couples. For example, at the time of this book's publication (March 2020), 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, a family law lawyer can help.

Canada's *Divorce Act* doesn't apply to common-law couples. The principles of law that set out the rights and responsibilities of couples who have never married are not found in legislation (except for spousal support). Rather, common-law couples have to look to decisions made by judges in previous cases (know as the "common law" — see page 7) and the law of equity.

2.2.2 Yukon legislation

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

- the *Family Property and Support Act;* and
- the *Children's Law 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 Law Act* sets out rules dealing with a parent's rights and responsibilities regarding custody (decision-making) and access (parenting time), both before and after separation.

The rules about support payments for children or a spouse that are set out in the *Family Property and Support Act* apply only to married couples who are separating until proceedings are started under the *Divorce Act* (when someone files for divorce). This is because of paramountcy. Once somebody has started proceedings under the *Divorce Act*, the provisions of that federal Act take precedence over the territorial Act. See the chart on page 12 for more information.

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

The Yukon *Family Property and Support Act and Children's Law Act* also cover some of the issues facing common-law couples who are splitting up such as parental rights and responsibilities and financial support for children and spouses or partners.

For common-law parents, Part 2 of the Yukon *Children's Law Act* is the legislation that governs 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 partners 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* apply only to married spouses (who are separating or divorcing). The rules about the family home and division of family property don't apply to common-law couples at all.

Guidance about how common-law couples deal with property division when they split up is mostly found in case law (previous judicial decisions). A couple may also enter into an agreement when they first start living together (often referred to as a "cohabitation," "prenuptial" or "marriage" agreement). If the couple entered into a valid, binding agreement before separating, the agreement will be used as the basis for their property division and support obligations when they separate.

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 more specific rules and principles as they decide how to resolve the disputes that come before them in court.

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.

Judges give reasons for the decisions 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. In many cases, you can read a judge's reasons for decision, including the rules or principles of law the judge applied, and why they 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 case 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. 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 families are exactly alike. That's why different cases can produce different results.

Judges' decisions

In the Yukon, 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, and so are applicable decisions made by the Supreme Court of Canada. In other words, Yukon judges are obligated to decide a similar situation that has already been decided by a Yukon judge or the Supreme Court of Canada in the same way.

The Yukon is a small jurisdiction, so judges hear a relatively small number of cases each year. This means that not every provision of law applicable to separating couples in the Yukon has been tested in court. Where there is no Yukon case law, decisions made by judges in other provinces and territories (which are not binding on Yukon judges) 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.

Judges apply the law to the unique facts of each case and those decisions continue to shape the law. If your case goes before a judge, the judge will consider all the circumstances, including those unique to your situation, to determine what should happen.

2.4 Rules and procedures

To function efficiently, smoothly and fairly, the court system requires everyone to follow 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 serious. In the worst-case scenario, you could lose your 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, the rules outline what documents you must file, how the documents should look, who must receive them and when, and so on.

The procedures that you must follow for a family law matter are found in the Yukon Supreme Court Rules, particularly Rules 63 and 63A. You can get a matter in front of a judge only by following the procedures set out in the Rules of Court. If you don't follow those rules and procedures, you likely won't get in front of a judge. Even if you are able to get in front of a judge, you could find your case dismissed or adjourned for not following the rules.

Complying with the Rules of Court can be confusing and overwhelming. It is important to get help if you are unsure of the next step to take.

2.4.1 The Rules of Court are not the law

The Rules of Court don't set out the rules of law; they set out the rules of procedure. This means they tell people how to prepare for court, including procedural timelines and which documents need to be filed with the court registry. Rules of Court don't say how the case 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. The law cannot be used to punish someone when the relationship ends. If your spouse or partner committed adultery, for example, that does not entitle you to a larger share of the assets upon separation.

Although the term is used a lot, there is no such thing as a "legal" separation. When one spouse or partner decides 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 does. Separation results from a decision made by one or both people. One spouse or partner deciding to separate is enough to cause a separation.

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

When couples split up, sometimes one of them moves to a different residence. It's also 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 often 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.

Some separated couples are able to co-exist in the same residence without any difficulty. Other times, living as separated people in the same residence doesn't work out well in the long term because the issues that caused the end of the relationship continue to be a problem. In those situations, the tensions between spouses or partners can become extremely uncomfortable for everyone, especially the children who may be caught in the middle.

No matter what your living situation is, it is important to ensure that your children are protected from conflict. This is not only common sense, it will be a requirement for divorcing parents once the amendments to the *Divorce Act* are in force.

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, although it can be common in other places such as British Columbia, 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 they're separated. A couple who have split up, and are living separately under the same roof, might wish to obtain a declaration since it might not be obvious that they are separated. Remember: as long as at least one of you intends to end the relationship, you're legally separated from the time that decision was made.

2.5.2 Why does the separation date matter?

The date of separation is an important date. 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 disagree 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 before you lose your right to do so (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 usually establishes the date of the marriage breakdown. The date of the marriage breakdown is important because it's usually the date when the assets owned by each spouse get divided (this is called the "valuation date"). The valuation date is often the same date as the date of separation.

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 as long as both spouses or partners still want to be together in a relationship, even though they're physically separated.

2.5.3 Common-law couples

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

2.6 Divorce

Once you're legally married, only a judge can grant you a divorce. This means that until you get a divorce order from a judge, you're still legally married, even if you've been separated for a long time.

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 (decision-making responsibility) and access (parenting time) for the children of the marriage. Since the *Divorce Act* is a federal law it applies in the same way across Canada.

There are no rules about property division in the *Divorce Act*. If you are married and you are divorcing in the Yukon, you can find the rules for property division in the Yukon *Family Property and Support Act*.

2.6.1 Grounds for divorce

There are three grounds for divorce in Canada:

- you and your spouse have lived separate and apart (even if you've lived as separated people in the same residence) for one year or more;
- your spouse has committed adultery; or
- your 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 for divorce at any time after you separated; however, 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 without your consent while still married to you. If your spouse commits adultery, it can be used as a basis for obtaining a divorce, provided that you have not forgiven or disregarded the adultery. If you're using your spouse's adultery as the basis for your divorce, it's not necessary to wait for a year before getting divorced; you can apply at any time. When you use adultery as your grounds for divorce, you must be able to prove that your spouse committed adultery, or your spouse has to admit to committing adultery in court documents. You can't claim a divorce based on adultery you've committed.

The *Divorce Act* is changing

At the time this book was published (March 2020), Parliament has given Royal Assent to amendments to the *Divorce Act*. It is expected that many of the amendments will come into force on March 1, 2021. It is outside the scope of this book to outline every change that will occur when the amended *Divorce Act* comes into effect. Therefore, it is important to check with a lawyer to ensure you know how changes in the law might affect you.

The third ground for divorce is cruelty. If one spouse treats the other cruelly (physically or mentally) and it becomes impossible to remain living together because of that cruel treatment, the spouse who has been treated cruelly is entitled to a divorce — provided that the spouse 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 your spouse treated you in a cruel manner and that, as a result, it's impossible for you to continue to live with your spouse.

2.6.2 Reconciliation: If you try to get back together

If you are married and you separate, 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 you and your spouse to try to work things out during the one-year period that you're separate and apart. If you try to get back together and reconcile during the year, the one-year separation period required for the divorce won't be affected unless you live together for the purposes of reconciling for more than 90 days in total.

You 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 granted.

2.6.3 Starting the process

The procedural rules for getting a divorce in the Yukon are set out in the Yukon Supreme Court 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 Statement of Claim (Family Law) – Form 91 in the Yukon Supreme Court, and paying the associated fee (at the time of writing: $140.

The Family Law Information Centre (FLIC) is an office of the Yukon Department of Justice – Court Services Branch that provides members of the public with free assistance with family law matters. It is important to know that FLIC does not take the place of a lawyer and will not give you legal advice about your situation. FLIC can, however, give you information, refer you to helpful resources, and help you understand procedural steps and which court forms to file.

FLIC offers a publication called "Applying for Divorce – A Family Law Self Help Guide." The guide helps to explain the Rules of Court and outlines the forms you'll need to finalize your divorce.

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

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.

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 or object when your spouse files for divorce. This is called an uncontested divorce and is common for couples who have resolved their family law issues outside of court.

After you've filed a Statement of Claim and someone other than you has served your spouse with it you can apply for a Divorce Order by Requisition (Form 2 in the Yukon Supreme Court Forms); see also Rule 63 of the Yukon Supreme Court Rules.

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 spouses who are separating	No	*Family Property and Support Act* (property, spousal support)
Married spouses who are separating but not yet divorcing	Yes	*Family Property and Support Act* (property, spousal and child support) *Children's Law Act* (custody (decision-making), access (parenting time), guardianship)
Married spouses divorcing	No	*Divorce Act* (divorce, spousal support) *Family Property and Support Act* (property)
Married spouses divorcing	Yes	*Divorce Act* (divorce, spousal and child support, parenting time and decision-making responsibility) *Children's Law Act* (guardianship) *Family Property and Support Act* (property)
Common-law partners separating	No	*Family Property and Support Act* (spousal support only)
Common-law partners separating	Yes	*Family Property and Support Act* (spousal support and child support)

3. Who can help?

3.1 Introduction

When you split up, inevitably there are issues that need to be sorted out. Depending on how complicated your situation is, and the level of conflict, you will probably want and need some help to resolve those issues.

Children

- How will parenting time be shared between you?
- Who will have the responsibility to make decisions affecting the children?
- How do you ensure that the financial needs of the children are met?

Support

- Will you receive or pay support? 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 a fight.**
- **If my ex hires a lawyer, that lawyer can give me legal advice too, so I don't need my own lawyer.**
- **Hiring a lawyer will cost at least $20,000.**
- **Hiring a lawyer will just drag things out and prolong the agony.**
- **My lawyer needs to be loud and aggressive to be effective.**
- **Going to court/trial is the only way to resolve our differences.**

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

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

The two methods aren't mutually exclusive — it's not necessarily either one or the other method. Both can be used. For example, you and your spouse may agree on most issues, but can't decide who will keep the family home. A trial may be needed to determine an answer to that one issue.

The vast majority of family law cases settle without going to trial. This means that the parties eventually reach an agreement, which they set out in either a separation 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 difficult for people who represent themselves without a lawyer.

3.2 If you go to court without a lawyer

There are many reasons why people go to court without a lawyer. One of the most common reasons is cost. It can be expensive to hire a lawyer to help you in a contentious family law matter. The application process can take years before a trial happens. Sometimes people start off with a lawyer, but can't afford to continue to pay for representation through the whole process.

A person who goes to court without a lawyer is called a "self-represented litigant." The legal system can be difficult to navigate for self-represented litigants. This is especially true in family matters, where emotions and stakes can run high. Judges expect self-represented litigants to make themselves aware of law and procedure so that a case is presented in a way that enables the judge to make a decision. This includes proper evidence being filed at appropriate times.

Research into self-represented litigants in Canada has found that their experience is often anxiety-producing, time consuming and stressful. A lack of understanding of the law and procedure can lead to confusion, prolonged proceedings and repeated court appearances that require taking time away from work, home and family.

If you have no other option than to represent yourself in court, it may be possible to consult with a lawyer to get advice about how to proceed. This is called "unbundled" legal services or a "limited scope retainer." In this type of situation, the agreement between you and your lawyer will outline very clearly what type of advice or help you will and won't receive. Not every lawyer offers unbundled services. There are resources listed in this book that may help you if you are considering being a self-represented litigant (see Chapter 9).

Here is an example of a common misunderstanding of the law made by self-represented litigants:

- Imagine you're being asked to pay child support, but feel you shouldn't have to because the other parent isn't letting you spend time with your children. 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 children, that's irrelevant to your obligation to pay child support. Judges and lawyers agree that the law is clear about this point: your parenting time and your obligation to pay 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, because you won't succeed.

- It's not that being denied time with your children doesn't matter to the judge. It's that there are other accepted procedures for seeing your children, such as making a court application to spend time with your children. If you pay child support and then make a separate application to see your children, the judge will look at all of the circumstances and may harshly treat the parent who is not allowing you to see your children. Being denied time with your children is irrelevant to whether or not you are required to pay child support to the other parent. Child support is the child's right and is based on the child's living arrangements and the income of the parent who is required to pay support.

3.3 Getting legal information

You can reach agreements with your spouse by sitting down together and deciding what works for your family. You can use a mediator to help you reach agreement (see Section 3.4). You and your spouse can hire collaborative lawyers to help you reach agreement (Section 3.5). You can hire a lawyer to negotiate and/or go to court for you (see Section 3.6). You can try a combination of these. However, it will be very difficult to reach a fair and reasonable result 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, but this book doesn't have all of the answers. It's intended only to let you know some 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 payment based on an hourly rate.

Source	Type of information provided
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 can't act as your lawyer.
Family Law Information Centre (FLIC)	The Yukon Department of Justice Family Law Information Centre (FLIC) is located in the Andrew Philipsen Law Centre in Whitehorse. FLIC offers free assistance with family law information, resources, referrals and workshops. They have a website with links to online resources. You can pick up information kits, forms and brochures at the FLIC office. FLIC can help you with procedural aspects of making or responding to a family law application. FLIC does not provide legal advice and cannot draft documents for you or respond to documents filed by your spouse.
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 about Ontario's law of property division won't help you much in understanding the specifics of the law in the Yukon. However, although the specific rules in the Yukon may not be the same, some of the solutions that a website based in B.C. or Ontario suggest may be usable in the Yukon, and can offer helpful assistance, especially when it comes to draft parenting plans.
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.

Note: Contact information for all these sources is provided in Chapter 9.

Source	Type of information provided
Meet with a Lawyer certificate program	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 will meet with you for 30 minutes and give you some summary advice for a flat fee of $30 (as of March 2020). In addition to giving you some basic information about the law as it applies to your situation, the lawyer can tell you whether you need to hire a lawyer. The lawyer isn't responsible for doing any legal work for you, but you can always ask if this lawyer will work under a limited scope retainer, provide unbundled services, or is available to be retained to deal with the case for you.
Consultation with a private lawyer	You can find a lawyer who practises family law (either from the Law Society of Yukon, an internet search, 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 the lawyer's hourly rate, which may range from $200 to $400 per hour or more. 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. Lawyers usually charge for the initial consultation (ask when you call to book an appointment). Once you've met, 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 to provide advice and to look after all the procedures for settling your issues. The lawyer will negotiate on your behalf, file 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 have become specialized and family law has grown to be more 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 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. You can call legal aid to set up an intake interview to see if you qualify for assistance. See the green sidebar on page 21.

3.4 Mediation

Mediation is a voluntary process where agreements can be reached through consensual dispute resolution. A mediator is a neutral third party who is trained to provide a structured process where people can determine what works best in their circumstances. Mediators don't make decisions for you or replace lawyers. They do not give legal, accounting or tax advice, but can give information about what the law says. Some lawyers are trained mediators. However, your lawyer can't be both your lawyer and your mediator at the same time.

A trained mediator can help to clarify 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 and your spouse to discuss options and can help you to reach an agreement that works for your family.

Mediation can be used at any time during your separation, including before, during and after court proceedings. You can hire a mediator whether you've been to see a lawyer or not. A mediator can even help you implement a signed separation agreement or court order; it is not uncommon for questions or disputes to arise after a matter is "resolved."

3.4.1 Yukon Family Mediation Service

The Yukon Department of Justice has piloted a free mediation program for families that has been extended until at least 2022. The Yukon Family Mediation Service is located in the Law Centre (contact information is found in Chapter 9 of this book). Either or both separating spouses can contact the program to set up meetings with the mediator, although both spouses must agree to participate in mediation, since it is a voluntary process. Generally, the free program offers a maximum of four sessions to reach resolution on parenting, child support and spousal support issues, although many couples are able to reach agreements in fewer than four sessions.

One of the goals of the pilot program is to implement an online mediation service for parenting plans. At the time of writing this is not yet available; however, you may wish to investigate this option to see whether it has become available. Online mediation is a good option for many people because it provides an efficient and user-friendly interface for parents to reach agreements on issues related to parenting time and decision-making responsibilities.

Use of mediation

One of the important amendments to the *Divorce Act* (not yet in force at the time of publication in March 2020) is to strongly encourage the use of mediation, negotiation and collaborative law to resolve family matters outside of court. In fact, the new law says that family law lawyers *must* encourage separating clients to try these processes, and clients *must* try to resolve their conflict using an out-of-court family dispute resolution process. This strong language indicates acceptance by the Parliament of Canada that family disputes are better dealt with outside the courtroom.

3.4.2 Court-ordered mediation

Sometimes people go to court and the judge orders them to attend mediation. It is expected that this will become more frequent after the *Divorce Act* amendments are in force. Court-ordered mediation is still voluntary. This means that although you have to go and meet with the mediator, no one can force you to reach an agreement in mediation. It is recommended that however you end up in mediation, you keep your mind open and trust the mediator to guide you through the process.

3.4.3 Private mediation

Negotiating a settlement with the assistance of a private mediator can be a cheaper alternative than hiring a lawyer to negotiate for you. When you mediate your problems with your spouse, you're negotiating together directly. Mediators usually charge only for the time spent with the parties in negotiations, and their fees tend to be lower than those of lawyers. The mediator's fees may be shared between you and your spouse or partner in whatever proportions you agree to. (If you and your spouse hire lawyers, you each have to pay your lawyer's full cost.)

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 before and/or during mediation to learn what the law says and what you can expect to happen if you go to court. Also, it's a good idea to make any agreement you reach as a result of mediation "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 or therapist. Some counsellors are also trained mediators, but they perform different jobs. The goal of

mediation is not to get back together again, it's to help a couple negotiate a workable separation. At the same time, mediators often coach parents on positive communication, so that they can work on having a cooperative and respectful co-parenting relationship after separation and/or divorce.

If you and your spouse want to work on reconciling your relationship, and both of you are willing to try to do that, then you should consider seeing a counsellor or therapist. Separations are difficult for everyone, and it is always recommended that you seek support from a counsellor to help you sort through the many emotions you may be feeling. This is especially true for spouses or partners who aren't ready for their relationship to end. A mediator or family law lawyer can help you find counselling resources; some are listed in Chapter 9.

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, it is often necessary to have assistance from a lawyer and/or other support people. In order to work, mediation requires a relatively balanced relationship and the ability of both partners to bargain effectively, which is not the case where one spouse is controlling or pressuring the other. Neither spouse should feel threatened, coerced or pressured by the other.

3.4.4 Disclosure and confidentiality in mediation

Honesty and disclosure are essential to an effective negotiation, including mediation. Both parties must be willing to cooperate in revealing all the necessary information and documentation so they can negotiate in an informed way. Neither party can be forced to negotiate an agreement without knowing all of the relevant information.

Generally, what goes on in mediation is confidential. The mediator can't be called as a witness in a later court proceeding if you don't reach an agreement. Things you say in mediation or settlement offers you make can't be used against you later if you aren't able to reach an agreement in mediation and you end up in court. The mediator will discuss limitations to confidentiality prior to beginning the process, and everyone will sign an Agreement to Mediate that sets out the process, rules and expectations.

Each mediator has an individual 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 training to ensure that each person is actively listening and hearing the other person. The mediator can encourage both of you to identify options, brainstorm solutions and consider various choices you may not have considered before. A mediator won't make decisions for you and won't pressure you into accepting any terms that you're not happy with. A mediator will provide you with information, but cannot provide you with legal advice. You can obtain legal advice about issues that are raised in the mediation from a family law lawyer.

If you want to try mediation

Not many people in the Yukon are trained in family law mediation. Some who are trained are also family law lawyers, but some are not. Mediation Yukon has a roster of mediators, some of whom work with families.

3.5 Collaborative law

Collaborative law (also called collaborative practice or collaborative team practice) is a process specifically designed to support spouses in reaching agreements related to separation and divorce, in low and high conflict situations.

Like mediation, collaborative law is a voluntary process for consensual dispute resolution. Unlike mediation, collaborative practice relies on a team approach, where both spouses are represented by collaborative lawyers. In some instances, the spouses jointly retain a family professional (usually a counsellor, therapist or social worker trained in collaborative practice) and/or a financial professional (a financial advisor, accountant, or business valuator trained in collaborative practice) to contribute neutral advice to assist the couple during the collaborative process.

If you want to try collaborative law

Not many lawyers in the Yukon offer collaborative law services. This is due to the limited number of family law lawyers, only some of whom are collaboratively trained at the date of writing.

There are many internet resources available for more information on what collaborative law is and whether it might work in your situation. The website of the International Academy of Collaborative Professionals provides links to collaborative organizations across Canada.

If you are interested in trying collaborative law, an internet search will show you which family law lawyers currently offer collaborative law services in the Yukon. Alternatively, you can contact the Law Society of Yukon for a listing.

The hallmarks of collaborative practice are transparency (providing full disclosure and negotiating in good faith) and respectful communication. Collaborative lawyers will not go to court for their clients if agreements can't be reached through the collaborative process. At the beginning of the process, the spouses agree that the group will share all information, including documents and legal advice. Joint meetings are held where there are group discussions about the issues, the interests of the spouses (which may be legal or not) and what the process will look like. A formal Participation Agreement is signed by everyone.

3.6 Lawyer negotiation and/or court

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. There are relatively few family law lawyers in private practice. Some family law lawyers will be unable to help you because of a conflict of interest (see Section 3.6.1).

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 for a recommendation — a word-of-mouth referral may be the best way of getting a lawyer;
- you can search on the internet;
- you can look in the Yellow Pages; and
- you can call the Law Society and ask for a Meet with a Lawyer certificate and a list of family lawyers.

There are also lawyers in B.C., Alberta and Ontario (and in other places) who have authority to practise in the Yukon and may be willing to help you. If you hire a lawyer from outside the Yukon, be aware that costs may be higher and the lawyer may be less accessible to you.

3.6.1 Conflict of interest

Lawyers can't place themselves in a conflict of interest with their clients. Your lawyer must act only in your best interests. A family law lawyer can't represent two clients with opposing interests.

Usually, before you see a lawyer, you are asked to provide some basic information so a "conflicts check" can be done. 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 they 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 can't tell you why they have a conflict because that goes against solicitor-client confidentiality. They can only tell you that there is a conflict.

3.6.2 Legal aid

If you can't afford a 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, which is funded by the federal and territorial governments.

Legal aid is available only to people who meet certain criteria. 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 household 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 — if you have a lot of debt, for example — and that makes it difficult for you to hire a lawyer. Depending on your situation, you may also be eligible if you agree to contribute something toward the cost of legal assistance.

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

- custody/decision-making responsibility;
- access/parenting time;
- family violence;
- child support; and
- exclusive possession of the family home (the right to live in the home for the time being until asset division issues are decided).

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 may 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 household income and household income 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.

3.6.3 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.

The lawyer will want to know about your situation, so you may want to write down key points to present during the first meeting. Prepare a list of bullet points to give to your lawyer that contains basic information such as your legal name and date of birth, the legal name and date of birth of your spouse or partner, your date of cohabitation/marriage, your date of separation, your children's names and dates of birth, your gross annual income, the gross annual income of your spouse or partner and the issues you will need to deal with. This will help save time. You may also want to write down a list of questions that you can refer to during the meeting.

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. Using a binder with dividers can be effective.
- 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. 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 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 give you an opinion about your chances of success. The lawyer should explain the risks and estimated 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 billed, and how often you'll be billed (see Section 3.6.4);
- the estimated total cost (this will always depend on how much time you need from the lawyer, because cost is based on time and time is charged by the hour);
- 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.

Social assistance

If you receive social assistance from the Government of Yukon, the Government of Yukon 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 (decision-making) and access (parenting time) you may wish to contact legal aid.

3.6.4 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 for the lawyer's advice and services.

When you retain a lawyer, you're buying that lawyer's 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 work is started 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.

At the time of writing, typical retainer amounts in the Yukon range from $2,000 to $5,000; they can be higher if your case is complex or if you are going to trial. If you're expecting a large settlement from your former spouse or partner, 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 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 reduces 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 phone calls with you or the other lawyer, meetings with you and others, legal research, drafting letters, drafting court documents, 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 (0.3 of an hour) on a phone call, and if the lawyer's hourly rate is $200, then the total cost for that phone call would be 0.3 x 200 or $60. Note that many lawyers record any activity they do on your behalf at a minimum of 0.1 or 0.2 of an hour (6 or 12 minutes). The lawyer's retainer agreement should spell that out. If it doesn't, ask.

The rate charged by family law lawyers in the Yukon ranges from about $200 to $400 an hour. In family law matters, negotiations about children, support and property 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, which 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 disbursements.

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 assumed 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 may 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 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.

3.6.5 Instructing your lawyer

Your lawyer's role is 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. On the other hand, your lawyer should give you legal advice and an explanation of the risks that enables you to make an informed and reasonable decision to base your instructions on.

Obviously, your instructions to your lawyer must be realistic, given the particular facts of your case, what the law says about those facts, and the advice you've been given by your lawyer. If you give your lawyer instructions asking for the impossible, either the lawyer may end the relationship, or you will be disappointed with the outcome.

Remember that you're paying for your lawyer's best professional opinion about what you can achieve in your circumstances. If you're not prepared to follow your lawyer's advice, then you should either ask for a clearer explanation of the law as it applies to your case or look for another lawyer. It is important for you and your lawyer to identify and address unrealistic expectations at the outset to avoid disappointment.

If you hire a lawyer, you should be comfortable with that lawyer. You are going to pay your lawyer money, so it's important for you to feel a sense of trust, and for you to have a good rapport. However, a good lawyer will likely need to tell you things you may not want to hear. Unfortunately, many people who are separating get their information from friends who have separated, from family who are upset with their former spouse or partner, or from television shows. People can then be surprised to learn what the law actually says about their rights and obligations.

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 give proper legal advice only 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 in your discussions. No one, not even a court, can require your lawyer to reveal what was discussed in conversations with you. This protection is called solicitor-client privilege and is for your benefit so you can tell your lawyer the truth in complete confidence. This confidence can't be breached by the lawyer unless you give specific instructions to do so.

3.6.6 If you're unhappy with your lawyer

If you're unhappy with your lawyer's services, you have the option of changing lawyers. If you are unsure about the advice you are getting from your lawyer, you can also obtain a second opinion. If you feel that your lawyer has charged you more than was agreed, you have the right to apply to have the bill "taxed." This means that a court officer will review your agreement with the lawyer and the work that 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 Andrew Philipsen Law Centre in Whitehorse.

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

3.7 Other government programs

3.7.1 The Maintenance Enforcement Program (MEP)

The Government of Yukon'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 an existing 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. The MEP will also 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 to collect 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.

3.7.2 The Family Law Information Centre

The Family Law Information Centre (FLIC) is an office of the Yukon Department of Justice, Court Services Branch. As mentioned in Section 2.6.3, FLIC provides members of the public with free family law information (including information about court procedure and forms), resources, referrals and workshops. FLIC has a website with links to online resources. See Chapter 9 for contact information.

FLIC does not take the place of a lawyer or give you legal advice about your situation. FLIC can give you information, refer you to helpful resources, and help you understand procedural steps and which court forms to file.

3.8 Community support

If 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 the support people in your community who can offer help. See Chapter 9 for contact information.

Chapter 4

4. Custody (decision-making) and access (parenting time)

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 (decision-making responsibility) and access (parenting time)
4.3 Access	4.7 Changing custody (decision-making responsibility) and access (parenting time)
4.4 Guardianship	4.8 Enforcement

4.1 What are the issues?

Not knowing what will happen to your children is the first concern for most separating parents. When parents separate, their roles as spouses or partners obviously change. Their roles as parents to their children continue, however, and the law recognizes this. Even if you separate from each other, you aren't separating from your children. Most children want to maintain a good relationship with both parents even if their parents are living separate lives.

The law requires parents to consider children's emotional and physical needs, and to make decisions that put these needs first. It encourages parents to find ways they can care for their children while living independent lives.

Common misunderstandings

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

While you were still together, it was obvious where the children would live. You also had some method of deciding important issues affecting the children, 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 separate.

When parents with children separate, two major issues need to be resolved:

1. Parenting time — What will the children's residential schedule look like?
2. Decision-making — Will one parent, or both, make the major decisions about health, education, religion and discipline? Which parent is responsible for taking the children to the doctor, dentist and who will make the appointments? Which parent takes the children to hockey and soccer and who deals with and pays for their enrollment?

There are many details that have to be worked out within each of those two major issues. For example, how will birthdays, holidays and other occasions be celebrated, and where? Can you still celebrate some of these occasions together as a family? What are the best living arrangements for the children? How much time will they spend with each parent?

Who will decide if the children should get braces? How do you decide which school they should attend? What happens if you can't agree about some of these things?

Each family will have its own unique circumstances and details that need to be considered. The overriding principle is that the details should be worked out in a practical way that's best for your children. It's usually best for everybody, especially the children, if the details can be sorted out between the parents themselves. No outsider can know what's best for children as well as their parents do — as long as the parents are thinking rationally about the best interests of their children.

Which law applies?

If parents are divorcing, custody (decision-making responsibility) and access (parenting time) rules are set out in the federal *Divorce Act*, which applies throughout Canada. As already mentioned, there are some important changes coming to the *Divorce Act*.

If parents were never married, or were married but are just separated, the rules for custody (decision-making responsibility) and access (parenting time) are set out in the Yukon *Children's Law Act*.

4.2 Custody

The term "custody" has historically referred to the exclusive right of parents to live with their children (it's a short form of "physical custody"). Since the federal parliament passed the first version of the *Divorce Act* in 1967, the term has also come to refer to the right of the parent with "custody" to make the major decisions about the child's welfare and 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 use more neutral terms such as "parenting time" and "decision-making responsibility" to describe those concepts.

At the time of publication (March 2020), all the relevant legislation — the federal *Divorce Act*, the Yukon *Children's Law Act* and the Yukon *Family Property and Support Act* — still use the word "custody." The *Divorce Act* will soon use "parenting time" and "decision-making responsibility" (likely as of March 1, 2021, when the amendments are planned to come into force). You'll see each of these terms used in this book, depending on which law is being discussed. 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 Law 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 of majority. 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 and emotional support and care 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 (parenting time) 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 programming 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 (decision-making responsibility) and access (parenting time) is the same for all children, whether their parents were married or not.

The *Divorce Act* amendments define "decision-making responsibility" as the responsibility for making significant decisions about a child's well-being, including health; education; culture, language, religion and spirituality; and significant extracurricular activities.

"Parenting time" is the time that children spend in the care of a person (usually a parent or step-parent), whether or not the children are physically with that person during that entire time.

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 includes a grand-parent, step-parent or the same-sex spouse or partner of a biological or adoptive parent. It does not include foster parents.

When parents split up, the law provides three choices for decision-making responsibility: by one parent (custody); by both parents together (joint/shared custody); and by each parent for at least one child who is in that parent's care (split custody). Under the *Divorce Act* amendments, using "parenting time" and decision-making responsibility" may simplify these options.

1. Custody (formerly referred to as "sole custody" where one parent has the decision-making responsibility for the children)

- 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," "parenting time" or "contact").

2. Joint or shared custody (both parents have shared decision-making responsibility for the children)

- Both parents have the right to make the major decisions affecting the long-term welfare of the children. 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 children may live with one parent full time or may live part time with each parent, based on an agreed residential schedule.
- Joint or shared custody requires flexibility and good communication between the parents. It's usually in the best interests of the children if the parents can set aside their differences to make it work.

3. Split custody (each parent has decision-making responsibility for at least one child)

- If there are two or more children, each parent has custody of at least one child.
- This doesn't happen very often, but in some circumstances, it may be the best choice. Sometimes children, particularly older children, express a preference that results in that child living apart from that child's siblings, in the full-time care of the other parent.

When no custody arrangements have been made, both parents continue to have custody. Neither parent has the right to take the child away from the care and custody of the other parent. Custody arrangements can be made by implied or express consent, however, without going to court and without signing an agreement. This may happen when the parents first separate 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 can be charged with abduction if there was no immediate threat or danger that required the child to be removed for safety reasons. Abduction is a criminal offence and the maximum punishment is ten years in jail.

4.2.1 What custody involves

When a parent has custody of a child, whether by express or implied agreement or by a 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 a child to be physically living with you, even though you do not have custody. For example, you and the other parent share decision-making responsibility (joint custody) even though the child lives with you and visits with the other parent occasionally.

It's important to note that neither parent has an exclusive right to have "care and control" of a child unless that parent obtains custody by agreement or court order. It's also important to note that neither parent has the right to remove a child to live elsewhere (in a different house in the same city, or in a different city, province or country) without the permission of the other parent or a court order allowing such a move to occur.

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 does not result in the parent who removed the child having custody, however.

There are three ways in which custody can be obtained:

- parents reach an agreement and they put that agreement in writing to show who has custody;
- the parents go to court and the judge grants one parent custody; or
- the parents ask a judge to approve their agreement and make their agreement a consent order.

4.2.1.1 Agreements

Parents can make a voluntary contract and agree that one of them will have custody (decision-making responsibility).

This agreement may be part of a parenting agreement or part of a separation agreement that also covers things such as the division of assets and debts, child support and spousal support.

Written agreements can, and often do, include clauses that are difficult to enforce, but serve as reminders to both parents. An example is a clause that says: "Each parent will deal with the other parent in a respectful and civil manner." Such terms are called "precatory terms" by judges and lawyers (see 4.2.1.2). Although this is something both parents should be doing anyway, it is difficult for a parent to go to court alleging breach of such a term and expect the judge to be able to do something about it. However, if there is enough evidence to show repeated breach of a term like this over time, a judge could order a change in custody to show the parent who is in breach that such behaviour will not be tolerated by the court because it is not in the best interests of the children.

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

Implied consent: If one parent leaves and takes the child, and the other parent knows this and doesn't object, then the child is in the custody of the first parent. Since the other parent hasn't objected, it's assumed that he or she has consented to the first parent having custody — at least for the time being. The two parents are considered to have a mutual understanding. If one parent leaves without taking the child, it's assumed that he or she intended the other parent to have custody for the time being. These actions are considered an implied consent to other parent having custody. However, if one parent had to leave without the children in order to escape violence, the law probably won't say that he or she gave implied consent for the other parent to have custody. It's also not a mutual understanding if one parent takes the child without telling the other parent. 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 talk and decide where the child will live and who will make the major decisions for the child, that oral agreement determines who has custody for the time being. One parent 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 to court for an order confirming the terms of their written or verbal agreement. This is called a consent order. Consent orders might be easier to enforce than a written agreement that's not submitted to the court. To receive a judge's approval, consent orders must include only enforceable terms (and must not include precatory terms — see 4.2.1.1).

4.2.1.3 Court order

A parent can apply to the Yukon Supreme Court and ask a judge for 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

When parents agree or a court orders parents to share parental rights and responsibilities, this is "joint custody." This is also sometimes referred to as "shared custody" (especially when considering child support — see Chapter 5).

Joint custody 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 with one parent most of the time. It's also possible, although it would be very unusual, for one parent to have custody and for the children to spend exactly half of the time with each parent. Joint custody means the parents share decision-making rights and parental obligations. The amount of time the child spends at the home of each parent is not the critical factor.

For joint custody to work in the child's best interests, there has to be ongoing, respectful 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 the details of a joint custody arrangement are usually set out in a written parenting agreement, or court order. Joint custody is not usually feasible if the parents aren't talking to one another or they can't find a way to cooperate.

Although it's possible for parents to have a verbal agreement about joint custody there are many reasons to write the agreement down and avoid misunderstandings (see Chapter 8).

Mediators

Communicating during and after separation is often difficult, even for former spouses who have effective co-parenting relationships. Life events like new partners, marriages and second families can cause conflict even when there has been a history of good communication and joint decision-making. A counsellor or lawyer who has experience working with separated clients or who has training as a separation coach can help you manoeuver through periods of time when co-parenting is challenging. A family mediator can also help resolve issues that arise from time to time during your co-parenting relationship.

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 the children's best interests. An example of when split custody occurs is when an older child wishes to move to live with one parent in another city, but the family agrees that a younger child should remain with the other parent in the family home.

4.2.4 What if both parents want custody?

If both parents want 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 and ask a judge to decide.

It's usually in the child's best interests for the parents to negotiate an agreement about their children. A judge doesn't know you, your children or your family dynamic. Judges are asked to make difficult decisions based on the information that comes before them in sworn documents (affidavits) and through verbal testimony. The judge has only a small snapshot into the lives of you and your children. From that small amount of information, the judge must impose a decision that is best for your children. When parents negotiate an agreement, they are taking control of the

situation and deciding for themselves what is best for the children instead of asking someone who doesn't know their family to decide. It's quite common for both parents and the children to be unhappy with the outcome of a court application where the judge is asked to decide. When parents are able to put their differences aside and reach an agreement that is child-focused, it is more likely that conflict will be kept to a minimum over the longer term.

There's an app for that: Sometimes communication between co-parents is most effective when managed all in one place. There are several smartphone Apps that help parents implement their parenting agreement. The apps use instant messaging, share and save important documents and receipts, and provide a parenting time calendar to make planning clear and efficient for everyone. Many parents find that the apps help reduce conflict and improve communication.

4.2.5 What is interim custody?

"Interim custody" means temporary custody. It is a temporary agreement or court order about where the children will live (also referred to as "residential arrangements," "access" or "parenting time") and who can make decisions about their well-being until a final agreement or order is made. If parents can't agree about custody (decision-making or physical custody) and it's necessary to ask a judge to make an interim custody order, an application must be made to court until there is a trial and a final custody (decision-making and parenting time) order is made.

Although interim orders are meant to be temporary arrangements, sometimes parents never need 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

Traditionally, "access" referred to the right of the non-custodial parent (the parent the child doesn't usually live with) to spend time with the child. In the past, this was referred to as "visiting rights."

In recent years there has been a shift to use terms such as "contact" or "parenting time" instead of "access" or "visiting rights." As with custody, these new terms place the focus on the children's right to see their parents, provided the contact is in the children's best interests. The law is clear that spending time with a parent is the child's right, rather than the parent's right to spend time with the child.

At the time of publication (March 2020) the federal *Divorce Act*, the Yukon *Family Property and Support Act* and the Yukon *Children's Law Act* still use the word "access," so that term is still used in this book. As discussed above, the changes to the federal *Divorce Act* will refer to "parenting time" or "contact" and not "access." When you are reading this book, you should check which words and their legal definitions currently apply to you.

If the children live with one parent, the other parent usually has contact with them at times and in places that are reasonable for everyone. Legally, access (parenting time) involves the right of the child to maintain a relationship with both parents. Children deserve generous contact with each parent unless generous contact is not in their best interests.

The federal *Divorce Act* (which applies to parents who were married) says that when you have access (parenting time) you also have the right to make inquiries and to be given information about the health, education and welfare of the child.

The Yukon *Children's Law Act* (which applies to parents who weren't married or who are separating but not divorcing) says that access, in addition to the right to be informed about the health and education of the child, also includes the right to give consent to urgent medical treatment and to consent to the marriage or adoption of the child. (Although the *Divorce Act* is less detailed in describing what access means than the *Children's Law Act*, in practice the principles and their application are essentially the same.)

Sometimes grandparents or other relatives apply for access or contact with children. Contact with relatives is sometimes included in a parenting agreement or court order. When parents disagree about other relatives having contact with the children, those relatives can make a separate application to the court requesting the right to have contact.

On application, a judge can make the following orders for access or contact: unspecified, specified, and supervised.

Time with each parent

The *Divorce Act* includes the "maximum contact" principle, which says that a child should have as much time with each parent as is consistent with the child's best interests. This may mean equal time with each parent; however, there is no presumption of equal time. The child's best interests may require more time with one parent at one point in time (e.g., while an infant is breastfeeding), and more time with the other parent at a different point in time (when the children are older they may prefer to spend more time with one parent).

4.3.1 Unspecified access or contact

This is usually called "reasonable" access and there are no conditions or terms. Parents are expected to work out a schedule or times that are convenient for everyone.

4.3.2 Specified access or contact

This is often ordered by a judge in situations where the parents have difficulty communicating or can't agree. A court order will set out the details of when the parent who has contact will see the children and when they must be returned. The order 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 when the parent has contact 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 concerns about abuse, violence or abduction.

4.3.4 How is access or contact arranged?

Just as with custody the details around contact between parents and children can be arranged by agreement between the parents. If that's not possible, details can be ordered by a judge. 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.

The only consideration when it comes to contact between parents and children is what is in the best interests of the child. The amount of contact must be reasonable, but what's reasonable depends on all of the circumstances, including the nature of the child's relationship with the parent, the child's schedule, the parents' schedules, where they live and so on.

What is in the children's best interest may also change over time and, as a result, the terms of your parenting agreement may also need to change. It may be helpful to look at your parenting agreement as though it's a pair of shoes; it may fit your child quite well at age 4, but may not fit nearly as well at age 14.

4.3.4.1 Agreement

Usually parents attempt to negotiate reasonable access. For example, it's usually reasonable for parents who live in the same community to each see their children more frequently. On the other hand, parents who live farther from their children can expect access for longer periods of time on school holidays to make up for periods without seeing the children 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 (or parenting time) at the times and places as are agreed upon from time to time." This allows the parents to work out arrangements week by week or month by month and build in flexibility to accommodate factors such as work schedules.

However, if there have been problems in the past, it's usually better to have a detailed arrangement in writing, spelling out the dates, times and places of access (parenting time) to avoid misunderstandings.

4.3.4.2 Consent order

One or both parents can apply to court for the terms of their agreement to be set out in a court order. This is called a consent order. An advantage to having a court order is that it can be readily enforced in the Yukon and in many other provinces and countries. When parents don't have an agreement and start a court action they can, at any time, decide to agree to a consent order instead of asking the judge to make a decision for them.

4.3.4.3 Court order

If parents can't reach an agreement about parenting time, either parent can apply to the Yukon Supreme Court to ask a judge to decide. After a hearing, the judge will decide what reasonable access (parenting time) means in the circumstances. The judge will likely make an order setting out the times and places of each parent's time with the children as well as other conditions or restrictions that may be necessary to protect the child's interests, such as a parent being sober when picking up the child and during parenting time.

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 (decision-making responsibility) of the child, that parent is usually also considered the child's guardian. 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 Law Act*.

It's important to note that in the Yukon, guardianship means something a little different than it does most other places, and means the right to manage the property of the child — not the child's person. If the child moves away from the Yukon and an issue about the child's property arises in the new jurisdiction, this difference can be confusing if the Yukon court order does not address guardianship relating to the child's property.

4.5 Parenting agreements

If you can communicate reasonably with the other parent, the two of you might be able to work out an agreement for the care of the children. 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 (decision-making responsibility) and access (parenting time): where the children will live, when they will live there, which parent(s) make major decisions for the child, 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).

A parenting agreement can be verbal or written. Where possible, parents should put their agreements in writing to avoid misunderstandings. Chapter 8 lists the advantages of putting your agreement in writing.

Written agreements list parental rights and responsibilities and provide a default or touchstone when parents disagree. When parents negotiate their own agreement they have control over the outcome, which can create a basis for better communication and future compromise. When parents work out their own agreements, there is also a greater chance that conflict will decrease over time.

What type of agreement?

Agreements about parenting issues can also be included in a comprehensive separation agreement that covers additional 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).

Parenting agreements may 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;
- what each parent's parenting time involves;
- financial support for the children;
- how major expenses such as dental care, eyeglasses or sports equipment will be paid;
- who has access to school records, medical records, and so on;
- discipline, education and religious instruction;
- decisions about what school or daycare the children will go to;
- what will happen if a parent wants to move out of the school district, or out of the territory or country; and
- how future disagreements will be resolved (through negotiation, mediation or collaboration before going to court, for example).

It can be very helpful to work with an experienced family mediator to make a parenting plan, because the mediator may raise situations or topics that you might not have thought of. This can help reduce future uncertainty and disagreements. 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 children 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.

When drafting a parenting agreement, you can choose one or more of these options:

- do it yourselves with the help of various resources (including this book);
- get the help of a mediator or collaborative practitioner to negotiate the terms of the agreement; or
- get the help of a lawyer to negotiate for you, write the agreement, double-check that the agreement will protect your immediate and long-term interests, and help enforce the agreement if an issue arises down the road.

Lawyers can offer two important services before an agreement is signed:

1. give advice about whether the contract is legally enforceable (whether it will stand up in court); and
2. give advice about whether the agreement is fair. (Chapter 8 lists the advantages of having a lawyer help with your agreement).

You may obtain a tax advantage (or disadvantage) from entering into an agreement. A lawyer may recommend that you consult with an accountant to get this type of advice.

4.6 Court orders for custody (decision-making responsibility) and access (parenting time)

If you can't negotiate and resolve custody (decision-making) and access (parenting time) with the other parent or with the help of a mediator or collaborative lawyers, sometimes the only option is for one or both of you to apply to court for an order granting custody (decision-making responsibility) to one of you.

To apply for custody (decision-making) you need to complete documents and file them with the Court Registry. In the application, you ask a judge to make an order granting custody (decision-making) to you or you ask a judge to confirm terms and conditions of access (parenting time) for you and the other parent. In the affidavit that accompanies your application, you list the facts that you believe support your application.

When *not* to sign

You shouldn't sign an agreement if you feel threatened or pressured to do so. Seek advice from a lawyer if you're feeling that way.

The application for custody (decision-making) may be opposed by the other parent or any other interested party (for example, a grandparent). Also, the Yukon *Children's Law Act* says that a person other than a parent can apply for custody (decision-making) or access (parenting time) — this is usually a grandparent or close relative. The *Divorce Act* allows someone other than a parent to apply as well, but requires special permission from the judge.

When one or both parents apply for custody (decision-making), they are usually also asking the court to order that the child can live with them. The judge will make an order about where the child will live in addition to whether one or both parents will make decisions for the child.

4.6.1 Best interests of the child

When judges decide custody (decision-making) and access (parenting time), the law requires them to consider "the best interests of the child." The judge's job isn't to decide what may be best for the parents, or to come up with the best compromise. The judge must consider and decide what will be best for the child in all the circumstances outlined in the documents that are filed and the evidence that is presented.

In practice, the important factors when looking at the best interests of a child are similar for all parents, whether they're divorcing or separating (whether or not they were ever 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." The amended *Divorce Act* will classify the following required considerations:

a. the child's needs, given the child's age and stage of development, such as the child's need for stability;
b. the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
c. each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
d. the history of care of the child;
e. the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
f. the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
g. any plans for the child's care;
h. the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
i. the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
j. any family violence and its impact on, among other things,
    i. the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child; and
    ii. the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
k. any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

If parents are just separating (and are not seeking a divorce) or if they were never married, the Yukon *Children's Law 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);
- 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 and 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 may take into account — for divorcing and separating or common-law parents — in determining the best interests of the child:

- the need 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 family members;
- the child's physical, emotional and psychological needs, including the need for stability, taking into account the child's age and stage of development;
- the child's history of care;
- any family violence;
- the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- the ability of the parent to communicate and cooperate about issues affecting the child; and
- any court order or criminal conviction that is relevant to the safety or well-being of the child.

When there is a hearing about custody (decision-making) and access (parenting time) parents present their evidence through documents and witnesses, including themselves. Friends, relatives and expert witnesses such as a physician, psychiatrist or other professional person who knows the family are often asked to testify. The court may also appoint a person to prepare a custody/access report (although there are few people qualified to prepare these reports in the Yukon, and it could take quite a bit of time to obtain a report).

All witnesses can be questioned (cross-examined) by the other parent or that parent's lawyer if he or she has a lawyer. Sometimes the child is also given a lawyer, called the "child's lawyer." A judge may recommend that a child's lawyer be appointed if it seems that the child should be independently represented by a lawyer to present the child's views and preferences to the court.

In addition to considering the best interests of the child, a judge may also consider:

- the parenting roles adopted by each parent when the family lived together;
- the willingness of each parent to facilitate maximum contact with the other parent, provided that is in the child's best interests;
- whether one parent is home when the children are home to eliminate the need for child care;
- whether there has been family violence, emotional or verbal abuse (and whether the children have witnessed it).

The following is not relevant to determining the child's best interests:

- which parent decided to end the relationship;
- whether a parent committed adultery;
- past conduct, unless it specifically relates to the ability to be a good parent;
- the parent's lifestyle, unless it affects his or her ability to parent;

- the gender or age of the parent or child (there's no presumption that a child must live with a parent of the same gender, or that young children should live with one parent instead of the other);
- the ability to support a child financially — both parents must contribute to the child's support regardless of where the child is living.

4.6.2 Orders for interim custody (decision-making)

When a parent applies to court for custody (decision-making) there will be a delay before the trial can be held. This delay can last several months or years. If the parents can't agree about who will make decisions for the child and how much time the child will spend with each parent, one or both parents can apply to a judge to make an order that will determine these issues until the trial is held.

An application for interim custody (decision-making) and access (parenting time) can be heard more quickly than a trial. Each parent files a sworn statement, called an affidavit, which sets out the facts as that parent sees them. Each parent can be cross-examined on affidavits by the other parent (or that parent's lawyer). The judge will make a decision based on the affidavits, case law and submissions of the lawyers (or parents, if they are self-represented).

Sometimes courts like to maintain the "status quo" until trial. This may mean that the children will continue to live where they are currently living. However, there may also be good reason to change the child's residence before the trial and create a new "status quo." For instance, the judge may think it's in the child's best interests to spend equal time with each parent until trial and may order an equal time-share arrangement, even though the child has been living with one parent following separation.

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.

When you go to court, the judge's decision will be informed by the case law and the evidence about the child's best interests. The case law and the evidence that is presented may not match your own ideas of what is in your child's best interests.

This is one reason why it's a good idea, if possible, to reach an agreement with the other parent instead of going to court.

4.7 Changing custody (decision-making) and access (parenting time)

A court order or agreement usually continues indefinitely until something happens to make a change necessary. From a legal standpoint, the longer a child has lived with one parent, the harder it may be to convince a judge to change that arrangement. Judges consider stability and "preservation of the status quo" when deciding what is in the best interests of the child. Ideally, parents will continue to consider what is best for their children and make child-focused decisions as their children grow and mature instead of leaving those decisions to a judge.

If a "status quo" has developed and there is an agreement or court order in place, it may be necessary to prove a "material change in circumstances" that affects the well-being of the child before a judge will be willing to change the status quo as it is outlined in the agreement or court order. A "material change in circumstances" is a legal phrase and there is case law that outlines what qualifies as a "material change." If you have an agreement or court order, you may wish to consult a lawyer to receive advice about whether the current circumstances are enough to be considered a "material change in circumstances."

4.7.1 When can an order be changed?

A parent can apply to change an order if there has been a "material change in circumstances" since it was made. This is called a variation application. It is not an appeal. A variation application is a new request to have the same level of court (Territorial Court, Supreme Court, etc.) reconsider the case because of a material change. 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 who applies for a variation of the court order has the burden of proving that the change is "material" and that it affects the best interests of the child.

For example, if a parent obtained an order that the child will live with that parent, and later seriously neglected the child, that is a change in circumstances that affects the child's best interests. The other parent could apply to change the child's living arrangements and the parent's decision-making responsibility, based upon these developments.

If the existing order is an interim (temporary) order, the parent who wants 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 of the circumstances and on the best interests of the child.

Why court should be the last resort

Parents should consider going to court as the last option and should do so only when every attempt at reaching an agreement has failed. Going to court has several disadvantages:

1. Court is adversarial. By its very nature, court pits one parent against the other; this can destroy what goodwill may still exist between parents, making the ability to co-parent effectively much less likely.
2. The child is often caught in the middle. Children can feel the stress and strain that court is causing their parents even when parents don't talk to their children about the application or the court process.
3. Lawyers can be expensive. Lawyers usually handle cases on a fee-per-hour basis. A matter that goes to trial often involves a hundred hours or more of a lawyer's time (meaning tens of thousands of dollars charged to each client by each lawyer). 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.
4. Delays are common. Negotiating between lawyers, obtaining dates for pre-trial procedures, booking court time and hiring expert witnesses can all take a lot of time and money. 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 both the child and the parents. Sometimes the factors originally being argued become irrelevant or aggravated over time.
5. The parent whose application does not succeed may appeal. Appeals lead to delays, more legal fees, more stress, more time away from family and work, and continued uncertainty about the status of the child.
6. The parent who is unsuccessful may go back to court. A court can reopen the case whenever either parent applies, because the child's best interests need to be reconsidered in light of any new evidence a parent may wish to present to the court.
7. Even parents whose applications are successful don't necessarily feel that they've won. These parents spend a lot of time and money and go through considerable stress to have a third party control their fate and the fate of their children. Sometimes the court orders a compromise that neither the parents nor the children are happy with.

There's a difference between changing an interim (temporary) order and changing a final order. It's generally harder to prove the type of material change in circumstances necessary to change a final order. And even though it may be easier to prove a change in circumstances for interim (temporary) orders, judges will usually be reluctant to change an interim order that's relatively new. A parent can't go back every month or two and ask for a variation.

4.7.2 What if the custodial parent moves?

A common issue in the Yukon is when a parent wants to move with the child to another province, territory or country. When there is a lot of contact between the child and both parents, the child's relationship with the parent who is not moving will be affected by the move. The parent who is not moving may want to bring an application to prevent the move or change custody (decision-making) and the child's living arrangements.

The main consideration for the judge is the best interests of the child. Among other things, the judge will consider the child's connection to a school, extended family and community; the disruption that will be caused by a move or change in custody (decision-making) and living arrangements; and the impact the move may have on the child's relationship with the parent who isn't moving. Even if you have custody (decision-making responsibility), that does not mean you have the right to move with your child without the other parent's consent. If you can no longer meet the access terms in the order or agreement, you will need to go to court and apply to vary the order.

Relocations

The coming amendments to the *Divorce Act* include defined notice requirements in advance of a proposed move, and these considerations about relocating a child during or after separation/divorce:

a. the reasons for the relocation;
b. the impact of the relocation on the child;
c. the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
d. whether the person who intends to relocate the child complied with any applicable notice requirements, provincial family law legislation, an order, ruling from an arbitration, or agreement;
e. the existence of an order, arbitral award or agreement that specifies the geographic area in which the child is to reside;
f. the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
g. whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

Importantly, the judge is not allowed to consider whether the parent proposing to move with the child would move anyway if the court were to prevent the child from moving.

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 the order to be changed. The Court of Appeal will overturn a trial judge's decision only if there's been a mistake in fact or law. Since the Court of Appeal doesn't get to hear all the witnesses the judge heard it is less likely to overturn the decision based on a mistake in fact. Appeals are usually successful only if the Court of Appeal decides the trial judge made an error in law.

You cannot apply to vary an order that you disagree with. You must appeal that order to the Court of Appeal and show there has been an error in fact or in law. Similarly, you cannot apply to the Court of Appeal to vary an order when there has been a material change in circumstances; you must apply to the same level of court to have the order varied. If you have questions about the differences between variation applications and appeals, you should consult a lawyer.

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 interests, the judge can refuse to enforce it. Also, a judge can give one parent rights that are different from the contract if that is in the child's best interests.

4.8.2 What if a judge's order is ignored?

People who disobey court orders can be charged with contempt of court and may be subject to a fine or jail sentence. For example, a parent who doesn't return a child at an agreed or court-ordered time can be fined or jailed for contempt of court. The parent may 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 (decision-making responsibility) or when it's that parent's parenting time.

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. This is a serious area of family law and you should ask a lawyer's advice before deciding to withhold a child from the other parent. If a child isn't returned when he or she is supposed to be returned, the judge may ask a peace officer to enter and search any place where it is believed the child is being kept and return the child to the other parent.

Court orders 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 a peace officer to become involved if the situation warrants it.

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.

A lawyer can advise whether you should go to court or if there is another way to resolve the situation (such as calling the other parent's lawyer). Police involvement and being charged with contempt of court are two serious consequences of ignoring a court order. If the situation is considered serious enough, a parent found guilty of contempt could be sentenced to jail, have parental decision-making responsibilities taken away or have parenting time reduced and/or supervised.

There are consequences for interfering with the other parent's parenting time. If there is an order or agreement that a child spends time with one parent on Saturdays from 9 a.m. to 5 p.m. and the other parent always seems to make plans for the child during that time, the parent who is making alternate plans is disobeying the court order. The law recognizes that generous contact with both parents is usually in the child's best interests. The judge will consider whether the parent who is making alternate plans is willing to encourage and support the child's time with the other parent when deciding whether to change the order or agreement about custody (decision-making) and access (parenting time). Interfering with your child's time with the other parent can lead to a new order being made that will restrict or limit your parenting time and decision-making responsibilities.

Similarly, if a parent doesn't exercise parenting time or fails to show up for scheduled visits that parent is also disobeying the court order. More importantly, waiting for a parent who doesn't show up for parenting time can be disappointing, confusing and upsetting for the child. Failing to exercise your parenting time or showing up sporadically can also lead to a new order being made that will restrict or limit your parenting time and decision-making responsibilities.

4.8.3 Is it possible to refuse access?

A judge will deny parenting time with a child only if this would be in the child's best interests. It's rare for parents who want to parent their children to be completely refused by the court to do so. The child's best interests usually require lots of regular contact with both parents. The child has a right to have a good relationship with both parents, and a judge won't restrict that right without good reason.

When a parent wants to deny, restrict or have the other parent's parenting time with a child supervised, he or she must clearly demonstrate to a judge that it is in the child's best interests to deny, restrict or supervise that time. This is a high hurdle to overcome and you should likely seek legal advice prior to making such an application.

Parents sometimes refuse to provide the other parent with time due to fear that the child will be kidnapped and not returned, because of abusive behaviour towards the child, or past alcoholism or neglect. Each case will be considered according to its own merits and circumstances. Instead of denying or limiting parenting time, the judge might decide to impose conditions. For example, if there is a concern about alcoholism, the judge might order that the parent can pick up and spend time with the child only when the parent is sober. Where there has been abuse or neglect, the parent may only be granted time with the child in the presence of an authorized person. This is called supervised access (see Section 4.3.3).

Even if a parenting time with a child is denied, it is possible for that parent to go back to court and ask again, as long as there has been a change in the circumstances that led to time being denied in the first place. If the court initially denied time with the child due to a parent's severe drug addiction, for example, that parent could reapply after treatment and recovery.

Sometimes a parent wants to deny the other parent time with the child because child support payments have been missed. The parent who is supposed to be receiving support may feel that this is the only way to "get even." Failure to make child support payments does not give the recipient parent the right to deny the payor parent from spending time with the child. The child has the right to maintain contact with both parents. It's not the child's fault when payments aren't made, and contact with both parents is the child's right. The recipient parent must use the legal means available to collect child support payments (see Chapter 5). Denying the child contact with the payor parent isn't one of them.

4.8.4 Leaving the Yukon

When a parent has custody (decision-making responsibility) for a child, that parent may be able to move with the child provided the child's time with the other parent is not affected. If the child's time with the other parent is affected, that parent can apply to a judge to prevent the child from moving or to change custody (decision-making responsibility).

For example, as mentioned in Section 4.7, suppose one parent has custody (decision-making responsibility), the child has regular contact with the other parent, and they all live in the Yukon. If the first parent decides to move to Australia, the move will greatly reduce the child's time with the other parent and the cost associated with the child seeing the other parent regularly will be high. The other parent can ask a judge to vary the original order to grant custody (decision-making responsibility), or to change the child's parenting time with him or her. Whether or not the judge will vary the order will depend on what is in the child's best interests.

Free "For the Sake of the Children" workshops are available and mandatory for parents who are part of a family law application in court. The workshops help parents to understand the potential impacts of separation on their children and how parents can help children through this difficult time. See Chapter 9 for contacts.

Court orders often include a term that requires parents to tell each other if they plan to move, and to give a minimum of 30 to 60 days' notice before the move. The amendments to the *Divorce Act* require 60 days' notice of a proposed relocation, in a specific prescribed format that includes a proposal for ongoing parenting time, decision-making responsibility and contact with the non-moving parent.

If there's a concern that a parent might abduct the child, an order may include a provision that the child not be removed from the Yukon. A parent can also ask a judge to order a parent to do the following:

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

If a parent illegally removes a child from the Yukon, a Yukon order preventing removal can be enforced anywhere in Canada. An order granted by another court in Canada can also be enforced in the Yukon courts. If a parent illegally takes the child out of Canada, there is help both locally and internationally through the Hague Convention (see Chapter 9). The rules set out in the Hague Convention may help if the child is in a state or country that has also adopted the Hague Convention. The Yukon's Central Authority, in the Yukon Department of Justice, can help if your child has been abducted, provided the country where the child has been taken honours these rules — not all countries do. You will also need a lawyer's help. 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.

4.8.5 Abduction is a criminal offence

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

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 with whom that child has become accustomed must be weighed against continuing full contact with the access parent, and that parent's 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

*****Note: the coming amendments to the *Divorce Act* not only change the language from "custody" to "decision-making responsibility" and from "access" to "parenting time," they also provide a new framework for determining relocation in divorce cases. It remains to be seen how this framework will be applied by the courts once the amendments come into force.

Chapter 4 summary

Issue	Legal term	What you can do	Who can help
Where will the children live for the time being?	Care/primary residence/ physical custody/parenting time	Negotiate an agreement Apply for a court order	Mediator Lawyer Legal aid
Who will make major decisions about the children?	Custody/Decision-making responsibility	Negotiate an agreement Apply for a court order	Mediator Lawyer Legal aid
When will the children spend time with the non-residential parent?	Access/parenting time/ contact	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 Apply for a contempt order	MEP Lawyer Legal aid
How is an agreement or order changed?	Variation by agreement or application	Renegotiate an agreement Apply to vary a court order	Mediator Lawyer

5. Child support

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 children until they reach legal age of majority (19 in the Yukon). Parents might also be obligated to support children who are older than 19 if the children have not "withdrawn from their parents' charge" (for example, the child has a disability or illness or the child is attending college or university full time).

Both parents are equally responsible for the financial support of their children, 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 child support following a separation. If a parent starts a new relationship and has a new family, that parent 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 that person may have an obligation to pay child support, depending on the circumstances.

Children have a right to the same standard of living that each of their parents enjoy, and the same standard of living they would have had if the parents remained

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 child support isn't being paid.**
- **If my income goes up, I don't have to report the increase.**
- **I don't have to pay child support if the other parent makes more than I do.**
- **I will never have to pay support for children that are not biologically related to me.**

living together (to the extent possible, given that one household has become two and the total income is usually the same as it was when the family was intact).

Child support is the child's right and it is in the child's best interests to ensure the recipient parent receives the support the child is entitled to receive. This does not mean the payor parent can pay support directly to the child. Child support is payable to the other parent. A parent who continually fails to provide child support payments can be dealt with seriously by the law (see Section 5.6).

If a payor parent can't find work or is too sick to work, there may not be a requirement to pay support, or the amount of child support payable may be reduced. The payor must negotiate a change to the child support amount with the recipient parent or apply to court to decrease the child support amount.

There is also a provision in the *Child Support Guidelines* (currently Section 10) that recognizes what is called "undue hardship." When circumstances make it difficult for a payor to maintain child support payments, the payor can ask the court to make an order for a child support amount that is less than what the *Child Support Guidelines* say the or she should pay. There are many things, including total household incomes and household standards of living, that are considered when an "undue hardship" application is made. Maintaining a large motor vehicle payment or an unreasonably high mortgage or rent payment is not going to be enough to succeed in an "undue hardship" application. A judge will likely order you to continue paying the same amount of child support and forfeit your vehicle or move if you are feeling financially strained in these circumstances. It is difficult to prove "undue hardship," and you should consult a lawyer before making such an application to see if your circumstances qualify.

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 provide a table that shows how much a parent must pay, based on the parent's gross annual income. The *Child Support Guidelines* are some of the most certain and rigid rules applied in family law, because they protect children's rights to be cared for financially by their parents.

Which law applies?

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 payor parent lives in the Yukon, the Yukon table applies. If the payor parent lives in another province or territory, the table for that province or territory applies.

Free copies of the tables and the *Child Support Guidelines* are available in Whitehorse and the communities from the Maintenance Enforcement Office and FLIC or a community government agency. The guidelines can also be found on the internet. Many offices and websites also have helpful resources to help parents calculate child support. See Chapter 9 for contact information.

The *Child Support Guidelines* became law across Canada for several 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 to ensure that children still benefit from the financial means of both parents;
- they help 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 payor parents should pay. According to these tables, when the children spend less than 40% of the time with a parent, the amount of child support that parent pays in support will depend on:

1. how much the payor parent earns in gross annual income;
2. where the payor parent lives; and
3. the number of children the payor parent is responsible for supporting.

The table amounts are based on the average amount that Canadian 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 children. In other words, the proportion of family income devoted to the children 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 children the family has. The amounts in the tables are based on the average amount that a parent at a particular income level would spend on raising children. In addition, the tables were designed to take into account the recipient parent's contribution to the financial support of the children in proportion to the recipient parent's income.

5.2 How much child support?

If the payor parent lives in the Yukon, you use the Yukon table. You find the payor 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 children. The table already takes into account the taxes payable by the payor parent, so it is that parent's gross annual income that is used to determine payments. Each province and territory in Canada has a separate table to reflect the different tax rates in each jurisdiction. Child support is not taxable in the hands of the recipient parent and is not tax deductible for the payor parent.

For example, if a payor parent lives in the Yukon and earns $50,000 a year before deductions and there are two children, then the base monthly child support payable is $768 total, according to the Yukon table.

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 an amount that is different from the table amount will be the most fair and appropriate in the circumstances.

Child support basics

Child support depends on the payor parent's gross annual income, where the payor parent lives and how many children there are.

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

The federal Guidelines were updated in 2017. The Yukon Guidelines were updated in 2009. Make sure that you're looking at the most recent versions of the guidelines and the tables when you are determining the amount of child support that should be paid.

Here are some examples:

- there are special expenses such as extra childcare or medical expenses;
- there would be "undue hardship" to either parent or to a child if the table amount was ordered or agreed to;
- the parenting arrangement has the children living with each parent at least 40% of the time; or
- the children are older than 19.

Justice Canada suggests that you can determine the amount of child support in eight steps. Each step is explained in the sections below:

- Step 1. Which guidelines apply?
- Step 2. How many children and for which children?
- Step 3. Which parent receives child support?
- Step 4. Which table to use.
- Step 5. What annual income?
- Step 6. How to find the table amount.
- Step 7. How to deal with special expenses.
- Step 8. How to deal with undue hardship.

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 when you make an application to court for support.

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.

You should also check that you're referring to the most recent version of the Guidelines/table. The federal Guidelines were updated in November 2017. The Yukon Guidelines were updated in 2009. The Yukon Guidelines adopt the federal tables "as amended from time to time," which means that the most recent federal table (updated in November 2017) will be the table that applies in the Yukon.

Step 2 How many children and for which children?

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 has not withdrawn from parental charge 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 recipient 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 (including how the child is able to contribute financially; e.g., through scholarships, grants, summer employment in the case of attending post-secondary education); 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 children. 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 payor parent gives the child support to the recipient parent, not directly to the child. The assumption is that the parent with whom 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 recipient parent — is the one with whom the child usually lives. For example, if the children live with one parent at least 60% of the time, then that parent is entitled to receive regular child support payments from the other parent. The recipient parent also contributes financial support, usually as part of the general household expenses.

If the children live with each parent about half of the time — at least 40% of the time — then the *Child Support Guidelines* call this "shared parenting." In that case, the parents are required to pay child support to each other for the benefit of the child, based on their respective gross annual incomes and the *Child Support Guidelines*. The amount of support that is paid depends on each parent's income, how they share any increased costs of shared parenting, and the means and needs of both parents and the child. The goal is that the child should have about the same standard of living in each household.

If there are more than two children, and one or more of them lives with one parent more than 60% of the time, and one or more of them live with the other parent more than 60% of the time, this is called "split custody." Each parent has physical custody of one or more of the children. In this case, child support depends on the incomes of both parents, and how much they'd be obligated to contribute for each child in the other's custody. The parents each have a child support obligation to the other parent for the child not living with that parent. The amount will also depend on any special expenses and needs.

Credits and benefits

It is important to know the implications of child support and parenting agreements on the eligible dependent credit, child tax benefits and other credits and benefits you and your spouse may be entitled to. It is outside the scope of this document to outline these, but a lawyer experienced in family law can assist with wording your agreement and carrying out the terms in compliance with Canada Revenue Agency requirements.

Step 4 Which table to use

The Yukon table is used when the payor parent lives in the Yukon. If the payor parent lives somewhere else in Canada, the table to use is the one for that province or territory. If one parent lives in another country, the Yukon table should be used (as long as one parent lives in the Yukon). In a shared custody or split custody arrangement, where the income of both parents is relevant, use the table where each parent lives to determine that parent's share.

You should also ensure that you are consulting the most recent version of the table. At the time of writing this book, the most current tables were those released in November 2017.

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 payor parent. In some cases, calculating annual income can be complicated, so you may wish to consult a lawyer or an accountant. It's important that this amount is accurate.

Gross annual income is the amount (before deductions) that a person receives from employment, self-employment, rental income, as the beneficiary to a trust and as income from investments. Gross annual income 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, income information for the previous three tax years must be provided. This information will be required from both parents in these cases:

- you have a split or shared custody arrangement;
- there are special or extraordinary expenses (under Section 7 of the *Child Support Guidelines*);
- 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 payor parent earns more than $150,000 a year;
- one of you is applying to court for child support and there are special expenses or shared or split custody (see section 21 of the current Guidelines); or
- one of you has acted like a parent to the other's child (e.g., a step-parent).

If the case goes to court, both parents must provide complete and accurate income information if there are special expenses (see Section 21 of the Guidelines, which states that the applicant must also provide income information when the applicant's income is necessary to determine the amount of the support order). If your income is required to determine child support, the judge will order you to provide it if you haven't already done so and may order you to pay costs if you've been asked to supply your income information and haven't done so.

Proof of income must include copies of at least the following information:

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

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

- pay slips (including year-to-date earnings);
- a letter from the payor's employer stating the wage or salary;
- the business's financial statements (if the parent controls a business);
- proof of Employment Insurance, workers' compensation or disability payments; and
- details of business partnerships.

The recipient parent can ask a judge to assign an income amount (called "imputing income") 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 payor parent has done any of 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;
- has 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:

- your income has increased or decreased over the past three years;
- your income has gone up and 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.

On-line child support help

Justice Canada has helpful on-line information at www.justice.gc.ca/eng/fl-df/child-enfant/2017/look-rech.asp.

Enter the gross annual income, select the number of children and the province or territory of the payor 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.

If the payor 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 about 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.

Step 6 How to find the table amount

Once you know the correct amount of gross annual income, using the table is pretty easy. Using the Yukon table (in the November 2017 version of the Guidelines, or more current if applicable) when the payor parent lives in the Yukon, find the gross annual income in the column on the left. Next, look to the right and find the row beneath the number of children. The cell 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 gross annual incomes that are straightforward (e.g., salary from one employer) and when the child is under 19 and in school, determining the appropriate monthly child support payments can become complicated if there are other factors. Whether the table amount is the actual amount that should be paid depends on certain exceptions and calculations (see Steps 5, 7 and 8).

Step 7 How to deal with special or extraordinary expenses

The child support amount in the table applies in most cases and is 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 that they determined using 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 a different arrangement.

For example, if the payor parent earns twice as much as the recipient parent and the special expense is $75 a month for math tutoring, the payor parent would probably contribute $50 and the recipient parent would probably contribute $25. The payor parent's share of $50 would then be added on to the basic monthly child support amount determined by using the table. If the table said 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 recipient parent gets for the expense. For example, childcare may be a special expense, and the recipient parent may get a tax deduction for those expenses (if the child lives with the recipient parent more than 60% of the time).

Sometimes parents have a hard time agreeing about whether certain expenses should be considered special expenses, and how payment for those expenses should be divided. Determining special and extraordinary expenses can get complicated. Unfortunately, if there's already a lot of conflict, making decisions about the payment of special and extraordinary expenses can make it worse. If necessary, one or both parents can apply to court and ask a judge to make a decision. A judge will often look at whether the parents would have paid for the expense had they stayed together (e.g., if the child was encouraged to participate in a competitive sport prior to separation, it will often be expected that the parents will continue to financially support the child's participation after separation).

Under the guidelines, these special expenses are included:

- childcare expenses that a residential parent pays due to work, 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:

- an expense that's higher than the recipient parent can reasonably cover given that parent's 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 How to deal with 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 custody or split custody.

There are two main questions to answer when deciding if there is 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 would it 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?

The effect of remarriage

The only time 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.

These circumstances could cause undue hardship for a payor 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) is unable to self-support.

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 who complete the

"household comparison of standards of living test" set out in the federal *Child Support Guidelines* can deduct Canada Pension Plan contributions and Employment Insurance premiums when determining their gross annual income. The Government of Canada, Department of Justice has helpful tools and workbooks to assist with calculating 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 (decision-making) and access (parenting time). Agreeing about child support is easier, faster, less stressful and less expensive than hiring lawyers to negotiate the amount, especially if the dispute ends up in court. Parents can also get help from a mediator or a lawyer at any or all of the stages in negotiating and reaching an agreement.

When parents make an agreement about the appropriate amount of child support, they're not legally required to follow the *Child Support Guidelines* or the table amount. 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 special expenses.

If the table amount isn't used

If an application for divorce or other court order is filed that does not set out appropriate care and financial support for the children, a judge can decline to grant the divorce order. When parents have agreed not to use the child support table amount, the reasons for deviating from the table amount must be clear, appropriate and reasonable for the judge to grant the order.

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

- the name and birth date for each child involved;
- the gross annual income of any parent whose income is used to determine the amount of the child support order or special and extraordinary expenses;
- the child support table amount determined under the Guidelines;
- the child support table amount determined for a child 19 or over;
- information about special expenses, which child the expense relates to, the amount of the expense and the proportion of the expense to be paid by each parent;
- the date when a lump sum payment of child support was made (if applicable); and
- the date when the first child support payment was or will be made and the date when future payments are to be made.

A written agreement 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 future costs. 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 parenting or separation agreement?
- Do either or both parents wish to contribute to a savings fund or RESP 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 the child is no longer a student?

5.3.1 Can agreements be registered 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 the 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, 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 legal and official. A consent order can be registered with the Government of Yukon's Maintenance Enforcement Program (MEP). Once you do this, if the payor parent doesn't pay at some point, MEP will help 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 children, a court will not uphold the agreement. Courts don't consider agreements about children to be as binding as other contracts or agreements (such as those for property division or spousal support).

5.3.2 Can you agree to ignore child support payments?

Although parents sometimes agree to ignore child support payments, they don't have the right to waive their child's entitlement to receive child support. The obligation is owed to the child, not the recipient parent. It's in the child's best interests that all the financial support possible is available for him or her. If an agreement that waived child support went to court, a judge probably wouldn't approve it. If the child needs support, the court will likely order support to be paid even if the recipient parent had agreed not to ask for it.

Sometimes a parent will agree to ignore child support payments because there has been a lot of conflict and emotional pain and the recipient parent 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 Maintenance Enforcement Program (MEP). Payments are then sent to the MEP office at the Law Centre in Whitehorse; MEP forwards the payment to the recipient parent. It's not necessary to send payments to or receive payments directly from the other parent.

5.3.3 If you're feeling pressured into an agreement

If you feel pressured or threatened into an agreement for any reason, including physical, mental or emotional abuse by the other parent, you shouldn't sign. An agreement reached in this way likely isn't in your child's best interests. 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 table states the amount of child support to be paid every month, based on the income earned each year by the payor parent. Most payor 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 or biweekly to coincide with the payor parent's pay schedule.

5.4 Court orders for child support

If the parents can't agree on the amount of child support (including after mediation, a collaborative process, or after negotiating through lawyers), one parent will need to apply for a court order. The parent who has the day-to-day care of the child and who is seeking child support usually makes this application. A judge will consider where the children are living and the gross annual 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 (see Section 21 of the Guidelines).

If the recipient parent receives social assistance from the Government of Yukon, then the Government of Yukon 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 that will be received by the recipient parent.

How to apply for child support

If you've chosen not to hire a lawyer, FLIC has guides and easy-to-read booklets that explain all the steps to apply for a child support order or to change an existing order. These documents and the required forms are available on the FLIC website or from the FLIC office. Contact information is provided in Chapter 9.

The application for child support includes this information (forms can be downloaded from the Yukon Courts website; see Chapter 9):

1. A Statement of Claim (Family Law) – Form 91;
2. An Affidavit (Form 59) or Child Support Affidavit (Form 98; this is a list of the relevant facts and information about the case, sworn or affirmed in front of a notary or commissioner of oaths); and
3. A Financial Statement (Form 94; this is a detailed listing of your income, if your income is required to determine child support).

At the hearing, you'll be asked to give evidence — a statement of facts under oath. The other parent may also give evidence. Both parties may be asked questions by the other parent or their lawyer, and by the judge. The judge will then make a decision as to how much child support the payor parent must pay.

5.4.1 What if the other parent 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.

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 amount, or because the payor parent has a different gross annual income. You might be able to amend your parenting agreement, or you may be able to complete the court application on your own with some assistance from FLIC. If the matter is more complicated, you may need a lawyer's help.

You may need to apply to change the order or agreement or to cancel it. For example, your agreement or order may not include a term that says when child support payments should end.

When it comes to paying child support, payor parents have a legal duty to tell recipient parents that their income has increased. It's not up to the recipient parent to ask; it is up to the payor parent to tell.

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

- The payor parent's income has changed.
- There's been a material change in circumstances in the child's life (e.g., the child has additional 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 payor parent's life and the payments now pose an undue hardship (e.g., the payor parent is temporarily or permanently ill or disabled, or is now responsible for the care of an aging or disabled parent or sibling).
- The payor parent has moved to another Canadian province or territory and a different table applies.
- The child, or one of the children, is over 19 and no longer lives with the recipient parent and/or no longer requires financial support (or needs less support).
- The child support order or agreement was made before an amendment to the child support table (e.g., prior to November 2017).
- The payor parent did not pay child support and has accumulated a lot of debt or arrears as a result and wants the arrears to be reduced because of a change in circumstance that explains why support couldn't be paid.

Legal duty to report increased income

Parents who pay 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. If you find out the other parent's income has increased, you should ask the other parent, in writing, to provide income information within 30 days. If the other parent does not respond or provide the information to you, you should consult a lawyer to discuss next steps.

5.6 Enforcement

5.6.1 What if the agreement or court order is ignored?

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

Once the payor parent has registered with the MEP, all payments must be sent directly to the MEP office. The MEP will forward the payments to the recipient parent. If the payments are not made, the MEP can take action in several ways to try and collect the money from the payor parent:

- garnish the payor parent's wages, if the payor parent works in the Yukon;
- have the sheriff seize land or goods owned by the payor parent and sell them to pay the debt;
- seize or suspend the payor parent's passport or driver's licence;
- require the payor parent to come to court to explain the default; and
- if the payor parent fails to appear, have the payor parent arrested.

The MEP can try to enforce accumulated debt (arrears) of child support that is 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, Miles is a payor parent who has moved to Newfoundland and Labrador, which is a "reciprocating state"; in other words, it has signed the same agreement as the one signed by the Yukon. The recipient parent, William, lives here. He can start an application (file documents) in the Yukon and go to court here. The judge will listen to William's evidence and make 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 Miles a notice to go to court in Newfoundland and explain his case. If the Newfoundland court confirms the provisional order, then Miles is legally obligated to pay the amount that was ordered in the Yukon court. This is a brief description of a process that can take several months. People who use this procedure will need to consult with a family law lawyer.

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

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

5.6.3 What if the payor 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 payor parent lives. This requires filing the order in that province or state. The MEP will do this if the payor 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 payor parent, who may dispute it by going to court in the place where he or she lives. If it's not disputed, it becomes an order of that court.

If the payor 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 you have a support order from somewhere else?

If the payor 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." 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.

5.6.5 What if you think the recipient parent is wasting the money?

Sometimes one parent doesn't want to give child support 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. The law makes an assumption that the child's needs cost money and that the recipient parent is paying those expenses. The parent who receives child support is not required to show that every single dollar of the child support payment went directly to the child's expenses.

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 the child will still receive the benefit of child support from the other 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 that parent to provide missing documents and further financial information. The judge can also determine (impute) the amount of income that will be used to determine the amount of child support the payor will be responsible for paying. The judge can impose a penalty such as awarding the costs of the legal proceedings to the recipient parent or finding the payor parent in contempt of court.

A parent whose income is needed to determine 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.

Changes to the *Divorce Act*

The amendments to the *Divorce Act* include improvements to processes for enforcing child support orders in and from other jurisdictions. At the time of publication (March 2020) these provisions are not yet in force, but you should check with your lawyer or with the MEP to see what is available at the time you are reading this book.

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 contact with Dad. They agreed to $500 a month child support paid by Dad; six years later, child support 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 residence of the child 50% of the time. Mom earned about $20,000 per year less than Dad. A lower court ordered that child support 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 Section 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 longstanding 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 residential time with the child at least 40% of the time over 12 months. The family's entire financial context should be considered to ensure an adequate standard of living for both parental homes. Time with the children is not the only factor to consider when determining child support in a shared custody situation.

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

When the payor parent's income increases

Although the four different cases involved in this decision had different facts, in all of them the payor 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 less than 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 most of the case law suggests that a court will not go back further 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 payor parent's interest in certainty must be balanced with the child's need for flexibility and fairness. When considering an order for retroactive support, the court should take into account the recipient parent's delay (if any) in seeking child support, the payor 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	FLIC 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 (arrears)?	Arrears	Register with Maintenance Enforcement Program (MEP)	MEP Lawyer
How do you change the amount of child support payments?	Variation	Renegotiate an agreement Apply to vary a court order	MEP FLIC Mediator Lawyer

Chapter 6

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 or partner to the other after separation. In the past, spousal support 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 or partner.

There is an obligation to pay spousal support when there is:

- entitlement for one spouse to receive spousal support because certain criteria are met, and the other spouse has enough money to pay support.

Common misunderstandings

- **My ex has a new partner, so I can stop paying spousal support.**
- **Women never have to pay spousal 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 spousal support.**

When this is the case, spousal support may be paid to either:

- compensate a spouse or partner for lost opportunities due to the roles assumed in the relationship (compensatory support); or
- fill a financial deficit experienced by a spouse or partner because of a standard of living that will be much lower than that of the other spouse (needs-based support).

Spousal support may be paid after the couple separates, or while they're still living together.

Common-law partners who separate may also be entitled to receive, or be obligated to pay, spousal support. In the Yukon, 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 currently apply here in the Yukon are quite different than those in B.C., for example.

As outlined above, the spouse or partner must be entitled to receive spousal support. The payment of spousal support is not automatic and will depend on many things (as explained in Section 6.2). If the couple agrees that one of them requires financial assistance and is entitled to receive spousal support, or if a judge makes that decision, the next steps are to determine the amount, duration and form of spousal support. Each of those steps is discussed in this chapter.

Which law applies?

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 and are not divorcing, or if they were never married (common-law), 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 decisions of courts in similar cases), mostly from the Yukon or from the Supreme Court of Canada.

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 receive financial support?
- amount — if there is entitlement, how much support should be paid?
- duration — if there is entitlement, for how long is the recipient spouse entitled to receive support?
- form — if there is entitlement, how should payment be made and how often?

6.1.3 How is spousal support arranged?

Separating couples have three options for arranging spousal support. They can do so by agreement, consent order or court order following an application.

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 payments will continue, 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 an application for a divorce order. A mediator can help you reach agreement about these issues and a lawyer can help you draft an 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 determines that the agreement is legally enforceable and approves the order).

6.1.3.3 Court order

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

6.2 Who is entitled to spousal support?

Generally speaking, a spouse is entitled to receive spousal support if the couple agrees, or a judge determines that the spouse needs support and that the other spouse is able to pay it. In practice, of course, it's a bit more complicated than that.

Not surprisingly, the issue of whether one spouse needs financial support is often not straightforward or easy to determine. 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 lived together.

The law says that a spouse or partner has an obligation to pay support if the other spouse is experiencing financial need at separation, even if that need isn't a direct result of the marriage or its breakdown. A spouse or partner might experience need because of illness or disability or an inability to earn enough income to be self-supporting. This is called "needs-based" spousal support.

When considering need, one of the most important principles is the effect of the relationship and its break down on each person's financial position. Are you financially worse off or better off? The law says the longer a marriage lasts, the more financially interdependent the spouses are — and the more sense it makes to leave them in approximately similar financial positions when they separate.

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 existing spousal support 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 existing spousal support order continues to apply. In other words, a divorce doesn't end a spousal support order unless the spouses agree that it does, or a judge orders it to end.

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

If one spouse doesn't work outside of the home during the marriage, that person will be economically disadvantaged when the marriage ends. That spouse probably didn't develop the skills and experience needed to find a job that pays as well as the spouse who worked outside of the home. The longer the spouses were together, the more likely this is. When support is paid to compensate a spouse for a role assumed during the marriage that has resulted in an economic disadvantage to that spouse when the marriage ends, it's called "compensatory" spousal support.

The law encourages the recipient spouse to try to achieve economic self-sufficiency within a reasonable amount of time. However, the ability to become economically self-sufficient is only one factor. Another factor is whether the level of economic self-sufficiency the spouse is able to achieve is similar to the standard of living enjoyed by the spouses during the marriage.

There is a third type of spousal support, called "contractual" spousal support, which is based in an agreement between the parties. This could be an agreement made as part of a co-habitation or marriage agreement (discussed more in Chapter 8) or following separation.

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 that means. A judge will look at the facts of each case to see if it was "a relationship of some permanence," based on the way that courts have interpreted that phrase in the past. These are some of the factors the judge may 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 spousal support while the couple is still living together, or within three months of separating. This is a very short time period and it's unlikely that an extension will be granted.

As long as entitlement is proven and the three-month limitation period is met, 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 and its breakdown;
- 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 (means) and circumstances of each spouse, including these factors:

- 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 financial 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 legislation is more detailed than the federal *Divorce Act* in its list of relevant factors, in practice the principles are usually similar for divorces.

These are the circumstances that can be considered for separating spouses and common-law partners:

- the assets and income of both partners, including any benefit or loss of benefit under a pension plan;
- the recipient's ability to become self-supporting (earning power, including education, special training or skills);
- the ability of the payor to provide support;
- the age and physical and mental health of both;
- length of time the partners lived together;
- actual needs (this can include the couple's accustomed standard of living before the separation);
- the steps that could be taken for the recipient to become financially independent (e.g., retraining or a college program), including how long this would take and how much it would cost;
- 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;
- each spouse or partner's conduct;
- any contribution by the recipient to the payor spouse or partner's achievement of career opportunities and success;
- if married, the effect on the recipient's earning capacity because of the responsibilities assumed during the marriage;
- if married, whether the recipient cares for a child who is 19 or older but unable because of illness, disability or other cause to withdraw from parental charge;
- if married, any housekeeping, childcare or other domestic service performed by the recipient for the family;
- any legal right of the recipient to receive other types of support (other than social assistance); and
- if the recipient remarries or lives common-law with someone else.

6.2.4 Other factors considered by the court

Need and ability to pay: A recipient is entitled to maintain a similar standard of living to the one enjoyed by the couple during the relationship, but only if the payor has the ability to pay.

Conduct: Alleged misconduct won't disentitle a spouse from receiving spousal support. However, the court may consider conduct or actions when awarding spousal support. For example, if the recipient hasn't been able to achieve self-sufficiency because the other spouse's adultery was emotionally devastating, the court can consider this factor when determining whether the recipient is entitled to support.

Length of relationship and roles in the marriage: When spouses or partners lived together for a long time, and adopted more traditional roles within the marriage, the economic consequences of the marriage and its breakdown will be greater for the spouse who did not work outside of the home. In this scenario, the roles adopted during the marriage likely created economic dependency for the stay-at-home spouse or partner.

There are many factors to consider when roles are considered: Did one spouse always take time off from work when the children were sick? Did one spouse travel from place to place to support the other spouse's job changes, promotions or transfers? Did one spouse work part time and spend the rest of the time looking after the home and/or family?

Illness and disability: If one spouse becomes 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 needs because of his or her role in the relationship (for example, looking after children and maintaining the household).

Second families: A spouse's support obligations to a first family usually take priority over 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 recipient spouse may be entitled to spousal support even if remarried or living with someone else (in a compensatory support situation, for example). However, the court may take the fact that there is a new spouse or partner into consideration when 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.

Spousal support agreements: The law treats an agreement between two adults of equal bargaining power 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 spousal support agreement doesn't reflect both of their intentions or expectations, or doesn't meet certain requirements of the law, then the judge can set aside what they agreed and order something different. Even if what the couple agreed to is a bit different than what the law says, the judge will probably uphold the agreement unless one spouse was pressured or coerced to enter into the agreement, or one spouse's vulnerabilities were exploited by the other spouse.

6.3 How much spousal support?

After it's determined by order or agreement that one spouse is entitled to receive spousal support from the other spouse, the next questions are how much, and for how long?

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 support a recipient spouse is entitled to receive depends on all the circumstances of the particular case. These are some of the factors that are considered relevant to determining the amount:

- the ability of the spouse to self-support;
- immediate needs for education or retraining to enhance employability skills;
- childcare responsibilities that might restrict employment opportunities;
- difficulties maintaining or taking on employment if the spouse has physical custody of any children;
- the need to move away because of fear of a spouse or a spouse's family; and
- 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. In Canada, Spousal Support Advisory Guidelines (SSAGs) assist judges, lawyers and divorcing couples in determining the amount and duration of support.

The SSAGs 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 SSAGs provide mathematical formulas to determine spousal support as a percentage of net disposable income.

In practice it is unusual for a judge to deviate from the guidelines unless the formula results in with amounts that are inconsistent with the factors and objectives in the *Divorce Act*.

The SSAGs are different from the *Child Support Guidelines* (see Chapter 5) because they are not legally binding. However, the SSAGs are a useful guide for separating spouses and their lawyers to determine the amount and duration of spousal support that a judge might order in a given set of circumstances.

Calculating support amounts

For a free online service to calculate simple spousal support amounts based on the SSAGs go to mysupportcalculator.com. If you need assistance or have a more involved financial situation, many family law lawyers have special software for making complex calculations, including those that include special expenses. Your lawyer may also recommend that you speak to a financial professional to understand how the payment or receipt of spousal support will affect your budget. For example, the recipient must pay tax on the spousal support received, and the payor can claim the spousal support paid as a reduction in income if support is paid periodically (as opposed to a lump sum). These are important things to discuss with your family law lawyer and financial professional.

The SSAGs 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 — low, medium and high — for the amount and duration of spousal support. The precise number chosen within that range is something that the couple can negotiate, or the judge can order, depending on the facts of the 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 the amount and duration of support. The 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 or cohabitation. The duration is 0.5 to 1 year of support for each year of marriage, with duration becoming indefinite after 20 years of marriage or if the years of marriage plus the age of the recipient at the time of separation is equal to or greater than 65 (known as "the rule of 65").

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 of spousal support that is paid is the amount that will leave the recipient spouse with between 40 and 46% of the spouses' combined net incomes after child support has been deducted. The duration of spousal support depends on the length of marriage, the age of the recipient spouse and the age of the children when the couple separated.

6.4 Duration and form of spousal support

Spousal support can be granted for a specific or an indefinite period. For example, if a judge determines that the recipient spouse is likely to achieve economic self-sufficiency within one year, 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

Monthly payments are the most common, but payments can be every week, twice a month, once a year and so on. Payments can be for a definite period, such as three years, or until a specific event occurs, such as remarriage or retirement. Payments may be ordered to continue indefinitely for as long as the payor spouse lives. Normally, a person's obligation to provide support ends with the death of the payor spouse. There are exceptions, however. If you want to claim against the estate of the payor spouse or if you want to ask a judge to order that a spousal support order continue after the payor dies, you should consult with a family law lawyer.

6.4.2 Lump-sum payments

A lump sum may be preferable if both spouses want certainty or a clean break, or if there is a fear that the payor will be unwilling or unable 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 could be held in trust until a specific event takes place. A judge can also order a lump sum of support payments retroactively if it's appropriate in the circumstances.

Monthly and lump-sum payments have different tax implications. Monthly payments are taxable in the recipient's hands and tax deductible in the payor's hands while lump sums are not. You'll want to check with a lawyer or accountant before making a decision about what is right for you. See what the law says at the time you are making decisions about how support should be paid.

6.5 Agreements for spousal support

Couples often negotiate the amount of spousal support and include it in their written separation agreement. Prenuptial or marriage agreements and agreements made between common-law partners sometimes include a provision about whether spousal support will be paid if the couple separates.

When you agree to give up or waive the right to receive spousal support, or you reach an agreement with your former partner about the amount of spousal support, courts generally like to honour that agreement. You should consult with a family law 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, agreements are binding. The Supreme Court of Canada has ruled, however, that in determining whether to uphold a divorcing couple's separation agreement three questions need to be asked. 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?. Third, does it comply with the general objectives of the *Divorce Act*?

In the Yukon, separation agreements made by spouses who aren't divorcing, or by partners in a common-law relationship may be set aside by a court in these cases:

- the results would be unconscionable (generally, where one person's vulnerabilities were exploited by the other person, resulting in an agreement that is extremely unfair);
- the recipient spouse is receiving social assistance; or
- the payor spouse failed to make the payments agreed to under the agreement.

Generally, courts are reluctant to order something different from what the spouses or partners negotiated in their separation agreement, even when it is different from what the law would provide. This is true unless one of the spouses or partners was coerced, pressured or somehow manipulated into signing the agreement; in that case it is highly likely the court will set it aside.

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 recipient spouse can apply to the court for a court order. To apply for spousal support, the following documents are filed with the court registry:

- A Statement of Claim (Family Law) – Form 91;
- An Affidavit (Form 59) or Child Support Affidavit (Form 98; this is a list of the relevant facts and information about the case, sworn or affirmed in front of a notary or commissioner of oaths); and
- A Financial Statement (Form 94; this is a detailed listing of your income, if your income is required to determine child support).

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

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

Changes to the *Divorce Act*

The amendments to the *Divorce Act* include improvements to processes for enforcing spousal support orders in and from other jurisdictions. At the time of publication (March 2020) these provisions are not yet in force, but you should check with your lawyer or with the MEP to see what is available.

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 payor 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 MEP.

You can apply for spousal support in the Yukon and, 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 your spouse or partner lives and is confirmed there. The court in the Yukon 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 your spouse or partner is legally obligated to pay. For more information, contact the MEP office.

If you don't know where your former spouse is, a tracing agency might be the best solution. 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 take cases only for lawyers, police and other agencies, and not for individuals, however. You'll probably have to hire a family law lawyer to hire the tracing agency.

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 agreement doesn't apply to support orders made under the federal *Divorce Act*, however. Different rules apply (and may change with the upcoming *Divorce Act* amendments). Check with the Law Line or ask a family law lawyer.

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

6.7 Changing spousal support

If you have an agreement with your former spouse or a court order for 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 one of the following, however, you may be able to obtain 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); or
- 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 payor spouse becomes unemployed (for reasons outside that spouse's control), or becomes ill or disabled, that is likely a material change of circumstances justifying a change in spousal support. If the recipient spouse wins a lot of money in a lottery, that may be a material change of circumstances justifying a change in spousal support since there may no longer be need.

The SSAGs don't apply to the full range of issues that can arise when spousal support needs to be changed. Consult a lawyer if you need advice about varying a spousal support order.
See Section 6.3.1.

6.8 Enforcement

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

If the payor 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 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 with the MEP at any time. If you don't want to file the agreement or 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.

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 payor spouse sends all spousal support payments to the MEP. The MEP then forwards each payment to the recipient spouse. If payments aren't made on time, then the MEP will try to collect them by contacting the payor spouse.

If the payor spouse still doesn't 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 and sell the payor's property (such as a vehicle) to pay the debt;
- require the payor to come to court to explain the default (when payors fail to come to court, they 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 MEP, the spousal support agreement or court order must first be registered with the MEP office. A payor spouse may also wish to register with the MEP to have 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 payor 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 your spouse leaves and doesn't pay, you'll have to enforce the order through the province, territory, state or country 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 ABOUT SPOUSAL SUPPORT

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 successfully applied to increase spousal support. 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 set aside the wishes of the parties as expressed in a separation agreement only where the agreement is not in compliance with the overall objectives of the *Divorce Act*, where the agreement was made under oppression or pressure, or where it does not reflect the parties' original intentions.

Miglin v. Miglin [2003] 2 SCR 303

WHAT THE COURTS HAVE SAID

A husband and wife separated after 29 years together, 27 of them married. They had five children and owned a dairy farm, as well as other real property, vehicles and RRSPs. The parties were intermittently represented by lawyers and also used the services of mediators during their negotiation of a separation agreement. Approximately a year after their divorce, the wife applied to set aside the separation agreement on the grounds of "unconscionability." The trial judge found that the agreement was unconscionable because the husband had exploited the wife's mental instability during negotiations and had deliberately concealed or undervalued assets. This resulted in the wife receiving significantly less than her entitlement under the applicable law (in this case, the law in B.C.), despite the fact that it was the parties' express intention to divide their assets equally. As a result, the trial judge made an order awarding the wife an amount representing the difference between the negotiated equalization payment and the amount she was entitled to under the Act. The Court of Appeal disagreed with the trial judge's conclusions about the extent of the wife's vulnerabilities and concluded that, in any event, they were effectively compensated for because she had obtained legal advice. The Supreme Court of Canada agreed with the trial judge, and confirmed the principles that:

> The singularly emotional environment that surrounds the disintegration of a spousal relationship means that the negotiation of separation agreements takes place in a uniquely difficult and vulnerable context. Special care must therefore be taken to ensure that the assets of the former relationship are distributed through a process that is, to the extent possible, free from informational and psychological exploitation. Where exploitation results in an agreement that deviates substantially from the objectives of the governing legislation, the resulting agreement may be found to be unconscionable and, as a result, unenforceable.

Rick v. Brandsema [2009] 1 S.C.R. 295

As you see from *Rick v. Brandsema*, one case, or one set of facts and circumstances, can lead different judges to different decisions. Although the Supreme Court of Canada agreed with the trial judge in that case, the Court of Appeal disagreed. What this means in practice is that going to court can be unpredictable, and that even if you are successful in obtaining a decision in your favour, your spouse could successfully appeal the decision. The timeline from separation to trial to appeal(s) can last for years.

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 children 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 you get financial support from your 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 you do if an agreement or order isn't paid?	Enforcement	Register with Maintenance Enforcement Program (MEP) Apply for court order	MEP Lawyer
How do you change the spousal support amount or terms of payment?	Variation	Renegotiate an agreement Apply to vary a court order	Mediator Lawyer

Chapter 7

7. Dividing property

7.1 Introduction

When they separate, couples must decide how to divide their property and debts. "Property" doesn't refer just to land. "Family property" might also include a cabin or cottage, vehicles, furniture, large appliances, small appliances, artwork, china and silver, jewelry, recreation equipment, pensions, investments, chequing and savings accounts and so on. These things are all "property."

You may also need to decide issues such as who will pay the mortgage or the line of credit or the credit card bills in addition to the phone and electricity bills after separation. The bank may not want to give the lower-earning spouse or partner credit without a guarantee from the higher-earning spouse or partner, or without an agreement or court order showing a legal entitlement to support or equalization from the other.

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

Common misunderstandings

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

complicated arithmetic and accounting. A lot is at stake if you don't know 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 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, heirlooms, furniture and bank accounts). See Chapter 2 for an explanation of the applicable legislation.

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

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 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 family law lawyer.

Which law applies?

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 Property division for married couples

Each married spouse is generally entitled to 50% of the family possessions and belongings that are owned at the time of marriage breakdown. 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 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 they may have different responsibilities.

Every rule has exceptions if following the rule 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 the judge considers in dividing the assets is what is most fair in the circumstances.

The legal position of each spouse changes dramatically at the time of marriage breakdown. Up until the marriage breakdown, you are entitled to deal with your own property as you see fit (except in the case of the family home). At the time of the marriage breakdown, you and your spouse each become entitled to have the family assets divided in half. Neither of you has the right to treat any family assets as your 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 has applied 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 separation. Technically, however, even if there's no separation, either spouse can apply for a division of the assets. The application triggers a marriage breakdown.

The principle of equal division of family assets raises a number of practical questions. 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 property or possession that's relevant, not who bought it, whose name it's registered in, or whether the property or possession was owned by one spouse before the marriage.

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 considered family assets are cars, camping equipment, washers, dryers, stereos, freezers, TVs, dishes and 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 that the spouse can still get back (in other words, if you gave your sister the entire vintage record 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 considered 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 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 used by only one spouse and not used for transporting the 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, assign an agreed value to each item, and then allocate 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 issue 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. Sometimes it's unrealistic or too expensive to pay for an appraisal of an item; looking on line for similar used items for sale can be another way of determining value.

The second issue is what date to use when placing a value on the asset (this is called the valuation date). There is often 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 may differ in other territories and provinces.)

In some cases the value of an asset increases a lot between separation and trial and one spouse has paid the maintenance and mortgage; an example is a cabin that was worth $100,000 at separation, but because of fluctuations in the real estate market is appraised at $150,000 at the time of trial two years later. The judge can consider the increase in value if asked to depart from the usual 50/50 sharing rule. The judge may make an unequal division in favour of the spouse who has been maintaining the cabin and paying the mortgage (see Section 7.6). In other words, the court will try to ensure that the ultimate division is as fair as possible.

Equity in assets

The equity in an asset 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. For example, if one spouse owns a truck that has a present market value of $15,000, but still owes $5,000 in financing payments, the "equity" to be divided is $10,000.

7.5 The family home

The family home is a family asset, so the concept of equal division of family assets applies to it. The 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, cabin, apartment, condominium, trailer or even a houseboat. It must be located in the Yukon; a cabin in B.C. doesn't qualify.

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.

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 when the couple separated.

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 marriage and after separation. Unlike with 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 only in one person's name.

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

Caveat: This is an official notification to a 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 one of them as their family home.

A caveat can be placed on the property by just one spouse and is the method most often used to protect 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 your 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 bought 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 order the husband to pay half of the money he received from the improper sale to the wife. If the wife put a caveat on the house before sale, she could have prevented the sale from happening.

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 50% interest in the house by leaving first.

When couples separate, it's often difficult 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 the right of possession. The only thing that can usually be shared is the cash value of the residence. The couple has at least five 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 one-half interest in exchange for other property;
- one person can stay in the house for an agreed interim period of time (often for the benefit of the children) without paying occupation rent or sharing household expenses; or
- one person can stay in the house and pay occupation rent to the other.

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.

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 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 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 living in the family home with the children.

When one of these conditions is met, a judge will 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 to have to find alternate accommodations.

If a judge grants an order of exclusive possession, the order might include one or more of the following things:

- a time limit;
- directions regarding the furniture (for instance, that the furniture stay in the house for a certain period of time); and
- directions 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 you hold shares in a company that entitles you to occupy a housing unit (such as a time share). It's best to consult with a family law lawyer who can advise you of your rights and responsibilities.

7.5.2 What if one spouse dies before the couple separates?

The right to apply for a 50% interest in the family home is a personal right and can't be exercised against the estate when 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 death. The death of a spouse is not considered to be a marriage breakdown that entitles the other spouse to 50% of all family assets. The surviving spouse may have a legal entitlement to the house through other means, however. This will depend on whose name is on the title, if there is a will and if there are children.

7.6 If unequal division of family assets is more fair

In some cases, you may feel it's unfair to divide the family assets equally. You may ask your spouse to consent to an unequal division. If your spouse voluntarily agrees, the assets will be divided in the manner you agree on. If no agreement is possible, one spouse may apply to court to divide the assets in unequal shares.

If there's no agreement, the spouse who doesn't want to share the family property equally must prove to a judge that a 50/50 split is unfair. 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 spouse to get a half-interest in all the property the other spouse 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 the gift or inheritance 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 goes to court, the judge might divide the non-family assets between the spouses. The share that 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 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 you co-sign for your spouse, you are also responsible to the bank for repaying the debt. This is because you signed the bank loan, not because you are a spouse. The bank may repossess an asset if loan payments aren't made even if it is a family asset.

One spouse can become responsible for the debts of the other in two ways. First, if you grant your spouse authority to acquire debts in your name as your agent, and a third party is relying on that arrangement, you likely have a legal obligation, because your spouse had authority to acquire the debt in your name.

Second, each spouse is required to support the other on the basis of need and in accordance with ability (see Chapter 6 on spousal support). This principle is often interpreted by lawyers to mean that spouses should split 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 incurred to buy 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 common ways of dealing with debts associated with family assets:

- **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 asset is sold, the money from the sale is used to pay off the debt, and any money that remains is divided equally between the spouses.

7.9 Property division for common-law couples

There's no general law that property is split equally when a common-law couple separates. The property division sections of the Yukon *Family Property and Support Act* do not apply to common-law partners. 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.

However, common-law partners may sign a cohabitation agreement and agree to follow the property division rules outlined in the Act if they separate. Common-law partners can make a contract with each other to treat their property as if they were married. They can also agree to this in a written separation agreement when they separate. In order to be binding, such an agreement must be in writing and must be witnessed by an independent third person. If a common-law couple enters into a cohabitation agreement and subsequently gets married, the co-habitation agreement becomes a marriage agreement. It is recommended that you speak to a family law lawyer before signing a cohabitation agreement.

7.9.1 Separate ownership of property

For common-law couples who haven't agreed to follow the property division rules outlined in the *Family Property and Support 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 the couple as two people who just live together. Generally, the same rules that apply to roommates sharing an apartment 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 at separation.

7.9.2 Constructive trust

Another important principle for the property division of common-law couples is found in the law of trust. Constructive trust may provide you with an interest in property if you contributed to it in some way. You can contribute to the property indirectly through your labour, or through payment of living expenses, freeing your partner's money up to invest or save. You may acquire an interest in those investments or savings as a result of your contributions.

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 (without being paid for the work), or if a couple lived on one partner's earnings while the other partner put all earnings in the bank or toward paying off personal debt. 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 you can prove to a judge that your partner has been unjustly enriched, that you have 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. This is a complicated legal argument and you may need help from a family law lawyer to make the argument, either to your partner or to the court.

Even if the couple makes no specific oral or written contract 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 at all the circumstances of a case to determine what's fair. It is important not to wait too long after separation to make an argument for a constructive trust, since there are limitation periods to making claims (such as the three-month time limit to ask for spousal support). Ask your family law lawyer what limitation periods apply to your situation.

Because of the time and expense involved in using the courts to decide disputes, it's a very good idea for common-law partners to make a detailed cohabitation agreement with each other about the things they own and the things they will acquire in the future. A major benefit of a cohabitation agreement is that both partners are aware of their rights and obligations well before a separation happens and can plan accordingly. Even if common-law partners don't want to draw up a cohabitation agreement they may want to seek legal advice before buying a major asset together. These preventative measures can save both partners a lot of unhappiness and expense if the relationship ends.

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 governed 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.

7.10 Agreements and court orders

Couples can make agreements about how to divide property. They can do this in a prenuptial agreement or marriage contract prior to marriage, or a cohabitation agreement if they never marry. It can also be done through 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 won't be divided 50/50.

Even though marriage agreements sometimes result in a situation that seems unfair if the couple separates, courts are reluctant to overrule an agreement between two adults who willingly negotiated the agreement, especially if they had independent legal advice and the terms of the agreement are what each person expected them to be.

The Supreme Court of Canada has said that the courts shouldn't second-guess the agreements made by couples. Even if an agreement divides assets differently from what the legislation says, or from what a court would order, that doesn't mean the agreement is unfair enough to be disregarded.

A spouse who applies to court for a division of property must submit a statement (Form 94: Financial Statement) to the court, and to the other spouse, that outlines the following facts:

- the property they each owned at the time of the marriage breakdown;
- each family asset that would cost more than $100 to replace that was discarded in the year before separation; and
- their gross annual incomes (before taxes) for the three most recent tax years before separation.

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

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

Common law partners can also apply to court for a division of property and must submit a statement to the court outlining claims in trust and equity. That discussion is outside the scope of this publication.

7.11 Enforcement

Although each spouse is entitled to half of the family assets on separation, the division isn't automatic. Often there are disputes about whether certain assets are family assets and what value should be assigned. Sometimes both spouses will want the same asset. In the end, each couple must reach an agreement as to what's fair in their particular case, sometimes with the help of a family law 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 there is a court order prohibiting it. The other spouse's consent is not required, with the exception of the family home (different rules apply to it; see Section 7.5). If it later turns out that what one spouse thought was 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 leave, resulting in no reasonable hope of ever getting compensation, it's possible to apply for a court order to prevent the sale of assets. Seek a family law lawyer's help immediately if you have reason to be concerned that this may happen.

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 that 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 would be unfair in these circumstances to allow the common-law husband 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 you do with it?	Family home	Negotiate an agreement Apply for a court order	Mediator Lawyer
How do you divide your possessions?	Family assets	Negotiate an agreement Apply for a court order	Mediator Lawyer
How do you figure out the value of possessions and property?	Valuation	Negotiate an agreement Apply for a court order	Mediator Lawyer Accountant Valuator
Who is responsible for repayment of debt?	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

Chapter 8

8. Agreements

8.1 Introduction

There are different agreements or contracts for different circumstances:

- a marriage contract (or prenuptial agreement) is signed before marriage;
- a cohabitation agreement is signed by common-law partners and often includes terms about separation, spousal support and property division (please note: a cohabitation agreement becomes a marriage contract if the spouses marry);
- a parenting agreement is signed by parents who are married, common-law or who have never lived together, and deals with parenting time, decision-making responsibility and child support; and
- a separation agreement is signed at separation by a separating or divorcing couple.

This chapter focuses on separation agreements and parenting agreements. Marriage contracts and cohabitation agreements are outside the scope of this book, but you may be able to get free general information from the Law Line or from a consultation through the Law Society of Yukon's Meet with a Lawyer certificate program to find out if you might need one.

Some separating couples like to deal with parenting issues and child support in one agreement (a parenting agreement) and with asset, debt and spousal support issues in a different agreement (a separation agreement). Other separating couples prefer to deal with everything in one agreement that addresses asset and debt issues, support and parenting issues (a comprehensive separation agreement).

When a couple makes a written agreement they don't need to apply to court unless there's a reason to do so (e.g., someone breaches the agreement, or the couple wants to obtain a divorce or file a consent order). If there is an application to court (e.g., to obtain a divorce), the judge will look

at the agreement, especially when there are children, to ensure their best interests have been met. When the couple applies for a consent or divorce order, the application is looked at by the judge in the judge's office. This is known as a "desk order" and a court appearance is not required.

Separation is stressful and emotional. At first, it may feel as though reaching an agreement is not possible. Often people are hurt, and it takes a while before you can think clearly or see yourself as a single person. In most cases, however — especially if you get help from a family law lawyer or mediator — couples are able to negotiate a settlement and enter into a separation agreement. Even if a court application has been made it's possible to negotiate and settle before the court date. The majority of cases are resolved through negotiation and agreement without going to court.

8.1.1 Put the agreement in writing

There are several reasons to put an agreement in writing:

- It reduces the chance of misunderstandings, especially during separation when communication may be difficult and painful.
- It's more likely to be honoured. People don't feel as obligated to follow a verbal agreement.
- Circumstances change. Financial obligations might arise that weren't expected at the time of separation, a new relationship might start, a spouse make take 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.
- It helps the couple focus on the long term and decide how things will work in the future. For example, what if one parent wants to move? To what age or educational level will you support your children?
- It can be enforced by the court or be used as the basis for a consent order.

A written agreement can provide a clear statement of how things will work in the future. It can provide peace of mind to both spouses and provide a stable basis for planning for the future.

8.2 Do you 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 separate and apart (even in the same house), 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. Some agreements are more detailed than others. Whether you want to make a separation agreement with your spouse or partner is up to you.

It's particularly important to have a written agreement where there are young children involved or major assets to divide, such as a house or pension. Having a practical long-term plan that covers where the children live and how they will be supported is in the best interests of children and parents. The bank will require a written separation agreement if the house is being transferred from both spouses to one spouse and a new mortgage is being obtained.

There are other advantages to having a written separation agreement. A person paying periodic spousal support under a written separation agreement can claim the support paid as a deduction for income tax purposes. A person paying under a verbal arrangement cannot. Also, if one spouse later applies for a divorce, the separation agreement can be included with the divorce application to show the judge what arrangements have been made for the couple's children. If a couple has negotiated and settled things between them and adequate arrangements have been made for the children, the divorce will proceed more quickly and be considerably cheaper.

8.2.1 Is a separation or parenting agreement binding?

A separation or parenting agreement is a legally binding contract between separating spouses or partners. It's enforceable, which means that if one spouse breaks the agreement the other spouse can go to court 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 (see 8.2.1.1);
2. it was brought about by fraud (see 8.2.1.2);
3. the arrangements aren't in the best interests of the children (see 8.2.1.13); or
4. the parent's circumstances have changed in a significant way (see 8.2.1.4).

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 people at the same time. The agreement should be dated on the day the second spouse or partner signs it, because it's not binding until both people have signed. The agreement doesn't have to be notarized (sworn or affirmed before a notary public). As a precaution, lawyers generally have the witness swear an affidavit of witness confirming that he or she was present and actually saw the agreement being signed.

The Government of Yukon's Maintenance Enforcement Program (MEP) can help enforce the child support and/or spousal support terms of an agreement. For more information about the MEP and how they can help, refer to Sections 3.7.1, 5.3.1, 5.6.1 and 6.8.1.

Precatory terms

Some provisions in separation agreements are not legally enforceable, but are still important rules for how the couple intend to carry out the agreement. Called "precatory terms," they include provisions such as: "We agree to deal with each other in a civil manner." See Section 4.2.1.1.

8.2.1.1 The agreement must be entered into voluntarily

One person can't force the other to sign an agreement through pressure, threats, by withholding money or through any other intimidating means. If undue influence, pressure or intimidation are proved in court the agreement will be set aside. If both people obtain independent legal advice (receive advice from their own lawyers) before signing the agreement, it's unlikely that one of them can later prove the agreement wasn't voluntary. Getting legal advice protects both people. It's the reason your family law lawyer will suggest that your spouse get independent legal advice about 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 into signing an agreement and then take advantage of that dishonesty. If, for example, one spouse hides assets from the other spouse, the agreement may be set aside later.

Ignorance is different from fraud. If you sign an agreement giving up rights to family property without knowing exactly what the assets are and how much they're worth, you can't get out of the agreement just because you decide later that you shouldn't have signed it. There must 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 provide a statement under oath (sworn or affirmed) setting out the spouse's assets and their value. If your spouse isn't willing to do this, an application can be made to the court to compel the spouse to disclose income and assets.

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

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 children (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 the terms of the agreement that aren't in the children's best interests.

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 becomes unemployed and can't pay, or becomes ill.

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 you and your spouse and each signature is witnessed by an independent third person. There are many potential pitfalls in drafting 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 several 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 enforceability. Second, they can advise you about the fairness of the agreement within the general principles of family law. Third, they may be able to help you negotiate the terms of the agreement so that it better protects your interests.

Check with a lawyer first

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

- 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 precise language to help avoid misunderstandings.
- 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.
- A family law lawyer can advise whether the terms of the agreement are within the range of legal outcomes you could expect if you went to court.
- 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.
- If both parents get independent legal advice before signing, it's more difficult to say they didn't understand what they were signing or they signed it under pressure, threat or duress.
- It's cheaper to hire a family law lawyer to draft or review the agreement before it's signed, than it is to hire the lawyer to enforce or set it aside the agreement in court after the fact.

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 disregard 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. Once you've had independent legal advice about an agreement, it will be difficult if not impossible to argue that you didn't understand and agree to what you signed.

8.3 What goes in a separation agreement?

A separation agreement is divided into sections. The first section usually outlines personal details such as these:

- the legal names and addresses of each person;
- social insurance numbers (to help enforce support payments, or to enable future application for Canada Pension Plan credit splitting);
- the date of the marriage — or, in the case of a common-law couple, the start of their cohabitation (living together);
- the date of separation (for many couples, this will be the date one of them moved out);
- an acknowledgement that they have separated with no reasonable prospect of reconciliation;
- an acknowledgement that neither person will harass or annoy the other or the other's family members or friends;
- an acknowledgement that their agreement is a separation agreement as defined by the Yukon *Family Property and Support Act* (if they are married, or if support is being paid under that Act) and is binding on both of them.

Additional terms will depend on the couple's circumstances and the issues they want to include in their agreement. For example, where there are children, a separation agreement may include these terms:

- 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 for life insurance in the event that one spouse dies while child support is still payable;
- provisions about spousal support, such as "until the children enter Grade one," or "until the spouse completes a certain training program";
- a review of child and/or spousal support amounts in the future;
- responsibility for mortgage payments, maintenance and repairs, or the terms under which the family home will be sold;
- division of other family assets such as furniture, appliances, pensions, and investments;
- division of assets that are not family assets;
- responsibility for the repayment of debt;
- release of each spouse from any future claim to asset or debt division, spousal support or estates;
- security for a spouse who receives support if the payor dies before support is supposed to end;

If you're feeling pressured into an agreement

If you feel pressured or threatened to sign an agreement (including actual or threatened physical, mental or emotional abuse), don't sign. An agreement reached this way probably won't be in the best interests of you or your children. Tell someone and ask for help. Contact a family law lawyer (free legal advice from Legal Aid might be available; see Chapter 3). Contact information is in Chapter 9.

- an acknowledgement that the terms negotiated are binding even after a divorce;
- an acknowledgement that the terms will be binding on each person's estates and heirs;
- a clause that says the agreement is void/or remains in force 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.

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

8.4 What goes in a parenting agreement?

A parenting agreement outlines parenting responsibilities, decision-making, parenting time, child support, payment of children's expenses, holiday time and what happens when the parents can't decide about certain things (such as enrolment in extracurricular activities). Agreements about parenting issues can be separate or can be included in a comprehensive separation agreement; it depends on your situation and preference. Refer to Chapters 4 and 5 for more details about agreements for custody (decision-making), access (parenting time) and child support.

See Section 4.5 and Section 5.3 for more information on agreements about custody, access and child support.

When it works, an agreement is better than a court order because both parents have compromised a bit, you've had success working through some difficult issues, and you are controlling the outcome instead of a judge deciding for you. Yukon Family Mediation Services is a valuable free resource where parents can work with an experienced mediator to negotiate their agreement. Check to see whether there is an online parenting plan mediation service available; contact information is in Chapter 9.

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 during 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 other records;
- discipline and religious instruction;
- education;
- what will happen if a parent moves; and
- what will happen if there are disagreements in the future.

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 which is used to determine the amount of the child support order;
- the child support amount determined under the *Child Support 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 expenses, the proportion of the expenses to be paid and how and when it will 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 when future payments are to be made.

These types of issues can 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 child support agreement?
- Do either or both parents wish to contribute to a savings fund or Registered Education Savings Plan (RESP) 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 the child is no longer a student?

8.5 Sample agreements

Contact FLIC for a sample separation agreement and a sample parenting agreement (see Chapter 9 for contact information). 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

9.1 Immediate help

Police/RCMP

Emergency (in Whitehorse)	phone	911 or 867.667.5555
Emergency (in the communities)	phone	dial community prefix, then 5555

Victim Services

Victim Services (Whitehorse)	phone	867.667.8500
	web	www.justice.gov.yk.ca/prog/cor/vs
	toll-free	1.800.661.0408, extension 8500
Kwanlin Dün Justice	phone	867.633.7850
	web	www.kwanlindun.com/index.php/justice
Dawson City Victim Services Coordinator	phone	867.993.5831
Watson Lake Victim Services Coordinator	phone	867.536.2541
Kwanlin Dün Community Safety Coordinator	phone	867.633.7850, extension 622
VictimLinkBC (available to Yukon)	phone	1.800.563.0808
	web	www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/victimlinkbc

Transition homes

Kaushee's Place (Transition Home, Whitehorse)	phone	867.668.5733
	web	www.womenstransitionhome.ca/kaushees-place
Dawson City Women's Shelter	phone	867.993.5086
	web	http://dawsonwomensshelter.com
Help and Hope for Families (Watson Lake)	phone	867.536.7233
	web	www.helpandhopeforfamilies.ca
Carmacks Safe Home	phone	867.863.5710
Magedi Safe Home (Ross River)	phone	867.969.2722

Child abduction (within Canada)

Child Find Canada: Emergency	phone	1.800.387.7962
	web	www.childfind.ca
Missing Kids	phone	1.866.kid.tips (543.8477)
	web	https://missingkids.ca/en

Child abduction (international abductions)

Yukon's Central Authority	phone	867.667.5086
Emergency: Consular Affairs Bureau (24 hours a day, 7 days a week)	phone	1.800.387.3124 OR 1.800.267.6788
	International phone (collect):	+ 1.613.996.8885

The publication *Abduction: Stealing Children* is available from YPLEA (ypleayt@gmail.com), or from the Government of Canada: https://travel.gc.ca/travelling/publications/international-child-abductions.

	phone	867.668.5297
	toll free	1.866.667.4305
The Hague Convention	www.cic.gc.ca/english/helpcentre/answer.asp?qnum=1183&top=2	

9.2 Legal information and support

Family Law Information Centre (FLIC)

Andrew A. Philipsen Law Centre (Ground Floor), 2134 Second Avenue, Whitehorse
phone 867.456.6721
toll free (in Yukon) 1.800.661.0408 extension 6721
e-mail flic@gov.yk.ca
web yukonflic.ca OR https://yukon.ca/en/family-law-information-centre

Law Library

Andrew A. Philipsen Law Centre (Ground Floor), 2134 Second Ave, Whitehorse
phone 867.667.3086
toll-free (in Yukon) 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, Tutshi Building, 2131 Second Ave., Suite 102, Whitehorse
phone 867.668.5297
toll-free (in Yukon) 1.866.667.4305
e-mail lawyer@yplea.com
web www.yplea.com

Meet With a Lawyer certificate service

Law Society of Yukon, 104 Elliott Street, #304, Whitehorse
phone 867.668.4231
e-mail info@lawsocietyyukon.com
web https://lawsocietyyukon.com/for-the-public/meet-with-a-lawyer-certificate-program

Legal Aid

Yukon Legal Services Society, 2131 Second Avenue, #101, Whitehorse
phone 867.667.5210, toll-free 1.800.661.0408, extension 5210
e-mail intake@legalaid.yk.ca
web www.legalaid.yk.ca
www.legalaid.yk.ca/eligibility (financial eligibility guidelines)

Court Registry

Andrew A. Philipsen Law Centre (Ground Floor), 2134 Second Ave, Whitehorse

phone 867.667.5441; toll-free 1.800.661.0408, extension 5441
e-mail courtservices@gov.yk.ca
web www.justice.gov.yk.ca/prog/cs/registries.html
www.yukoncourts.ca/courts/territorial/contact.html

First Nations Court Workers and Legal Support

Kwanlin Dün Justice Program (Whitehorse)	phone	867.633.7850
Aboriginal Court Worker Program, CYFN: (Whitehorse, Carcross, Teslin, Haines Junction, Burwash, Beaver Creek)	phone	867.667.3781
Tr'ondëk Hwëch'in (Dawson City)	phone	867.993.7148
Liard First Nation (Watson Lake)	phone	867.536.7923
Ross River Dena Council (Ross River)	phone	867.969.2430 extension 209
Northern Tutchone Tribal Council	phone	867.537.3821 (Pelly Crossing) 867.996.3261 (Mayo)
Vuntut Gwitchin First Nation	phone	867.966.3261

Legislation

Yukon legislation (*Family Property and Support Act* and the *Yukon Children's Law Act*):

Copies available ($5 per statute) at the front desk, Government of Yukon Administration Building, Second Avenue, Whitehorse.

Also available at the Law Library or on the internet:

web www.canlii.org OR www.gov.yk.ca/legislation/legislation/page_e.html

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

9.3 Family law resources

9.3.1 Child Support Guidelines and Tables

Government of Yukon: 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)
Andrew A. Philipsen Law Centre (Ground Floor), 2134 Second Ave, Whitehorse
phone 867.667.5437; toll-free 1.877.617.5347
e-mail justmep@gov.yk.ca
web www.yukonmep.ca

Justice Canada

phone 1.888.373.2222 (toll-free number for information on federal guidelines)
web www.justice.gc.ca/eng/fl-df/child-enfant/fcsg-lfpae/2017/pdf/ona.pdf (Child Support Tables)
www.justice.gc.ca/eng/fl-df/child-enfant/2017/look-rech.asp (Child support look-up)
www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/guide/step8-etap8.html (Undue hardship)

Applying for or changing a family order

FLIC Guides; available at the Family Law Information Centre (FLIC)
Andrew A. Philipsen Law Centre (Ground Floor), 2134 Second Ave, Whitehorse
Pick up or download the guides, forms and kits required when applying for or changing a family order.
phone 867.456.6721; toll-free 1.800.661.0408, extension 5753
web www.yukonflic.ca OR https://yukon.ca/en/family-law-information-centre

9.3.2 Divorce information

Applying for a Divorce

Family Law Self-Help Guide: www.yukonmep.ca/pdf/Applying_for_a_Divorce.pdf OR
web www.yukonflic.ca/pdf/JFLIC_Guide_ApplyingDivorce_En_29420_FinalWEB.pdf

***Guide to Family Law* booklet**

Available at the Family Law Information Centre (FLIC)
phone 867.456.6721; toll-free 1.800.661.0408, extension 6721
e-mail flic@gov.yk.ca
web https://yukon.ca/en/family-law-information-centre

File for a Divorce

Court Registry, Andrew A. Philipsen Law Centre (Ground Floor), 2134 Second Ave, Whitehorse
phone 667.5937, toll-free 800.661.0408, extension 5937
web https://yukon.ca/en/legal-and-social-supports/family-law/file-divorce

How to Apply for a Divorce (Justice Canada)

web www.justice.gc.ca/eng/fl-df/divorce/app.html

Info Sheets on changes to the *Divorce Act* are available from the Law Line.

9.3.3 Maintenance Enforcement Program (MEP)

Andrew A. Philipsen Law Centre (Ground Floor), 2134 Second Ave, Whitehorse
phone 867.667.5437; toll-free 1.877.617.5347
e-mail justmep@gov.yk.ca
web www.yukonmep.ca

9.3.4 Interjurisdictional Support Orders (ISOs)

Maintenance Enforcement Program (MEP), Andrew A. Philipsen Law Centre (Ground Floor), 2134 Second Ave, Whitehorse: Information, forms and guides available
phone 867.667.5437; toll-free 1.877.617.5437
web www.yukonmep.ca/iso_forms.html

9.3.5 Representing yourself in court

FLIC has user-friendly booklets for people who choose to represent themselves at court. The booklets provide general information about court procedures and forms that may be useful if you need to file or respond to family law claims.
Available at the FLIC office, Andrew A. Philipsen Law Centre (Ground Floor)
phone 867.456.6721; toll-free 1.800.661.0408, extension 6721
e-mail flic@gov.yk.ca
web https://yukon.ca/en/family-law-information-centre

The series includes booklets on the following topics:

- Applying for an Initial Family Order
- Opposing an Initial Family Order
- Applying to Change a Family Order
- Opposing an Application to Change a Family Order
- Consent Orders
- Applying for Indigency Status: Step-by-Step
- Applying for a Divorce
- Changing a Divorce Order When Other Party Resides Outside Yukon: Step-by-Step
- Guide to Family Law

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

The Yukon Supreme Court Rules of Court (and Forms) are available online: www.yukoncourts.ca/courts/supreme/ykrulesforms.html

9.3.6 Mediation

International Academy of Collaborative Professionals

web www.collaborativepractice.com

Yukon Family Mediation Services

Andrew A. Philipsen Law Centre (ground floor), 2134 Second Avenue in Whitehorse
phone 867.667.5753; toll-free 1.800.661.0408, extension 5753
e-mail flic@gov.yk.ca
web https://yukon.ca/en/family-mediation-service

Mediation Yukon

Contact information for individual private mediators and their scope of practice is available at www.mediationyukon.ca.

Law Line

Copies of the publication *Guide to the Law #9: Alternatives to Trial* are available.

9.4 Counselling and support services

Mental Wellness and Substance Use Services

phone 867.456.3838; toll-free 1.866.456.3838
web www.hss.gov.yk.ca/ads_resourceinfo.php

Child ,Youth and Family Treatment Services

phone 867.667.8227; toll-free 1.800.661.0408 extension 8227
web www.hss.gov.yk.ca/cats.php

Child and Youth Advocate's Office

2070 Second Avenue, Unit 19, Whitehorse
phone 867.456.5575
web https://ycao.ca

Kids Help Phone

phone 1.800.668.6868
web https://kidshelpphone.ca

Les EssentiElles (services in French and English)

phone 867.668.2636
web http://lesessentielles.ca

Partners for Children

phone 867.332.5990
website www.partnersforchildren.info

Skookum Jim Friendship Centre

3159 Third Avenue, Whitehorse
phone 867.633.7680
e-mail sjfcfriends@northwestel.net
web www.skookumjim.com

Victoria Faulkner Women's Centre

503 Hanson Street, Whitehorse
phone 867.667.2693
e-mail info@vfwomenscentre.com
web www.vfwomenscentre.com

Family Law Information Centre (FLIC)

Andrew A. Philipsen Law Centre (Ground Floor), 2134 2nd Avenue, Whitehorse
phone 867-667-3066
e-mail FLIC@gov.yk.ca
web www.yukonflic.ca/2197.html

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

Government of Yukon Employee and Family Assistance Program

Confidential counselling for eligible government employees
phone 1.867.668.EFAP (3327) in Yukon
toll-free: 1.800.667.0993 outside Yukon
web https://yukon.ca/en/employment/what-we-offer-our-employees/short-term-personal-and-crisis-counselling

Glossary

Abuse	this includes mental, emotional and verbal abuse as well as physical harm or the threat of harm
Access	the contact or parenting time that children have a right to with the parent they're not living with — see Parenting time
Abduction	when a child is not returned to the other parent according to the terms of a court order or agreement, the child 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
Application for Divorce	the court application that starts a divorce; either spouse can file the application for divorce
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 the judge uses to make decisions about custody (decision-making responsibilities) and access (parenting time) 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 real property
Certificate of Divorce	the document stating that a divorce is final
Child's Lawyer	a lawyer appointed by a judge or hired by the parents to represent the child's interests when there is an application for custody (decision making) or access (parenting time)
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 child or spousal support
Common-law relationship	when a couple live together in a marriage-like relationship of some permanence but they are not legally married to each other
Contempt of court	this is a charge against a person that might happen if he or she intentionally doesn't follow the terms of a court order — 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 words "custodial" parent are not used as much anymore: The custodial parent may also be called the "residential parent." The children typically live with this parent most of the time. The parent with custody (decision-making responsibility) has the right to and responsibility for the day-to-day care of the child and for making major decisions involving the child, such as education, religion and health care. Note that the meaning of the term "custody" changes from place to place and is different under the federal *Divorce Act* and the Yukon *Children's Law Act*. See Decision-making responsibility.

Decision-making responsibility	the responsibility for making significant decisions about a child's well-being, including health, education, culture, language, religion and spirituality; and significant extracurricular activities — the revised Divorce Act uses this term instead of "custody"
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 accumulates in debt called arrears
Dependent spouse	the spouse or common-law partner who is eligible for spousal support after relationship breakdown, also known as the "recipient" spouse
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	to submit 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, and who has not paid it
Grounds	legally recognized reasons for getting a divorce
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 or decision making responsibility
Household comparison of standards of living test	a test to help decide whether someone will suffer undue hardship if the applicable amount of child support 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 (decision making) or child support
Interjurisdictional support order (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 by the Legal Aid office 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 in one large amount, rather than in smaller amounts on 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 Government of Yukon that is authorized to collect child or spousal support on behalf of the person entitled to receive it
Material change in circumstances	a significant change that affects the best interests of the child and may result in a change of custody (decision-making responsibility) or access (parenting time) and/or support payments; 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 provide an alternative to going to court to resolve issues or disputes
MEP	see Maintenance Enforcement Program
Non-exercise of access	when the parent who has contact with the child does not meet the access or parenting time provisions of a court order or agreement; for example, when the parent doesn't show up for scheduled parenting time with the child
Non-family asset	any property that's owned by either or both spouses that hasn't ordinarily been 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, when the child will have contact with the other parent, the amount of child support and how special expenses will be dealt with
Parenting time	when the children spent time in the care of a person (usually a parent or step-parent), with whom they don't live the majority of the time — the revised *Divorce Act* uses this term instead of "access"
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
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)
Power of appointment	the authority to decide that you will be the owner of property owned by another person (e.g., in the case of your elderly parent's house this would allow you to exercise the power in favour of yourself and transfer the house into your name)
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 — a provisional order has no force or effect until it's sent to the court in the other jurisdiction 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 (province, territory, state or country) 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 the lawyer 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 (even if they live separate and apart in the same home); 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 (decision making responsibility) and access (parenting time) 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 for when they must be served
Solicitor-client privilege	your lawyer has a professional duty to keep any discussions that he or she has with you confidential unless you waive that privilege
Special expenses	additional expenses relating to a child that are deemed to be reasonable and necessary for the child's best interests — an appropriate proportion of special expenses may be added to the table amount of child support in determining child support payments — see also Extraordinary expenses
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	guidelines that judges, lawyers and divorcing couples across Canada use to help determine the appropriate amount of spousal support that should be paid to an eligible dependent spouse or partner — also called SSAGs
Undue hardship	when a court decides it would cause too much financial strain or difficulty for one or the other parent if the court requires the paying parent to pay the amount from the Child Support Guidelines table (or the table amount plus special expenses)
Valuation date	in family law, property belonging to a separating couple is assigned a value as of this date; often the date of separation — changes in value after the valuation date may be considered by a judge in an application for unequal division of family assets
Variation	a change to an existing court order; you must apply to the court to vary a court order

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