The Law Society of Manitoba

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FAMILY LAW

Chapter 3

Divorce, Parenting, Support and Protective Relief

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A. LEGAL PRINCIPLES

1. Introduction

This chapter canvasses the relief available from the courts to spouses, unmarried cohabitees and parents in the areas of parenting, support and protection of the person. The *Divorce Act* provides for orders of parenting time and decision-making responsibility and spousal and child support for divorcing parties. Provincial legislation, in particular *The Family Law Act, The Family Support Enforcement Act, The Inter-Jurisdictional Support Orders Act* and *The Domestic Violence and Stalking Act*, provides for various types of relief including orders of non-cohabitation (separation), parenting time and decision-making responsibility, child and spousal support, declarations of parentage, support enforcement, protection, prevention, non-communication, sole occupancy of the family home and postponement of sale.

> *The Family Law Act* and *The Family Support Enforcement Act* came into force on July 1, 2023. These new statutes contain relief previously found *in The Family Maintenance Act* (repealed July 1, 2023) and harmonize with the provisions of the *Divorce Act*. *The Inter-Jurisdictional Support Orders Amendment Act,* which enhances procedures under that Act, also came into force July 1, 2023.

Married spouses may apply for relief under the *Divorce Act* or provincial legislation; unmarried parties may apply only under provincial legislation. With the exception of matters pertaining to children (available regardless of the duration or existence of a relationship), unmarried parties are only entitled to relief under *The Family Law Act* if they have cohabited in a conjugal relationship for at least three years or they have cohabited for at least one year and they are together the parents of a child, or if they register their common-law relationship under section 13.1 of *The Vital Statistics Act*.

2. The *Divorce Act*

The *Divorce Act* is the governing legislation for any proceeding in which a divorce is sought. The legislation provides that a divorce may be granted on the ground that a breakdown of the marriage has been proven.

Proof of breakdown is provided by evidence that the parties have been separated for at least one year (s. 8(2)(a)), or that one party has committed adultery (s. 8(2)(b)(i)) or treated the other cruelly (s. 8(2)(b)(ii)). A party may apply to court immediately upon separation, or even before separation if the action is based upon evidence of adultery or cruelty.

A party may apply for a divorce in a jurisdiction only if that party or the spouse has been habitually resident in that jurisdiction for at least one year immediately preceding the application.

Collusion in the grounds for divorce bars relief (s. 11(1)(a)). Either condonation or connivance bar relief on the basis of adultery or cruelty. Collusion is defined in section 11(4) of the *Divorce Act*. Condonation is the forgiveness of a conjugal offence with the full knowledge of all the circumstances (ss. 11(1)(c), 11(2), 11(3)). Connivance is an act done with corrupt intention to encourage adultery of the other party (s. 11(1)(c)). As these are terms specifically used in the divorce petition you may need to explain their meanings to your client.

> One of the most important bars to divorce is found in section 11(1)(b). The court must satisfy itself that reasonable arrangements have been made for the support of any children, failing which the granting of the divorce must be stayed.

The Act sets out a detailed statutory scheme to guide the courts in granting corollary relief which includes parenting orders, spousal support, and child support. This scheme was extensively amended with respect to the area of child support as of May 1, 1997 by both amendments to the Act itself, and by the declaration of a set of regulations called the *Federal Child Support Guidelines.* In June, 1998 *The Family Maintenance Act* was amended to make the guidelines applicable to all child support applications under *The Family Maintenance* Act (now repealed), and they are now applicable to all child support applications under *The Family Law Act* (see s. 59).

The provincial *Child Support Guidelines* (Regulation 52/2023 to *The Family Law Act*) are applicable to all cases, whether under *the Divorce Act* or *The Family Law Act*, where both parties reside in Manitoba. In dealing with these matters, be sure to refer to the current version of the Act and the guidelines, as there are some small differences between the provincial version and the federal version, which is used where the parties to a divorce reside in different provinces.

A divorce takes effect on the thirty-first day after it is pronounced. No formal application or order is necessary although a Certificate of Divorce is available to show that the divorce is final. The thirty-one day period can be abridged in special circumstances only with court approval by consent of both parties.

3. *The Family Law Act* and other Provincial Legislation

a) *The Family Law Act*

The Family Law Act deals with parenting orders, support, use of the family home, and child status (whether minor, adult, or independent). *The Family Support Orders Enforcement Act* deals with enforcement of support orders. It may, depending upon the circumstances, apply to people who are married, who have lived together, and/or who have had a child together.

The Family Law Act sets out rules on status and procedure for obtaining a declaration of parentage of children by any interested person. Note that a person may ask for a declaration that they are, or are not, a parent of a child.

The Family Law Act provides for the making of orders of parental responsibility, including the allocation of parenting time and decision-making responsibility. Either parent may seek an order. Absent such an order, the presumption is that parents have joint rights to exercise parental responsibilities with respect to their children, unless the parents have never cohabited after a child is born. In that case, the parent with whom the child resides is the only parent with decision-making responsibility and parenting time respecting the child (see s. 36).

Any person can apply for child support from the parents and also from spouses of parents, common-law spouses of parents and other persons who stand *in loco parentis* to the child, although the obligations of these persons are all secondary to those of the parents. *The Family Law Act* specifies that a child may also apply for child support, and that support may be paid directly to a child.

The Family Law Act sets out an obligation of mutual support between spouses or common-law partners and provides guides and rules for determining how those obligations will be met.

Common-law partners are defined in *The Family Law Act* to be persons who, not being married to one another, have lived together in a conjugal relationship for at least three years, or have lived together for one year and are together the parents of a child, or have registered their common-law relationship under section 13.1 of *The Vital Statistics Act*, regardless of how long they have cohabited (see s. 1).

The Family Law Act in section 84 provides for a court determination of the dates a common-law relationship commenced and/or ceased. The court can grant the relief available to common-law partners and spouses including orders of support and financial disclosure, and in the case of spouses, for non-cohabitation (see s. 83).

In addition, the court can make an order that one of the spouses or common-law partners has the right to occupy a family residence regardless of which spouse or common-law partner owns or leases the property, and can make an order postponing

the rights of either spouse or common-law partner to partition or sale, or to sell such property. These rights appear in *The Family Law Act* in section 80.

The Family Support Enforcement Act carries forward the enforcement of support orders previously found in Part VI of *The Family Maintenance Act,* including enforcement of orders pronounced prior to July 1, 2023. *The Family Support Enforcement Act* also provides for the enforcement of family arbitration support awards, enforcement of support for adult children and payment plans.

The Inter-jurisdictional Support Orders Amendment Act sets out the manner in which such an application is processed by the designated authority and the court.

These statutes are discussed in more detail below.

b) *The Family Law Modernization Act*

The Family Law Modernization Act was passed in June 2019. It includes *The Family Dispute Resolution (Pilot Project) Act, The Child Support Service Act, The Arbitration Amendment Act (Family Law)* and consequential amendments to *The Provincial Court Amendment and Court of Queen's Bench Amendment Act, The Family Maintenance Amendment Act* and *The Inter-jurisdictional Support Orders Amendment Act*. All of these changes aim to promote easier access to justice with out of court processes that are simpler and less expensive than proceeding through litigation.

The *Family Resolution Service* is being launched in phases. Based on guiding principles which include that most family matters should be resolved outside of court, and that children's needs come first, it is designed to empower families to make their own decisions by providing services that are easily accessible and understandable. It includes Early Resolution Supports, the Child Support Service and the Maintenance Enforcement Program. It is discussed in a number of sections in these materials, including those relating to parenting, child support, and enforcement. The website *Family Law Manitoba* is the hub for all family law resources and information.

The Child Support Service Act allows for initial calculations of child support and recalculation of existing child support orders, agreements and arbitral awards through the Child Support Service. It has been in force since July 2020 and is discussed in the child support section of these materials.

Changes to the Maintenance Enforcement Program came into effect July 2019 which significantly expanded the administrative authority of the program. Other changes also appear in *The Family Support Enforcement Act*, as discussed in the enforcement section of these materials.

New provisions were added to *The Arbitration Act* specifically with regard to arbitration of family law matters. These changes have been in effect since July 2019 and allow family arbitration awards to be enforced in the same way as court orders. Arbitration is discussed in the Initial Considerations chapter of these materials.

The Family Dispute Resolution Pilot Project is **not yet in force**. Its purpose is "to create a process outside the traditional court system that provides for the fair, economical, expeditious and informal resolution of family disputes". The Family Resolution Service is currently testing aspects of the pilot on a voluntary basis. Look for updates in the future as this work progresses.

> More information about this pilot project can be viewed at *The Family Dispute Resolution Pilot Project*.

c) *The Domestic Violence and Stalking Act*

Persons subjected to stalking and domestic violence can seek a wide range of civil remedies to address their individual needs pursuant to *The Domestic Violence and Stalking Act*. This Act creates two different types of orders: protection orders, obtained on a without notice basis from a designated justice of the peace of the Provincial Court of Manitoba; and prevention orders, being obtained with notice from the Court of King's Bench.

B. PARENTING

1. General

Amendments to the *Divorce Act* came into effect on March 1, 2021, and *The Family Law Act* came into effect on July 1, 2023. Under both of these statutes, the terminology relating to care of children has been altered. Under both the *Divorce Act* and *The Family Law Act* the court can make parenting orders which include "parenting time" and "decision-making responsibility" in place of "custody" and "access". "Contact" and "contact orders" are possible for non-parents.

Parents may apply under *The Family Law Act* for parenting orders. Non-parents may seek contact orders, with leave of the court.

Parenting orders can also be granted to divorcing or divorced parents as corollary relief under the *Divorce Act*. Both the *Divorce Act* and *The Family Law Act* allow for interim and final orders.

Parenting matters are determined based only on the best interests of the child.

Both section 16 of the *Divorce Act* and section 35 of *The Family Law Act* set out open-ended "best interests of the child" criteria for the court to consider on such applications. Note that the court must consider all matters relevant to a child's best interests which is not limited to the listed factors. Both statutes specifically direct consideration of the impact of any family violence.

2. Orders

Both the *Divorce Act* and *The Family Law Act* provide for orders relating to the parenting of children. The term "custody" previously in use most recently only in *The Family Maintenance Act* (repealed July 1, 2023) is equivalent to the current terms of "parenting time and decision-making responsibility". The previous term "access" is equivalent to "parenting time".

Section 2(1) of the *Divorce Act* and sections 1 and 37 of *The Family Law Act* define "decision-making responsibility" as "the responsibility for making significant decisions about a child's well-being, including in respect of:

(a) health;

(b) education;

(c) culture, language, religion and spirituality; and

(d) significant extra-curricular activities.

"Parenting time" is defined as the time that a child of the marriage spends in the care of a parent or person standing in place of a parent, whether or not the child is physically with that person during that entire time.

The transitional provisions in sections 100(4), (5) and (6) of *The Family Law Act* provide for the continued enforcement of orders and agreements made prior to July 1, 2023 under *The Family Maintenance Act* using the previous terminology and sets out the current equivalent terms.

Under the *Divorce Act* and *The Family Law Act* decision-making responsibility can be granted to one or both parents or can be allocated. Parenting time can also be allocated between the parents and may include a specific parenting time schedule and terms and conditions.

Parenting time may be described generally, such as "reasonable" or "as may be agreed" or may be specific and include terms and conditions such as times, places, rules for communication or, if there are concerns, non-consumption of drugs or alcohol or supervision provisions.

The term **shared parenting time** is defined for the purpose of child support in section 9 of the *Child Support Guidelines Regulation* under *The Family Law Act* (the Manitoba regulation) to be "where each parent exercises not less than 40 per cent of parenting time with a child over the course of a year."

Section 9 of the *Federal Child Support Guidelines* under the *Divorce Act* (the Federal regulation) is the same, except it refers to a spouse, rather than a parent.

The *Child Support Guidelines* also have a provision for **split parenting**. Under section 8 of both the Manitoba and the Federal regulation, split parenting where there are two or more children is where each parent (Manitoba) or each spouse (Federal) "has the majority of parenting time with one or more of those children."

An example would be where the parties have two children, and one lives with the mother and one lives with the father.

Under *The Family Law Act*, parents who have lived together after the birth of a child have joint rights to exercise parental responsibility with respect to the child including making decisions, unless and until a court orders otherwise (s. 36).

In Manitoba, the court is generally reluctant to change the status quo of joint parental responsibility on an interim basis. A common interim order may give the majority of parenting time with the child to one parent, with the other party to have parenting time at times to be agreed or at specified times, or may prescribe shared parenting time.

Courts in Manitoba have preferred to order joint custody (now called shared decision-making responsibility) on a final basis as well as on an interim basis, whenever possible. Where parents do not work together well, sometimes one parent will be granted final decision-making responsibility if they cannot agree after discussion. In an extreme case, a court may order parallel parenting with divided decision-making responsibility.

Precision and detail in a parenting order helps with parental compliance and is essential to enforcement should disputes arise.

3. Mandatory Parent Education

Rule 70.24.1(3) requires parties to actions for parenting orders, contact orders or private guardianship to attend the For the Sake of the Children program. Attendance at parent education is also one of the prerequisites for triage.

When a person files a petition/application or a notice of motion for a parenting order or private guardianship, the Registrar is required to give them copies of the *Court Requirements for Attendance at the Parent Information Program* pamphlet. Copies of the pamphlet must be served on all other parties at the same time and in the same manner as the application/petition or motion is served.

The pamphlet and further information about mandatory attendance at For the Sake of the Children is available on the *Manitoba Courts website* (Rule 70.24.1(16)(17)(18)).

Parties involved in parenting or private guardianship cases will not be required to attend the For the Sake of the Children program if the case falls into one of the following categories (Rule 70.24.1(7)):

- inter-jurisdictional proceeding;
- the parties are consenting to the child-related relief;
- the matter is unopposed;
- default is noted; or

- the parties attended the program (or a comparable program in another jurisdiction) within three years before the application or motion was filed or if a similar program was attended outside Manitoba (Rule 70.24.1(11)(12)).

This program is mandatory for all parties to a contested parenting application and an Acknowledgment of Completion form must be filed (Rule 70.24.1(22)). The Master is empowered to make orders dealing with failure to complete the program (Rule 70.24.1(20)) including costs, refusing to consider that party's evidence, striking all or part of the party's pleading or staying, adjourning or dismissing the proceeding.

The program is available in English and French. It consists of four online modules, and takes approximately four hours to complete in full. It is intended to assist parents to understand and cope with the emotional and legal implications of separation.

The For the Sake of the Children program is open to all parents and any interested individuals, and there is no cost to the participants. Registration is not required; the program can be started at any time, and may be completed at the pace that works best for the participant.

The modules present information on such topics as:

- parent-child relationships and parenting in separation and divorce;
- the effects of separation on children and ways to help children cope;
- the legal system and dispute resolution models; and
- how to develop a parenting plan.

Reflective questions are provided at the end of each module to assist participants in articulating key lessons. All four modules are required to be taken in order to obtain a completion certificate, the Acknowledgement of Completion Form, which may be filed with the court to demonstrate compliance with the prerequisite for triage.

As well as being a prerequisite in court proceedings, completion of the For the Sake of the Children program is required in order to access resolution services of the Family Resolution Service.

> More information and access to the course and the Acknowledgement of Completion form are available *online*.
>
> For more information on parenting, the Department of Justice offers an online course on parenting under the *Divorce Act* at *Information for Professionals*.

4. Assessments

Assessments by independent experts (social workers, psychiatrists, psychologists and the like) play a major role in determining some parenting disputes. The independent assessor can observe and listen to the child, something that judges are reluctant to do in the courtroom. The courts in Manitoba, as elsewhere, infrequently depart from the assessor's recommendations, and because of this, settlement very often follows the release of the report.

The court can appoint a family evaluator to prepare an assessment report for the court pursuant to section 49 of *The Court of King's Bench Act* and section 20.4 of *The Provincial Court Act*. The master may make such an order prior to a triage conference. The evaluator may be appointed by the court on its own motion or at a party's request.

The court rarely refuses to appoint an evaluator when both parents agree it is necessary, unless the parents request that the evaluation be done by Family Resolution Service. *The Court of King's Bench Act* section 49(2) specifically provides that the court may order an assessment "if satisfied that it is necessary in order to determine the best interests of the child." Although the *Divorce Act* contains no similar provision, as a matter of policy, the court has taken the position that it must be convinced that the assessment is necessary.

The evaluator that the court appoints is a Family Resolution Service family evaluator, unless the parties agree to a different person or agency. If Family Resolution Service does the assessment, and the parties previously attempted mediation with that service, a different worker will be assigned to the assessment and that worker will not have access to the mediation file on the family. As with mediation, the service is free, but the parties cannot choose who is to do the assessment.

Sometimes one of the parties resists participating in a court-ordered assessment. Generally, clients should be encouraged to cooperate as the court may draw an adverse inference if they refuse. *The Court of King's Bench Act* section 49(6) and *The Provincial Court Act* section 20.4(6) explicitly permit the court to do so.

Family Resolution Service does court-ordered assessments only. If the court refuses to order an assessment, the parties who feel they require one must make their own arrangements. This usually involves retaining a private practitioner at the parties' expense. Private assessments should have the agreement and cooperation of both parties. An assessment of one parent only has limited value.

> A parent who does not have sole decision-making responsibility should never arrange an assessment of the child without the other parent's written consent for the assessment to proceed.

Section 49(5) of *The Court of King's Bench Act* and section 20.4(2) of *The Provincial Court Act* provide that a court-appointed evaluator shall interview the parties and such other persons as may be appropriate and shall provide to the court a report containing information and opinion relevant to parenting or a related family matter that is in issue in the proceeding. Other factors for the court's consideration appear in *The Court of King's Bench Act* section 49(2) and *The Provincial Court Act* section 20.4(2).

The family evaluator will interview the parents and children in office, phone or video meetings and in home visits. They may also interview extended family and other persons, such as teachers or day care providers, whose observations may be helpful. External psychologists may be consulted.

In some cases, developmental assessments may be appropriate. Family Resolution usually refers such cases to the Child Development Clinic at Children's Hospital in Winnipeg, which does intellectual, physical and behavioural evaluations of children from birth to age seven. It is to be noted that where there is a medical referral, the clinic does not require a court-ordered assessment to do such an evaluation.

If child abuse concerns surface during an assessment, Family Resolution Service will refer the family to a Child and Family Services Agency for investigation, and the assessment will be held in abeyance until the child protection investigation is finished. Because of demand, it may take several months for the family evaluator to complete the investigation and report.

A good assessment report will focus on parenting skills and ability, the needs of the children and the children's relationship with each parent. Rule 70.17 specifies that the evaluator's report shall, unless directed otherwise, include:

(a) information the evaluator considers relevant to the matters in dispute;

(b) an opinion as to the suitability of each party to have parenting time, decision-making responsibility or contact;

(c) the views and preferences of the children;

(d) an opinion as to what plan respecting parenting would be in the best interests of the children, whether it corresponds with their views and preferences or not;

(e) the basis of the opinion; and

(f) a report upon any particular matter referred by a judge or master.

The report is provided to the court and to the parties' counsel. The court-appointed family evaluator, unlike a mediator who cannot be called due to confidentiality, may be called as a witness and may be cross-examined by both parties (*The Court of King's Bench Act,* s. 50 and *The Provincial Court Act*, s. 20.5).

Family Resolution Service also provides focused assessments in situations where there is a single major issue to resolve. A referral from court is needed and certain criteria must be met such as lower conflict levels and the absence of serious parenting concerns. The waiting

period is the same as for traditional assessments. In this process, there would be an emphasis on working with parents jointly and home visits may not be required.

5. Wishes of the Child

The *Divorce Act* (s. 16(3)(e)) and *The Family Law Act* (s. 35(3)(e)) include the child's views and preferences as one of the factors the court shall consider in determining the child's best interests giving due weight to the child's age and maturity.

In *Jandrisch v. Jandrisch* (1980), 16 R.F.L. (2d) 239, at 242, the Manitoba Court of Appeal commented about two children, aged 10 and 12*: "These are not teenagers and certainly not children mature enough to decide with what parents they are to reside. Children must not write their own order of custody nor dictate their wishes to the court."*

In *Jandrisch v. Jandrisch*, Huband J.A., stated that, while a trial judge has the discretion to interview children in private, without counsel, there must be some record of what was said in the interview and the trial judge should confine their enquiries to ascertaining the wishes of the child. However, judges seldom interview children.

How the child's wishes are communicated to the court is somewhat problematic, given that the court does not want to have children participate in the litigation in any manner. In parenting matters, testimony in court and affidavits by children are strongly discouraged.

One way of placing the child's wishes on the record is through assessment reports. The expert interviews the child and reports to the court the views the child has expressed. Rule 70.17 requires the evaluator to report the views and preferences of the children. An amicus is also sometimes appointed to speak to the best interests of the child.

Family Resolution Service provides a brief consultation service to the court to address the wishes or concerns of children aged 11 to 17 years. In situations where the voice of the child is required, a Family Resolution Service family evaluator can be accessed to meet with parents and see the child within 10 working days, where possible. The family evaluator will provide a short written response to the court within 1 – 2 months of the referral.

Unlike in child protection proceedings, the legislation does not provide for separate counsel for children in parenting disputes and the court is not usually receptive to the concept. In *J. v. J.* (1977), 4 R.F.L. (2nd) 157 at 161, the Manitoba Court of Appeal said that independent representation is not usually appropriate because it is undesirable to involve children in choosing between parents.

6. Rights to Information

The *Divorce Act* (s. 16.4) and *The Family Law Act* (s. 45) provide that any person to whom parenting time or decision-making responsibility has been allocated is entitled to request and be given information about the child's well-being, including in respect of their health and education.

Unless the parent has decision-making responsibility, this is a right to information only and is not a right to be consulted or to participate in decisions about the health, education, or religion of the child. Section 45(3) of *The Family Law Act* makes clear that the right to information is not a right to be consulted about, or to participate in, decision-making.

7. Relocation

The *Divorce Act* and *The Family Law Act* contain provisions with respect to relocation. Relocation is defined in section 2(1) of the *Divorce Act* as a change in the place of residence of a child that is likely to have a significant impact on the child's relationship with a person who has parenting time, or decision-making responsibility or a pending application for same, or a contact order respecting the child. Section 49 of *The Family Law Act* contains a similar definition.

As set out in section 16.9 of the *Divorce Act* a person with parenting time or decision-making responsibility for a child must provide at least 60 days' notice of an intention to relocate, to any other person who has parenting time, decision-making responsibility or a contact order.

Notice is given using the form in the regulations which sets out the expected date of the relocation, the new address and contact information, and a proposal as to how parenting time, decision-making responsibility, or contact as the case may be, might be exercised.

A without notice application can be brought to the court seeking an order altering the notice obligations where appropriate, including where there is a risk of family violence.

The party wishing to relocate may do so only with court authorization or if the other party has not objected within 30 days of being served, *provided there is no order prohibiting a relocation.*

Objections must be made using the form in the regulations or by making an application under sections 16.1(1) or 17(1)(b) for a parenting order or a variation of a parenting order.

The objection form sets out that the person objects to the relocation and why, and their views on the other party's proposal for the exercise of parenting time, decision-making responsibility or contact.

Section 16.92(1) sets out a lengthy list of additional factors to consider in deciding the child's best interests and whether to permit the relocation including:

- the reason for the relocation;
- its impact on the child;
- the amount of time the other party has with the child and their level of involvement in the child's life;
- the reasonableness of the new proposal with respect to the parenting order; and
- whether each party has complied with their other obligations.

There is a specific prohibition against considering whether the parent would relocate without the child or not relocate, if the relocation was not permitted.

The legislation further sets out who has the burden of proof to show whether the move is in the child's best interests or not (see ss. 16.93 and 16.94).

If the court permits relocation, it may apportion costs for the exercise of parenting time between the relocating and non-relocating party.

If a person with a contact order wishes to relocate, they are also required to provide notice to the parties with parenting time or decision-making responsibility, which includes the date of relocation, the new address and contact information and a proposal as to how contact might be exercised. An application may be made to the court without notice to modify those requirements if appropriate to do so, including where there is risk of family violence.

> More information, including the forms and detailed instructions can be found in the Department of Justice course "Relocation under the *Divorce Act*" on the Justice Canada website *Information for Professionals*.

The Family Law Act in sections 49 – 52 contains provisions that mirror those in the *Divorce Act*. Note that a parent may have parenting responsibilities pursuant to a court order, or pursuant to the presumptions under section 36.

Note also that the petition for divorce (Form 70A), joint petition for divorce (Form 70A.1) and answer (Form 70J) require any party who seeks a parenting order under the *Divorce Act* to certify that they are aware of their duties and responsibilities including to provide notice of any relocation or change of residence. The same acknowledgment is also part of the affidavit of petitioner's evidence (Forms 70M and 70M.1) where a divorce is sought on affidavit evidence. This is also required under *The Family Law Act* petition (Form 70B).

8. Change in Place of Residence

A change in place of residence is a change that is not likely to have a significant impact on the child's relationship with another party with parenting time, decision-making responsibility or contact under a contact order. What might not have "significant impact" will vary with the case, but could include a move a short distance away that would not cause a change in the existing arrangements (ss. 16.7 and 16.8 of the *Divorce Act* and s. 55 of *The Family Law Act*).

The party who intends to change residences must notify the others in writing of the date of the change and the new address and contact information. A without notice application may be brought to court to modify these requirements where appropriate, including where there is risk of family violence.

9. Applications for Parenting Orders by Non-Parents

The *Divorce Act* in section 16.1 permits non-parents to apply for an order for parenting time or decision-making responsibility on either an interim or final basis, with leave of the court only. Section 16.5 also permits such individuals to apply for a contact order with leave of the court. Section 40(1) of *The Family Law Act* provides that family members may apply for a contact order. Non-family members may apply for a contact order pursuant to section 49(4) only with leave of the court in exceptional circumstances.

The previous similar provisions of *The Child and Family Services Act* which allowed applications for access to the child by another family or non-family member of a child have been deleted.

The previous access provisions in *The Child and Family Services Act,* (now "contact" in *The Family Law Act)* made specific reference to grandparents as a result of amendments that came into force in 2006. The first Manitoba case considering those amendments is the 2009 decision of Madam Justice Rivoalen, *Goldstrand v. Goldstrand*, 2009 MBQB 40, where estranged paternal grandparents were granted access to a grandchild and a step-grandchild over the objections of the children's mother, the widow of the grandparents' deceased son.

A grandparent advisor is available at the Family Resolution Service to help families find the best solutions and services when contact and guardianship by non-parents are in dispute. The grandparent advisor service may include mediation services between parents or guardians and grandparents, when requested.

10. Child Abuse

Allegations of child abuse are made from time to time in parenting disputes. Counsel should be aware of the provisions in *The Child and Family Services Act* concerning the reporting of a child "in need of protection." Section 17(2) of *The Child and Family Services Act* sets forth illustrations of when a child is in need of protection.

Section 18(1) of *The Child and Family Services Act* states that:

> ***Reporting a child in need of protection***
> *18(1) Subject to subsection (1.1), where a person has information that leads the person reasonably to believe that a child is or might be in need of protection as provided in section 17, the person shall forthwith report the information to an agency or to a parent or guardian of the child.*

Pursuant to section 18(1.1) where a person does not know the identity of the parent or guardian of the child or the person reasonably believes that the parent or guardian is responsible for causing the child to be in need of protection, or is unable or unwilling to provide adequate protection to the child or is abusing the child, the report shall be made to a child and family services agency. The only exception is contained in section 18(2) which provides:

> ***Duty to report***
> *18(2) Notwithstanding the provisions of any other Act, subsections (1) and (1.0.1) apply even where the person has acquired the information through the discharge of professional duties or within a confidential relationship, but nothing in this subsection abrogates any privilege that may exist because of the relationship between a solicitor and the solicitor's client.*

For additional information, see the child protection materials in Chapter 9.

C. SUPPORT

1. Child Support

a) Entitlement

Spouses (which includes former spouses) can apply for child support under section 15.1 of the *Divorce Act* in divorce proceedings or corollary relief proceedings. *The Family Law Act* in section 59(1) allows for child support applications by parents, guardians, another person on behalf of a child, or the child. Section 59(2) confirms that a child support order may be made against more than one person. Both statutes provide for interim orders, as well as for final orders.

The definition of "child of the marriage" in the *Divorce Act* section 2(2) includes a child of two spouses or former spouses and any child to whom one is a parent and the other stands in place of a parent or to whom they both stand in place of a parent.

The Family Law Act also places child support obligations on step-parents and persons who stand in the place of a parent to a child (*in loco parentis*).

The nature of a step-parent's obligation to support a stepchild pursuant to the *Divorce Act* was settled by the Supreme Court of Canada in the case of *Chartier v. Chartier*, [1999] 1 S.C.R. 242. The Manitoba Court of Appeal decision of *Monkman v. Beaulieu* (2003), 33 R.F.L. (5th) 169 dealt with the nature of that obligation when it arose pursuant to *The Family Maintenance Act* (now repealed and replaced by *The Family Law Act*) in a common-law relationship situation. In both of these cases, the respective courts concluded that once an *in loco parentis* relationship is created, it cannot be unilaterally terminated.

Under the *Divorce Act*, by virtue of the definition of "child of the marriage" in section 2(1), support is payable for a child as long as the child is "under the age of majority" (18 in Manitoba) and has not withdrawn from their parents' charge, or is over the age of majority but is "unable by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life." See *Rebenchuk v. Rebenchuk*, 2007 MBCA 22. The provisions of section 56 of *The Family Law Act* are virtually identical.

The most common "other cause" is that the child is in full-time attendance in an educational program. Full-time is defined by the educational institution, often as 60% of a full course load, per term.

Child support orders made under the *Divorce Act* or *The Family Law Act* do not automatically expire when a child reaches the age of majority or is no longer dependent. Depending upon the specific terms of the order, usually an application must be made to the court for a variation order to terminate the support obligation. The Manitoba Maintenance Enforcement Program may continue to enforce a support obligation until the obligation is terminated by a subsequent court order or the recipient opts out.

The Maintenance Enforcement Program and the Child Support Service may also conduct eligibility reviews for adult children and determine that child support will no longer be enforced. For more information, see the sections on maintenance enforcement and the Child Support Service in these materials.

b) The Child Support Guidelines

i. Introduction

Before the coming into force of the *Child Support Guidelines,* judges had complete discretion respecting the quantum of child support, based on the parents' and the child's means and needs. The basic principle, as enunciated in *Paras v. Paras* (1970), 2 R.F.L. 328 (Ont. C.A.) was that the children's expenses should be divided between the parents in proportion to each parent's ability to contribute. This budget approach has now been replaced by the *Child Support Guidelines* which came into effect under the *Divorce Act* in 1997 and *The Family Maintenance Act* in 1998. The *Manitoba Child Support Guidelines* are currently found as Regulation 52/2023 to *The Family Law Act*.

Section 15.1(3) of the *Divorce Act* provides that child support orders must be made "in accordance with the applicable guidelines." Section 59(3) of *The Family Law Act* requires orders to be made "in accordance with the child support guidelines."

> The *Manitoba Child Support Guidelines Regulation* has been designated by the Federal government under section 2(5) of the *Divorce Act* as the applicable guidelines under the *Divorce Act* in Manitoba, so that, as of June 1, 1998, the Manitoba regulation has also applied to cases under the *Divorce Act* where both parents live in Manitoba. The Manitoba legislation essentially mirrors the *Divorce Act* provisions, although there are a few differences.

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See:

- *The Family Law Act Manitoba Child Support Guidelines* Regulation 52/2023.
- The Federal regulation (i.e. the *Federal Child Support Guidelines*).
- The Federal *Tables*, an online calculator and a Step-by-Step Guide.

> The complete reference manual to the guidelines is also available to lawyers, free of charge, through the Federal government. This manual can be ordered by calling (toll-free) 1-888-373-2222.

ii. Taxation

Child support payments are not taxable in the hands of the recipient, nor deductible by the payor.

Generally speaking, payors cannot claim tax credits (for example, the eligible dependent credit) for children for whom they pay support. This may be different in narrow situations where there are actually two payors.

For example, in a case of shared parenting time, care must be taken when drafting an order or agreement to provide for a payment by each parent in order to permit the claim in appropriate circumstances. An offset of payments such that only one parent is required to pay will not be sufficient. Parents must also agree in writing as to who will claim which child if there is more than one child, or if there is only one child, they may agree that the claim will alternate annually between them.

Tax advice should be sought in such situations.

c) Quantum of Support – Presumptive Rule

i. Table Amounts

> The heart of the legislative scheme is found in the tables in Schedule I. The tables stipulate the amount of support to be paid on a monthly basis for various numbers of children by payors at different income levels. The body of each regulation sets out the rules for determining child support pursuant to the tables and when the court may depart from them.

The tables were most recently amended on November 22, 2017 to reflect the impact of income tax changes as well as federal/provincial/territorial tax rules. The 2017 Simplified Tables are available *here*.

Section 3(1) of both the Manitoba and Federal regulations sets out the presumptive rule that the amount of a child support order must be in accordance with the table amounts, plus any amount determined under section 7 of the regulations (special expenses), "unless otherwise provided under these guidelines." The regulations provide otherwise in many circumstances. Departures from the table amounts are discussed below.

There are different tables for each provincial and territorial jurisdiction. The variation between the tables for each province and territory merely reflects variations in provincial/territorial income tax rates.

The applicable table is the table for the province where the payor parent habitually resides at the time the application is made or determined, unless the payor lives outside of Canada or the payor's address is unknown, in which case the table for the province where the recipient lives is used (s. 3(3) of the regulations).

The amounts in the tables depend on two factors: the payor's income and the number of children. The tables contain a self-support reserve - a threshold amount of income below which no amount of child support is payable.

The tables set out income in increments of $1000, and in order to determine the precise amount payable, it is necessary to multiply the amount of income over the interval level by the percentage set out in the table. The Federal government has also developed a more user-friendly simplified version of the table with amounts specified for $100 income intervals.

> The *online calculator* will perform the calculation for you in seconds.

Schedule I indicates that the table amounts were derived from "economic studies on average spending on children in families at different income levels in Canada." While the table amounts are based on the payor's income only, the theory is that the recipient parent will automatically be contributing to the child's support in accordance with their own means.

d) Additional Amounts: Health Insurance and Special or Extraordinary Expenses (Sections 6 and 7)

> Section 6 of both the Manitoba and Federal regulations allows the court to order a parent to maintain or acquire dental or medical insurance for the child when such coverage is available to the parent through their employment or otherwise at a reasonable rate.
>
> Section 7 of the regulations allows the court to order an additional amount over and above the table amount for "special or extraordinary expenses" on either parent's request.

Qualifying Expenses:

The regulations limit what is considered a special expense to expenses for child care, health care, education, and extracurricular activities costs. However, not all of these expenses may be claimed. Section 7(1) of both the Manitoba and Federal regulations specify the expenses that may qualify as follows:

(a) child care expenses incurred as a result of the parent's employment, illness, disability or education or training for employment;

(b) that portion of the medical and dental insurance premiums attributable to the child;

(c) health-related expenses, or any portion of health related expenses not covered by insurance, that exceed $100 annually, including orthodontic treatment, professional counseling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and medications, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

The Federal regulations define "extraordinary expenses" in section 7(1.1). The same definition appears in the Manitoba regulation in section 7(5). An expense is considered "extraordinary" if it is higher than the requesting parent can reasonably cover, taking into account the requesting parent's income, and any child support the requesting parent would receive.

Alternatively, if that definition is not applicable, the court will consider:

- the income of the requesting parent (including child support);
- the nature and number of the educational programs and extracurricular activities;
- any special needs and talents of the child;
- the overall costs of the programs and activities; and
- any other similar factor that is relevant.

The family's pre-separation spending will also be relevant, demonstrating what expenses the parents believed to be appropriate prior to separation. Thus families at similar income levels but with different pre-separation lifestyles may be treated differently with respect to special expenses.

e) Determining the Amount of an Order for Section 7 Special or Extraordinary Expenses

In determining the amount a payor parent must contribute, section 7(2) of the Manitoba regulation provides the following guiding principle:

> …the expense is shared by the parents in proportion to their respective incomes *above the threshold level of income below which no amount of child support is payable in the table for the province in which the parent habitually resides,* after deducting from the expense, the contribution, if any, from the child.

The italicized words do not appear in the Federal regulation. They were added to the Manitoba regulation because a very strict interpretation of the Federal provision results in the inequity that a parent who does not have enough income for self-support could be required to contribute to special or extraordinary expenses, whereas a parent with the same level of income would not have to pay anything for child support. The threshold level of income for a parent residing in Manitoba is $12,000. A parent earning less than $12,000 would not be required to pay child support.

While this section refers only to the parents' respective incomes, the reference in section 7(1) of the Manitoba and Federal regulations to the means of the parents and the child indicates that the court should look at a bigger picture rather than merely looking at the parents' incomes where special expenses are claimed. "Means" usually includes much more than income - the court may look at the entire financial picture of the family: income, assets, debts and expenses.

The Manitoba regulation makes it clear that the court can estimate the amount of a special expense, and that the court must order a set amount, not a proportion of an amount not yet determined.

In addition, the court need not specify the particular expenses to be covered by the amount ordered. Instead, the order merely identifies the category of the expense (i.e., the clause of s. 7 pursuant to which the order is being made), and the child or children to whom the expense relates. These provisions are contained in the opening stem of section 7(1) and in section 13, which specifies the information which must be included in a child support order.

While the Federal regulation allows the court to estimate the amount of a special expense, section 13 of the Federal regulation differs from the Manitoba regulation in that it requires that each special expense be particularized. It also allows the court to order a proportion, rather than a set amount, where the amount of an expense cannot be determined.

In drafting court orders, be aware that the Manitoba Maintenance Enforcement Program will only enforce the payment of a section 7 expense where the amount to be paid is expressed as a specific dollar amount in the court order (a "sum certain").

f) Departing from the Table Amount

i. Adult Children

If a child is over the age of majority, the court can treat the child as if they are under the age of majority or, if the court considers the table amount to be inappropriate, can order whatever amount it considers to be appropriate (s. 3(2)(b)). See *Rebenchuk v. Rebenchuk*, 2007 MBCA 22.

Generally, the closer the child's circumstances remain to those prior to attaining the age of majority, the more likely the table amount will be ordered. For example, a child in full time attendance in post-secondary education who continues to live with a parent will likely continue to receive the table amount of support, while a child in full time school but earning significant income or a child living and attending school in another province may receive support not based on the table but based on means and needs.

ii. Payor's Income over $150,000

Under section 4 of the regulations, if the payor's income is over $150,000, the court can look at the means and needs of both parents and the child and order "such amount as the court considers appropriate" in relation to the amount of the payor's income over $150,000.

The court may order a higher or lower amount than the full table amount, but the table amount is presumptive and is almost always ordered. (See *Francis v. Baker*, [1999] S.C.R. 250.)

iii. Split Parenting Time

Section 8 of both the Manitoba and Federal regulations provides that where each parent has the majority of the parenting time with one or more children, the amount of the child support order is the difference between the amounts that each parent would otherwise pay if a child support order were sought against each of the parents.

For example, if in a family with three children, one child lives with parent A and two children live with parent B, child support would be calculated by determining the amount parent A would pay to parent B for the two children in parent B's care, and the amount parent B would pay to parent A for the one child in parent A's care. The parent with the greater obligation would then pay to the other the difference between the two obligations.

g) Shared Parenting

Section 9 of both the Manitoba and Federal regulations describes the method for determining support where each parent has parenting time with a child "not less than 40% of the time over the course of a year."

Presently there is no required mathematical formula to calculate 40% and the court retains a great deal of discretion, although generally courts do not resort to counting hours.

Section 9 of both the Manitoba and Federal regulation requires the analysis of child support in cases of shared parenting to take into account:

(a) the table amounts for each parent;

(b) the increased costs of the shared parenting arrangements;

(c) the conditions, means, needs and other circumstances of each parent and child.

Section 7 expenses are not to be considered separately in cases of shared parenting but are included as part of the global support analysis.

The determination of child support in shared parenting circumstances is very difficult and a full analysis requires extreme detail. It is a lengthy and costly endeavour, frequently not justified in relation to the dollar differences at issue. See *Contino v. Leonelli-Contino*, 2005 SCC 63 and *Kolisnyk v. Loscerbo*, 2010 MBCA 1.

In practice, the vast majority of cases, whether determined by court or by agreement, usually result in support being set based on the table amounts for each parent.

Frequently section 7 expenses are also determined separately from the base child support amount.

Care must be taken in drafting support orders where parenting is shared, as under the *Income Tax Act* a payor parent may not claim an eligible dependent credit for a child for whom they pay support. There is an exception where there are two payors and therefore no one would otherwise ordinarily be able to claim the credit.

Drafting the order or agreement to provide that each parent pays support to the other (rather than fixing the offset amount to be paid) may allow each parent to claim one child (if more than one) or make the claim in alternate years, provided the agreement or order so specifies. Tax advice should be sought.

Section 81 of *The Family Support Enforcement Act* will allow the Director responsible for support enforcement to enforce the payment of the difference between the amounts that two payors owe each other pursuant to an order.

h) Undue Hardship

Pursuant to section 10 of both the Manitoba and Federal regulations, the court can deviate from the guideline amount where undue hardship exists. Either spouse or parent or person on behalf of a child may claim undue hardship.

> An undue hardship claim involves a two-stage test. Both stages of the undue hardship test must be proven.

Under the first stage, the claimant must establish that "undue hardship" would result if the guideline amount were awarded. Section 10(2) of the regulations gives a non-exhaustive list of circumstances that may cause undue hardship, such as:

- an unusually high level of debt incurred to support the family prior to separation or to earn a living;
- unusually high expenses in relation to exercising parenting time with a child;
- a legal duty to support any other person pursuant to an order or a written separation agreement;

- a legal duty to support additional children from a different relationship; or
- a legal duty support another person who cannot obtain the necessities of life due to illness or disability.

Under the second stage of the undue hardship test, section 10(3) of the regulations directs the court to deny the undue hardship claim if it is satisfied that the household of the parent claiming undue hardship would have a higher standard of living than the other parent's household if the guideline amounts were awarded. Schedule II sets out a mathematical formula the courts may use to establish relative household standards of living in an objective way.

The Comparison of Household Standards of Living Test in Schedule II requires the court to establish the income(s) of all persons in the household. The "household" is defined broadly to include new partners. The definition includes any person residing with the spouse (*The Family Law Act* refers to "parent") "who shares living expenses with the spouse or from whom the spouse otherwise receives an economic benefit as a result of living with that person, if the court considers it reasonable for that person to be considered part of the household."

The regulations do not restrict the court to the use of this test for determining relative standards of living. The court can, and may, look beyond income to all of the financial circumstances of both households in order to make a determination.

The court may make an order that departs from the table amount for a specific period of time to allow a party reasonable time to satisfy any obligation that has caused the undue hardship. The court must record its reasons for making an undue hardship order.

i) Special Provisions

Both the *Divorce Act* (s. 15.1(5)) and *The Family Law Act* (s. 59(3) and (4)) allow the court to depart from the guidelines where there is an order or a written agreement respecting the financial obligations of the parents, or the division or transfer of their property, which contains special provisions that directly or indirectly benefit the child, or if special provisions have otherwise been made for the benefit of the child.

For example, the parties might agree that the parent who does not have the majority of parenting time with the children will transfer their interest in the family home to the other parent without payment, and pay less support than mandated by the guidelines, in order to directly benefit the children by allowing them to remain in the family home, which would otherwise not be possible.

The court can only order an amount that differs from the guidelines if it is persuaded that the application of the guidelines would result in an amount of child support that is "inequitable given those special provisions." Where the court makes an order on this basis, the court must record its reasons for doing so (*Divorce Act* s. 15.1(6) and *The Family Law Act* s. 59(5)).

j) Consent Orders

The *Divorce Act* (s. 15.1(7) and (8)) and *The Family Law Act* (s. 59(6) and (7)) permit the parties to enter into consent orders for a support amount that is different than the amount that would be determined in accordance with the guidelines. The court must be satisfied that, having regard to the guidelines, reasonable arrangements have been made for the support of the child.

> Financial information will need to be provided to the court to permit the determination of whether the agreed upon arrangements are in fact reasonable.

k) Person in Place of Parent

Determining the quantum of support for a person standing *in loco parentis* to a child remains essentially at the discretion of the court. Section 5 of both the Manitoba and Federal *Child Support Guidelines* regulations directs the court to have regard to the guidelines and any other person's legal duty to support the child in ordering "such amount as the court considers appropriate having regard to the guidelines and any other parent's legal duty to support the child."

It is possible that a biological parent and a person standing *in loco parentis* could both be ordered to pay child support simultaneously for the same child.

l) Determination of Income

Accurate determination of income is critical to the guidelines' scheme. The regulations attempt to capture a parent's *actual* ability to pay by using income tax information, and adjusting it in certain ways to arrive at a total annual income figure which is reflective of a parent's ability to pay child support.

> Section 16 of the regulations provides that a parent's annual income is determined using the **sources of income** set out under the heading "Total income" in the T1 General Form, and then adjusted in accordance with Schedule III of the *Child Support Guidelines Regulation*.

Schedule III, which is incorporated by reference in the Manitoba regulation, adopts some deductions from the *Income Tax Act.* For example, employees may deduct travel expenses as set out in section 8(1)(h) of the *Income Tax Act*. Schedule III adopts some *Income Tax Act* adjustments with modifications. Section 5 of the schedule provides that the actual amount of dividends, not just the taxable amount, must be included to determine income.

The schedule does not permit the deduction of standard CPP and EI employee contributions. Paragraph 1(i) of Schedule III provides that the only Canada Pension Plan contributions and *Employment Insurance Act* premiums a parent can deduct from income are those which the parent pays on behalf of a person employed by the parent to assist in the parent's employment.

Amendments to the Federal Guidelines to deal with the treatment of split pension amounts came into effect as of June 11, 2009. These amendments provide that where a spouse is deemed to have received a split-pension amount under paragraph 60.03(2)(b) of the *Income Tax Act* such that it is included in that spouse's total income in the T1 General form issued by the Canada Revenue Agency, that amount is to be deducted from that spouse's income for the purpose of determining their annual income for child support purposes.

Because the Federal amendments include certain changes to the Schedules to the Federal Guidelines and Manitoba's regulation adopts the Federal Schedules as amended from time to time, the changes to the Schedules are also in force in Manitoba.

Section 17 of both the Manitoba and Federal regulations directs the court to determine a person's annual income on the basis of the amount of income the person will likely receive in the current year from the various sources of income. However, if the court believes that determining a person's income on that basis would not be fair, the court may look at the person's income over the past three years. Thus the regulation allows the court to consider a pattern of income and not just income at a particular point in time. This is particularly important for parents with fluctuating incomes.

When the paying parent does not have a regular job with a regular pay cheque, the determination of income can be a challenging exercise, leaving plenty of room for argument. For example, the regulations do not specifically set out or limit what can be deducted as an expense for the purpose of determining net business, professional or farming income. The *Income Tax Act* specifies what can be deducted for the purpose of that legislation, but in many instances, those deductions, although presumably reasonable from the point of view of assessing a person's ability to pay tax, may not be so reasonable from the perspective of assessing a person's ability to pay child support.

Section 19(2) of both the Manitoba and the Federal regulations provides that for the purpose of determining whether income should be imputed because a parent "unreasonably deducts expenses from income," "the reasonableness of the expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act* (Canada)."

Home office expenses are a good example of this. Section 19 of both regulations provides a way of addressing this. Under this section, the court may impute income to a spouse in such amount "as it considers appropriate in the circumstances."

Section 19 provides a non-exhaustive list of circumstances which may warrant the court imputing income. This list includes the following circumstances:

(a) the parent is intentionally under-employed or unemployed, other than as required by the needs of a child or by the reasonable educational or health needs of the parent;

(b) the parent is exempt from paying Federal or provincial income tax (for example, if the spouse is a status indigenous person whose income is earned on reserve);

(c) the parent lives in a country that has effective rates of income tax that are significantly lower than those in Manitoba (or Canada);

(d) it appears that income has been diverted which would affect the level of child support to be determined under the guidelines;

(e) the parent's property is not reasonably utilized to generate income;

(f) the parent has failed to provide income information when under a legal obligation to do so;

(g) the parent unreasonably deducts expenses from income;

(h) the parent derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income, or that are exempt from tax; and

(i) the parent is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Section 20 of both the Manitoba and Federal regulations provides that if the parent does not reside in Canada, their annual income is determined as if they resided in Canada, unless they reside in a jurisdiction with a higher effective tax rate than Manitoba (or Canada) in which case the court may take that into consideration.

Section 15(2) of the regulations allows the court to use an amount for income to which the parties have agreed in writing provided the court finds that amount to be reasonable, taking into account the financial information that is required to be filed in court. This permits parties to reach agreement as to income without requiring court determination.

m) Financial Disclosure

The rules set out the financial information required for court proceedings involving child support. King's Bench Rule 70.05 sets out the financial information that is required with an originating process. Rule 70.05.1 requires that a demand for financial information be served with an initiating pleading (Form 70D.1). Rule 70.07(4) and (8) set out the requirements for financial disclosure when filing an answer, and Rules 70.08(2) and (3) set out the requirements when filing a reply.

These provisions reflect the requirements of the Federal and Manitoba regulations and the filing requirements for Form 70D, the four part financial statement prescribed under the rules. Form 70D.1 specifically lists the disclosure to be provided by the other party and must be served with the initiating pleading.

Rules 70.05(5) and 70.07(8) additionally provide that where financial information of the petitioner or respondent is necessary to determine an amount of child support, all of the documents required by section 21 of the *Child Support Guidelines* regulations must be filed as exhibits to that party's affidavit, failing which the affidavit must contain an explanation as to why all of the required documents have not been provided.

Section 21 of both the Manitoba and the Federal regulations requires the provision of extensive financial disclosure. The Manitoba regulation adds the requirement of filing a financial statement in Form 70D, as is required by the Manitoba court rules.

The documents to be provided include:

- copies of every personal income tax return filed for the three most recent tax years;
- every notice of assessment and re-assessment issued, for the three most recent tax years;
- an employee's most recent earnings statement showing total earnings in the year to date, including overtime; and
- financial statements for the last three years for self-employed professionals and business owners.

The general rule is that a party only has to file financial information if their income information “is necessary to determine the amount of the order.” Section 21 of both the Manitoba and Federal regulations requires the parent who is applying for a child support order and whose income information is necessary to determine the amount of the order to file the enumerated documents at the time of the application. The other parent has a certain period of time within which to file the required income information if it is necessary to determine the amount of support.

This means that both parents’ income information will be required when undue hardship is claimed (s. 10), and whenever issues are raised which call on the court’s discretion, including support for adult children (s. 3), payor’s income over $150,000 (s. 4), special expenses (s. 7), and shared parenting (s. 9).

In all of these situations, the full financial picture is necessary in order for the court to determine an appropriate support obligation. Further, when a party is asking the court to make a finding of undue hardship, the court has to determine relative standards of living by reference to the Schedule II standard of living test (which requires the annual income of all persons in the household to be considered) or by some unspecified means which would likely involve full financial disclosure, including disclosure of assets.

Where relief is urgently required, Rule 70.09(1) allows a party to commence a proceeding or file an answer or reply without filing the required financial information, provided they file an undertaking to file the required financial information within 20 days. Should they fail to do so, Rule 70.09(2) provides that the court may, on motion without notice, make an order requiring that financial information be filed and served within a specific time.

Under Rules 70.09(3) and 70.09(4), where the financial information provided lacks particularity, the court may order that particulars of financial information be provided within seven days, failing which the court may dismiss the party’s action, strike out the answer or order costs.

Sections 22, 23 and 24 of both the Manitoba and Federal regulations permit a motion to compel financial disclosure where same has not been provided and permits a court to make a contempt order, award costs in an amount to fully compensate for all costs of the proceeding, or dismiss or strike out a pleading. The court may also proceed to a hearing and draw an adverse inference or deem income to the parent who has failed to disclose.

The Manitoba regulation further provides that such an application may be made without notice.

It is not necessary to file an application to vary support in order to seek financial disclosure. Once an order has been made, a spouse/parent against whom a child support order has been made is required to provide financial disclosure to the recipient spouse/parent, upon request, on an annual basis.

Section 25 of the Federal regulation and sections 21(6) and 21(3) of the Manitoba regulation specify the documents which must be provided. This includes updated documents required under section 21 (tax returns, etc.), updated information respecting special expenses (where such expenses have been ordered to be paid), and updated information regarding undue hardship, where a finding of undue hardship has been made.

Section 58 of *The Family Law Act* contains a similar obligation to provide financial disclosure and permits the court to order disclosure from the parent or their partner, employer, principal or other person who has the information, and provides for a penalty of up to $5000 for any non-complying person. Section 74 of *The Family Law Act* also confirms that the provision of updated financial disclosure may be ordered as part of a child support order.

n) Form of Orders

Section 13 of the regulations specifies the information that must be contained in a child support order. A child support order must state:

- the name and birth date of each child to whom the order relates;
- the income of any parent/spouse whose income is being used to determine the amount of the child support order;
- the table amount, where applicable and/or the amount determined for adult children;
- information regarding special expenses; and
- the first payment date and the date for subsequent payments.

The order must also set out any amount determined otherwise (for example, for children whose parenting is shared, or in cases of undue hardship).

o) Variations/Recalculations

Variation of child support is permitted under section 17 of the *Divorce Act* and section 61 of *The Family Law Act*.

> Both section 17(4) of the *Divorce Act* and section 61(2) of *The Family Law Act* require that the court be satisfied that a change in circumstances as provided for in the guidelines has occurred prior to making a variation order.

Section 14 of the regulations provides that the coming into force of the guidelines (i.e., the regulations) is deemed to be a change in circumstances. Similarly, the coming into force of the updated Federal child support tables on December 31, 2011 and

subsequently on November 22, 2017, may constitute a change of circumstances where application of the updated tables would result in a different child support amount. Thus, pre-guidelines orders may be varied without the necessity of proving another change in circumstances.

For orders made under the guidelines and determined on the basis of table amounts or otherwise, the test will be any change in circumstances that would result in a different child support order.

Normally any variation of a child support order requires one of the parties to commence court proceedings to vary. However, both the *Divorce Act* and *The Family Law Act* contain provisions designed to make the updating of guidelines orders faster and simpler. Section 25.01 of the *Divorce Act* permits the province to establish a provincial child support service to recalculate support at regular intervals. These functions must be performed by the child support service in accordance with the applicable guidelines.

p) Child Support Service

In July 2020 *The Child Support Service Act*, C.C.S.M. c. C96 came into force. To facilitate both initial and recalculation decisions for child support, the Child Support Service initially established under *The Family Maintenance Act* was continued under *The Child Support Service Act.* Prior to July 2020, it operated as the Child Support Recalculation Service.

The Child Support Service has expanded authority and can make initial orders for table amounts of child support and section 7 special expenses, recalculate child support, recalculate child support for adult children based on the tables, and can deem income based on minimum wage or deem income increases where financial disclosure has not been provided. It cannot make initial orders or recalculate where discretion would be required, such as in a case of undue hardship.

Pursuant to the *Child Support Service Regulation* it also can recalculate support in cases of shared parenting in accordance with the parents' table amounts, but cannot consider the discretionary factors set out in section 9(b) and (c) of the *Child Support Guidelines*.

Applications are made by parents directly to the Child Support Service at no cost. Procedures and sets of required forms are available on the Family Law Manitoba website and are described in the Appendix at the end of this chapter.

Initial calculations (s. 3(2) of *The Child Support Service Act*) require that:

(a) the parents live separate and apart and the child's living arrangements have been agreed by consent or acquiescence;

(b) there is no court order or family arbitration award or child support agreement that is eligible for recalculation.

The order can be recalculated if it was made pursuant to the *Manitoba Child Support Guidelines*, or if made under the *Divorce Act* in another province (or is an order registered in Manitoba under *The Inter-jurisdictional Support Orders Act*) where the payor resides in Manitoba, or the recipient resides in Manitoba and the payor agrees to recalculation (s. 2).

Provided the eligibility criteria are met and the applicant has provided all required information (s. 5 of the *Child Support Service Regulation*) the officer will issue a Notice of Calculation which must be personally served on the respondent (ss. 6 and 7). A substitutional service order is also possible (s. 8).

Once served, the respondent has 21 days to provide financial disclosure.

Income is determined pursuant to section 10 of the regulation based on the financial disclosure. In the event disclosure is absent or lacking the officer may determine income based on past income, previous employment or work history or education of the payor. Payroll information may be sought if the employer is known. If no information can be obtained, minimum wage income can be deemed.

Sections 11-13 of the regulations set out limitations on calculating child support, including where there is a reasonable claim for undue hardship, or where either parent has corporate or partnership income.

Section 7 expenses can only be calculated where the parents have agreed on the nature and amount of the expenses.

Child support in cases of shared parenting can only be based on *Child Support Guidelines* section 9(a), the table amounts for each parent.

The commencement date for child support can be no earlier than the application date.

The Child Support Service can also terminate recalculating child support for an adult child if the recipient voluntarily consents in writing, if the Maintenance Enforcement Program advises that an adult child no longer is eligible for enforcement or if the service is not satisfied the adult child is eligible for recalculation.

The content required in the decision is set out in section 14(1) of the regulation and must use Standard Clauses.

The decision will be registered in court (s. 3(7) of *The Child Support Service Act*) and a copy will be provided to the recipient, the payor and Maintenance Enforcement.

If a payor or recipient disagrees with the decision, they may apply to court to vary, suspend or terminate the child support order under *The Family Law Act* or the *Divorce Act*, or to set aside the decision. Such an application is not a stay of the decision unless the court so orders.

The Child Support Service can recalculate a child support order, a previous child support calculation by the service, a family arbitration award for child support, or a child support agreement that provides for recalculation (s. 5(1) of the Act).

Pursuant to the regulations, recalculation can be automatic (s. 17), upon application (s. 19), or can be an early recalculation (s. 22(1)). Early recalculation is available at least 6 months after the last calculation provided that there is a significant change in income or circumstances that warrant it.

Generally, recalculation is performed one year after the initial child support decision and every 2 years thereafter (s. 21).

Parties may also opt out of recalculation.

Parents receive a Notice of Upcoming Recalculation 40 days prior to recalculation (s. 25(1) of the regulations) which provides general information and imposes a 30 day deadline to make a request for section 7 expenses.

Parents also receive a request for information, sent on the recalculation start date (s. 26(1) of the regulations). This advises whether any section 7 expenses are being requested and provides particulars and details the financial information that is to be provided, the deadline and the consequences of non-compliance.

If updated financial information is not provided and cannot be obtained, the officer may deem income in accordance with sections 28(1) and (2) of the regulations at the greater of minimum wage or the income amount in the current order, or the current income plus the applicable percentage (10 - 30%) based on the length of time since the last income determination.

Retroactivity is limited to the date of the last calculation (ss. 30(5) to 30(7) of the regulations). There is no retroactive recalculation prior to the application for recalculation (s. 19), or if there was a request for no recalculation (s. 24), or if income is deemed (s. 28).

If both parents do not cooperate with the provision of information in relation to shared parenting or special expenses the officer may decline to recalculate (s. 27(1) and s. 25(3) of the regulations).

Recalculation for *Divorce Act* orders is governed by sections 34 and 35 of the regulations. Recalculation is not available if the order imputed income other than under clause 19(1)(b) or (c) of the *Child Support Guidelines* (relating to spouses who are exempt from income taxes or pay taxes at a significantly lower rate), unless the

order states that the amount may be recalculated and provides the formula to be applied.

For further detailed information about the Child Support Service, email *CSRS@gov.mb.ca* or visit Manitoba Justice's Family Law *website*.

q) Retroactive Child Support

In the July 31, 2006 decision of the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, the court considered the circumstances justifying a retroactive award of child support. The court concluded that the child still needed to meet the definition of "child of the marriage" at the time of the application.

This decision provided that some of the factors the court should consider in determining whether or not to make a retroactive child support order were:

(i) the reasons for the recipient parent's delay in asking for an order of child support (or a variation in the amount of child support);

(ii) any misconduct on the part of the paying parent (i.e., hiding income, pressuring the recipient not to seek an increase in support);

(iii) any hardship suffered by the child(ren) as a result of the paying parent's shortfall in support; and

(iv) any hardship that the paying parent might suffer if forced to pay a retroactive child support order.

In determining the appropriate date for a retroactive order to begin, the Supreme Court held that the start date should be the date the recipient parent let the paying parent know that child support needed to be addressed, up to a maximum of three years prior to the date of the recipient parent's application to court.

In *Michel v. Graydon*, 2020 SCC 24, the Supreme Court of Canada began to refine the DBS principles. The court confirmed that a child does not have to be a dependent child at the time of the application for a retroactive variation. It also broadened the concept of blameworthy conduct to include a failure by the payor to disclose income changes. It also recognized that delay by a recipient could include difficulties with access to justice.

The principles were further refined by the Supreme Court of Canada in *Colucci*, 2021 SCC 24. Where a retroactive variation is sought to reduce support, it is based on a change of circumstances that took place in the past. The presumptive start date would be back to the date of effective notice, being the date the payor provided notice

of a decrease in income and sufficient reliable evidence, up to 3 years before formal notice (a court application) (see paragraph 113).

Requests for retroactive downward variations are usually accompanied by a request to remit arrears. If retroactive variation is permitted, the court will revise the support order using the *Child Support Guidelines*, thus changing the arrears.

If retroactive variation is denied, and no material change is found, the court will take a strict approach. The onus is on the payor to prove that there is no current or future ability to pay the arrears, even if there are terms such as a flexible or creative payment plan. Rescission of arrears in such a case is a last resort in exceptional cases.

Where a retroactive variation is sought to increase support, *Colucci* provides that the onus is on the recipient. However, the payor has the obligation to provide full financial disclosure as discussed earlier.

The presumptive start date will be the date of effective notice, provided that formal notice (i.e., filing a court application) is made within 3 years. Unlike in requests to vary support downward, there is a low standard for "effective notice" which could be the recipient simply broaching the topic with the payor. If there is no effective notice, the presumptive start date is the date of formal notice.

Delay by the recipient in requesting an increase is a minor factor; crucial is the potentially blameworthy conduct of the payor in failing to disclose income changes (see paragraph 114). If retroactive variation is granted, support will be quantified using the *Child Support Guidelines*.

The Court can also depart from the presumptive start dates for the variation, applying the DBS principles, where appropriate. For example, in a downward variation this could include a finding that the payor had a reasonable reason for the delay which could justify an earlier start date, or hardship to a child which could call for a later start date.

2. Spousal or Common-Law Partner Support

a) Introduction

Spouses and former spouses can apply for support in divorce proceedings or corollary relief proceedings under the *Divorce Act* both on an interim or final basis (s. 15.2).

In *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.), the court rejected a self-sufficiency or clean break model of spousal support in favour of a compensatory model which considers the consequences of the relationship on the economic positions of the parties. The court said that all the factors and objectives listed in the *Divorce Act* (now in ss. 15.2(4), 15.2(6) and 17(7)) must be considered, and that none have priority.

In *Bracklow v. Bracklow* (1999), 44 R.F.L. (4th) 1, the Supreme Court stressed that there is no single model of spousal support. McLachlin J., at paragraph 32, stated that it is "a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court."

Spouses and unmarried cohabitees can apply for both interim and final spousal support under *The Family Law Act*, but unmarried cohabitees must be common-law partners, having cohabited in a conjugal relationship for at least three years, or for at least one year and together being the parents of a child, or having registered their common-law relationship under section 13.1 of *The Vital Statistics Act* (see ss. 1, 63, 64, 65 and 69).

b) Principles of Spousal Support

Section 15.3(1) of the *Divorce Act* and section 71(1) of *The Family Law Act* direct the court to give priority to child support when it is considering applications for both child and spousal support.

The court must record its reasons where giving priority to child support results in a smaller or no spousal support order (s. 15.3(2) of the *Divorce Act* and s. 71(2) of *The Family Law Act*). In this event, any subsequent reduction or termination of the child support will be considered a change of circumstance in a subsequent application to vary spousal support (s. 15.3(3) of the *Divorce Act* and s. 71(3) of *The Family Law Act*).

Spouses have an obligation to take all reasonable steps toward self-sufficiency in so far as that is practical and reasonable in the circumstances. Note that this is not a strict obligation to *become* self-sufficient.

The Court must take into account all relevant factors in assessing spousal support. These include the conditions, means and needs of each party, the length of time they cohabited, their roles in the relationship and any agreement, arrangement, or order relating to support. (See s. 15.2(4) of the *Divorce Act* and s. 70 of *The Family Law Act* which includes a lengthy list of circumstances to consider).

The objectives of a spousal support order are set out in the *Divorce Act* section 15.2(6):

> *(a) recognize any economic advantage or disadvantage arising from the marriage or its breakdown;*
>
> *(b) apportion the financial consequences of raising children over and above that considered in child support;*
>
> *(c) relieve any economic hardship of marriage breakdown;*
>
> *(d) insofar as is practical, promote economic self-sufficiency of each spouse within a reasonable period of time.*

> The first two objectives relate mostly to a compensatory model of spousal support, where the spouse is entitled to support as compensation for losses to their ability to be financially self-sufficient as a result of the marriage.
>
> The last two objectives relate mostly to a non-compensatory model of spousal support, where the spouse's entitlement to support relates to losses occasioned by the marriage breakdown, rather than the marriage itself.
>
> In most cases, entitlement will have both compensatory and non-compensatory elements.

Spousal support may be awarded on a lump sum or periodic basis. Most orders are for periodic support. Lump sum orders are fairly rare. They may be used in circumstances where there is an ability to pay a lump sum and there can be a "clean break", where the recipient has a particular need for a lump sum, or where the payor is unlikely to pay on a periodic basis.

c) Taxation

Unlike child support, spousal support payments are taxable in the hands of the recipient and tax deductible by the payor in the year received and paid, provided:

- that the parties are living separate and apart;
- that payments are periodic; and
- that payments are paid pursuant to a written separation agreement or court order.

Canada Revenue Agency *P102 Support Payments* defines "court order" as a "decree, order, or judgment made by a court, such as a family law court or other competent tribunal." It is not clear whether a family arbitration award is included, and thus whether payments pursuant to a family arbitration award are tax deductible/included. It may be wise to enter into a court order to accord with an arbitral award.

A written agreement may also include, for the purposes of tax deductibility/inclusion, payments that were made prior to the signing of the agreement, but in the same calendar year or in the previous calendar year, and paid in contemplation of the agreement. See Canada Revenue Agency P102 Support Payments.

Lump sum payments are not tax deductible or included for tax purposes.

A payment which is a compilation of past due periodic payments can continue to be classed as periodic payments; the acceptance of a lesser lump sum payment in satisfaction of periodic payments would be a lump sum payment.

d) Spousal Support Advisory Guidelines: A Brief Summary of the Basics

There are no mandatory guidelines comparable to the *Child Support Guidelines* for spousal support. The *Spousal Support Advisory Guidelines* (SSAG) are advisory only; however they are widely and most commonly applied.

The SSAGs do not determine entitlement, which must first be proven. The SSAGs are a tool to help quantify the amount and duration of spousal support.

The *Spousal Support Advisory Guidelines* and the Revised Users Guide provide details on how to use the SSAG.

There are two formulas for spousal support under the SSAG, the "without child formula" and the "with child formula". Both formulas offer a calculation of quantum (based on incomes) and of duration. Income determination, including imputation, usually accords with the principles set out in relation to child support in the *Child Support Guidelines*.

The **without child** formula is based on the length of the cohabitation relationship and the difference between the parties' gross incomes.

The support amount ranges from 1.5 - 2% of the income difference multiplied by the years of cohabitation, to a maximum of 50% of the income differential, per year.

For example, if Rory earns $100,000 and Morgan earns $80,000, the income differential is $20,000. If they cohabitated for 10 years, 1.5 - 2% times 10 years would lead to 15 - 20% of the income differential of $20,000. The recommended annual gross support (tax deductible/included) would be between $3,000 - $4,000 or $250 - $333 per month.

The basic recommended duration is 0.5 – 1 year for each year of cohabitation. The duration is indefinite where the cohabitation was 20 years or more, or where the cohabitation was five years or more and the years of cohabitation plus the age of the recipient at the date of separation total 65 or greater.

In the example above, the duration would be 5 - 10 years. If Morgan was 56 at the time of separation, the duration would be indefinite (age 56 + 10 years cohabitation = 66).

Note that indefinite does not mean "permanent" or "infinite" but rather "duration not specified". The award of support is variable under appropriate circumstances pursuant to the *Divorce Act*. See *Cadigan v. Cadigan*, 2007 MBCA 28.

Exactly where the support falls within the range is dependent on the court's assessment of the strength of the various aspects of the compensatory and/or non-compensatory claims and other factors relating to need, ability to pay, property division, debt and incentives toward work and the promotion of self-sufficiency.

The **with child formula** is significantly more complex and most practitioners rely on a computer program such as ChildView or DivorceMate to perform the calculations.

Since child support takes priority over spousal support, it is taken into account first, and must be deducted from the payor's income prior to considering spousal support.

Since child support is not tax deductible, it is paid from the payor's net income. Therefore, the payor's gross income must be reduced to net income by subtracting the payor's income tax, CPP and EI premiums and any other adjustments. Child support (including s. 7 expenses) is then subtracted to yield the payor's Individual Net Disposable Income (INDI), or the amount the payor has to spend on themselves after meeting their responsibilities to the government and to their children.

The same calculation is then made with respect to the recipient's income, to yield the recipient's INDI (the amount of disposable income they have to spend on themselves). This also entails subtracting the amount that the recipient is notionally paying themselves for child support based on the *Child Support Guidelines* tables for their income.

> The range of the amount of spousal support determined under the **with child** formula will be the gross amount (a before tax amount) necessary to leave the recipient with 40 - 46% of the parties' combined INDIs (an after tax amount).

Because spousal support will be taxable to the recipient and deductible to the payor, each of whom may be in a different tax bracket, the calculations are complex, and the use of a computer program (or a tax expert) is essential. It will calculate the various amounts of tax deductible/included support that will be necessary to leave the recipient with 40 – 46% of the parties' combined individual net disposable incomes.

The duration range is from 0.5 years per year of cohabitation or the date the youngest child starts school full time (the lower end of the range) to one year per year of cohabitation or the date the youngest child finishes high school (the upper end of the range).

Where in the range the quantum or duration is fixed is determined in the court's discretion in consideration of factors such as the strength of any compensatory claim, the recipient's needs (age, earning capacity), ages and number of children, the payor's needs and ability to pay and the promotion of self-sufficiency.

At the present time, the court rarely, if ever, specifies a finite duration for support in an initial support order, leaving that issue for a future variation application.

See the Appendix for a sample printout showing both child and spousal support calculations using the ChildView program, and an explanation of the information it contains.

Support can also be "restructured", where amounts may be traded off against duration. Support in a lower amount might be paid for a longer duration. Support might be higher for a shorter period of time, or reduced to a lump sum payment taking into account its tax free nature.

Note that it is possible, depending on the number of children and the income levels, for a parent who has the majority of parenting time to have a greater net household income than the parent who is paying child support. This should not be surprising, for example in a case where the recipient and several children live in one household, and only the payor resides in the second household.

In cases of shared parenting time, an important consideration is the amount of spousal support that will leave each household with approximately equal net disposable incomes. This means that the amount of spousal support could be capped at the maximum amount required to do so. The intent is to arrive at support that allows the children to enjoy similar standards of living in each household. Therefore, after child support is determined, spousal support can be determined within a range that includes the amount necessary to equalize household net incomes.

There are numerous other considerations in cases of shared parenting, split parenting, adult children, second families, re-partnering, post separation income increases, illness and in cases where the party paying spousal support has the majority of parenting time.

All of these issues (and more) are set out in the SSAG and the Revised Users Guide. Both can be found on the Department of Justice *website* under the heading Spousal Support.

D. ORDERS OF PROTECTION

1. *The Domestic Violence and Stalking Act*

The Domestic Violence and Stalking Act ("the Act") provides persons subjected to domestic violence and stalking the ability to request different types of civil protective orders to address their protection needs.

The Act creates two different types of orders: protection orders, obtained from a designated justice of the peace of the Provincial Court of Manitoba, and prevention orders, obtained from the Court of King's Bench.

> Domestic violence is defined in section 2(1.1) of the Act as an intentional, reckless or threatened act or omission that causes bodily harm or property damage or a reasonable fear of same, conduct that reasonably constitutes psychological or emotional abuse, forced confinement or sexual abuse.
>
> Stalking is defined in section 2(2) as harassment and repeated conduct that causes the other person to reasonably fear for their own safety. Examples of such conduct include following, watching, communicating or threatening the person or anyone known to them and includes using the internet or electronic means to do so.

Persons in certain categories of relationships who have been subjected to domestic violence can apply for a protective order under the Act. Section 2(1) of the Act sets out these categories of relationships.

Domestic violence occurs when a person is subjected to the specified acts or omissions by another person who:

(a) is cohabiting or has cohabited with the person in a spousal, conjugal or intimate relationship;

(b) has or had a family relationship with the person, in which they have lived together;

(c) has or had a family relationship with the person, in which they have not lived together;

(d) has or had a dating relationship with the person, whether or not they have ever lived together; or

(e) is the other parent of their child under Part 2 of *The Family Law Act* or by adoption, regardless of their marital status or whether they have ever lived together.

In addition, a person who has been subjected to stalking can apply for relief, regardless of the nature of their relationship to or with the stalker (if any).

An adult can also apply for a protection order on behalf of a minor who is being stalked or subjected to domestic violence and the committee or substitute decision maker for a mentally incompetent individual can also apply for that person if the appointment gives that authority.

a) Protection Orders

Persons subjected to domestic violence or stalking can seek protection orders from designated justices of the peace quickly, simply and inexpensively, without notice to the respondent. Applicants must provide evidence under oath about the stalking or domestic violence.

Section 6(1) of the Act provides that a justice of the peace may grant a protection order where the justice determines that:

(a) domestic violence or stalking is occurring or has occurred;

(b) the person seeking relief believes it will continue or resume;

(c) the person seeking relief requires protection because there is a reasonable likelihood that the domestic violence or stalking will continue or resume; and

(d) due to the seriousness or urgency of the circumstances, the protection order should be made without delay.

The justice of the peace must also consider specific risk factors relating to the occurrence of domestic violence or stalking when determining an application for a protection order. These include the history of domestic violence or violence against animals, the nature of the violence, circumstances of the respondent including mental health or substance abuse and the circumstances of the applicant including health, pregnancy or economic dependence.

Protection orders can be granted even if any of the following circumstances exist:

- a protection order was previously granted against the respondent, regardless of whether they complied with it or not;
- the respondent no longer resides with the applicant or in the same community;
- if the respondent is incarcerated when the application is made or criminal charges have been laid against them;
- the applicant resides in an emergency shelter or safe place; or
- the applicant has a history of resuming the relationship with the respondent.

Protection orders may contain any of the following provisions contained in section 7(1) that the justice of the peace considers necessary or advisable:

- prohibiting the respondent from following the applicant or others;

- prohibiting the respondent from communicating with the applicant or others;
- prohibiting the respondent from attending at any place that the applicant or others happen to be or regularly attend, which may include the applicant's residence or place of employment;
- where the respondent is prohibited from communication with or contacting the applicant or attending at a place that the applicant is, an exception can be included to permit the respondent to attend court or other court-related proceedings such as family mediation where the applicant will be present. If the exception is included, there are some specific conditions, such as the respondent remaining at least 2 metres away from the applicant and not communicating with the applicant unless the judge or mediator is present;
- giving the applicant or respondent temporary possession of necessary personal effects;
- peace officer assistance to remove the respondent from the applicant's residence and/or to ensure the orderly removal of personal effects;
- requiring the respondent to turn over any firearm, ammunition or any specified weapon that they possess and authorizing the police to search for and seize such firearms, ammunition or weapon.

One of the significant amendments made to the legislation in 2016 is a mandatory firearms ban in specific circumstances. If a protection order is granted and the justice of the peace determines that the respondent is in possession of a firearm, the order must include a provision requiring the respondent to turn over any firearm and ammunition that they possess, failing which the police will be given the authorization to search and seize such firearms and ammunition.

The Act was also previously amended in 2005 in relation to, among other things, the expiry of protection orders. Protection orders granted before October 31, 2005 continue in force indefinitely, unless they are varied or revoked by a subsequent order. However, all protection orders granted since October 31, 2005 contain expiry dates.

A protection order will ordinarily expire 3 years after the date it is granted, but the designated justice may grant a longer term order if satisfied that protection is required for a longer time. If a protection order has expired or will expire in the next 3 months and there is a continuing need for protection, the applicant may reapply for a new protection order. Compliance by the respondent with a prior protection order will not in itself mean that the applicant is no longer in need of protection.

While applications for protection orders are most commonly made in person by an applicant, individuals can also apply either in person or by telephone with the assistance of a police officer, a lawyer or a person designated by the Minister of Justice for this purpose. These protection order designates (or PODs) work in shelters,

resource centres and other community service agencies and have received specialized training to assist applicants to apply for protection orders and to do safety planning. Persons needing immediate relief can request orders outside of regular office hours by a telecommunication application with the assistance of a police officer, a lawyer or a POD.

Once a protection order is granted, it is transmitted to an appropriate centre of the Court of King's Bench, filed in that centre, and becomes a King's Bench order and is enforceable as such.

Although protection orders are made without notice, a respondent can apply within 20 days of service of the order, or such further time as a judge on application may allow, to request to have the order set aside by the Court of King's Bench and have the opportunity to present evidence.

Section 12 of the Act deals with the nature of hearings when a respondent applies to set aside a protection order. Section 12(2) provides that "the onus is on the respondent to demonstrate, on a balance of probabilities, that the protection order should be set aside or that an item that was delivered up or seized pursuant to the order should be dealt with in the manner requested."

Section 12(3) states that the person who applied for the protection order may present additional evidence at the set aside hearing and that person's evidence "before the designated justice of the peace shall be considered as evidence at the (set aside) hearing."

In 2007, in *Baril v. Obelnicki*, 2007 MBCA 40, the Court of Appeal provided direction regarding the proper interpretation of section 12(2). Rather than imposing a legal burden on the respondent to set aside an ex parte (without notice) protection order, section 12(2) must be interpreted to impose on the respondent only an evidentiary burden, that is, to bring forward evidence to demonstrate that, on a balance of probabilities, it is just or equitable that the order should be set aside.

b) Prevention Orders

The second type of order created under the Act is a Court of King's Bench prevention order. When making prevention orders, judges can grant any of the types of protective relief available from designated justices of the peace. In addition, the court can include any other such terms or conditions it considers appropriate to protect the applicant or to remedy the domestic violence or stalking. These additional conditions can include:

- sole occupation of the family residence;
- temporary possession of specified personal property, such as household goods, furniture or vehicles;

- seizure of items used by the respondent to further the domestic violence or stalking;
- recommending or requiring the respondent receive counselling; and
- prohibiting the respondent from damaging, or dealing with property in which the victim has an interest.

As well, judges of the Court of King's Bench can order the respondent to pay compensation for any monetary losses the applicant or any child of the applicant has incurred due to the domestic violence or stalking (such as expenses relating to new accommodations or moving, for counselling, medical costs, security measures, lost income or legal fees in connection with the application).

Where the court is satisfied that a respondent has operated a motor vehicle to further the stalking or domestic violence, the court can order the respondent's driver's licence be suspended and prohibit the respondent from operating a motor vehicle.

The Act allows applications to be made for interim prevention orders, including interim prevention orders without notice to the respondent, if the court feels an order is required on that basis to ensure the applicant's safety.

Section 19 of the Act provides that any time after a protection order is filed with the Court of King's Bench or a prevention order is granted, the court may, on application by either party, delete or vary any condition in the order, or add terms or conditions. The court can also revoke the order. A judge must be satisfied that it is fit and just to do so before deciding to vary or revoke the order.

The Act also provides in section 21 that the applicant or a witness may request, in relation to either a protection order or a prevention order, that the court impose a publication ban, prohibiting the publication or broadcast of any information that might identify a party, a witness or any child.

c) Registration of Orders on the Canadian Police Information Centre (CPIC) System

Protection orders made by designated justices of the peace are automatically forwarded by the court to the police for registry on the CPIC system. Similarly, prevention orders granted by a judge of the Court of King's Bench are also forwarded to the police to be registered on the CPIC system.

It is important that counsel representing individuals who have obtained prevention orders or relief under section 81(1) of *The Family Law Act* (which bars contact or communication) provide the necessary information to the court to ensure that new orders containing protective relief are in fact registered on CPIC.

The notice to the profession and reference guide can be found on the Manitoba Courts *website* under Notices and Practice Directions or directly at *Notice to the Profession* for the Court of Queen's Bench, June 5, 2002.

d) Courts

Applications to set aside or vary protection orders under *The Domestic Violence and Stalking Act,* whether stand-alone applications or those that are filed concurrently or subsequently as part of family proceedings will be set down on the Protection Order Hearing List, which is held on alternate Wednesdays at 2:00 p.m.

A transcript of the hearing before the judicial justice of the peace and affidavits must be filed prior to the first appearance on the list. Personal appearance by the parties and counsel is required. If the matter cannot be resolved at that time in a summary manner, it will be pre-tried and readied for a contested hearing. The hearing date will be set within 30 - 60 days.

It is not a prerequisite that the set aside/vary application be determined prior to a triage conference. The triage judge may set a prioritized hearing. If a triage conference is already set, the matter will be adjourned to the triage conference.

The judge presiding at the Protection Order Hearing List may be a General Division or Family Division judge, and may make referrals to Victim Services for safety planning and counselling, awaiting the hearing.

The process is described in the February 13, 2020 *Practice Direction* – Proceedings Under *The Domestic Violence and Stalking Act* – Applications to Set Aside/Vary a Protection Order (General and Family Divisions).

Note that the procedure described in the December 17, 2018 *Practice Direction* – Comprehensive Amendments to Court of Queen's Bench Rules (Family) effective February 1, 2019 at page 29 which differentiated between stand-alone applications and those connected to family proceedings is **no longer operative**.

2. Relief under *The Family Law Act*

Section 81of *The Family Law Act* enables a judge of the Provincial Court or the Court of King's Bench to make orders prohibiting or restricting contact and communication between spouses, common-law partners, or persons who have lived together in a marriage-like relationship. Section 100(10) *of The Family Law Act* provides that existing orders made under *The Family Maintenance Act* (now repealed) will also continue in force.

Former clauses 10(1)(c) (prohibition) and 10(1)(d) (non-molestation) of an earlier version of *The Family Maintenance Act* enabled spouses and persons who resided together in certain cohabitation relationships to apply for orders of protection. Although both clauses 10(1)(c) and (d) were repealed September 30, 1999 by a consequential amendment in that Act, many old system prohibition and non-molestation orders continue to exist. The former clauses provided as follows:

> ***Order***
> *10(1) Upon application under this Part, a court may make an order containing any one or more of the following provisions and may make any provision in the order subject to such terms and conditions as the court deems proper: . . .*
> *(c) That one spouse shall not enter upon any premises where the other spouse is living separate and apart.*
> *(d) That one spouse shall not molest, annoy or harass the other spouse or any child in the custody of the other spouse.*

Orders that were granted under section 10(1)(c) are referred to as prohibition orders and orders that were granted under section 10(1)(d) as non-molestation orders. These types of orders usually contained peace officers' assistance clauses. Section 10.1(1) of *The Family Maintenance Act* (now repealed) provided that despite the repeal of these clauses, applications for relief pursuant to them that were still pending on September 30, 1999 may be continued as if the clauses remain in effect. It further provided that existing orders under these provisions continue in force. The transitional provisions in section 100 of *The Family Law Act* provide that any such orders made under *The Family Maintenance Act* remain in effect.

3. *The Child Sexual Exploitation and Human Trafficking Act*

The Child Sexual Exploitation and Human Trafficking Act ("the Act") came into effect on April 30, 2012. The Act provides that protection orders can be granted in relation to child victims of sexual exploitation or adult or child victims of human trafficking.

In the case of children, a protection order can be requested by a parent, a child's legal guardian or an appropriate child welfare agency. Such protection orders can prohibit the respondent against whom the order is made from having contact with a particular person, following them or attending at the subject's residence, school or workplace. The protection order will normally be granted for three years but could be longer, or renewed, if necessary.

A protection order can be granted upon application to a judicial justice of the peace of the Provincial Court of Manitoba. The application process for a protection order is similar to the

procedure found in *The Domestic Violence and Stalking Act*. Applicants must provide evidence, under oath, about the human trafficking or child sexual exploitation. The court can grant a protection order if it finds that:

- human trafficking or child sexual exploitation has occurred;
- there are reasonable grounds to believe that it will continue; and
- the victim needs immediate or imminent protection.

For the purposes of the Act, a person commits human trafficking of another person when

(a) the person:

   i. abducts, recruits, transports or hides that person; or

   ii. controls, directs or influences the movements of that person; and

(b) uses force, the threat of force, fraud, deception, intimidation, the abuse of power or a position of trust, or the repeated provision of a controlled substance (ex: drugs/inhalants/alcohol), to cause, compel or induce that person to:

   i. become involved in prostitution or any other form of sexual exploitation;

   ii. provide forced labour or services; or

   iii. have an organ or tissue removed.

Child sexual exploitation occurs when a person compels a child to engage in sexual conduct by the use of force, the threat of force, intimidation, the abuse of power or a position of trust, or in exchange for a controlled substance such as drugs or alcohol.

Human trafficking is a tort and an action can be brought against the perpetrator without proof of damages. Remedies may include an award for general, special, aggravated or punitive damages, an accounting of profits as a result of the action, and an injunction.

4. Extra-Provincial Orders

Under *The Enforcement of Canadian Judgments Act,* civil protection orders granted by courts from other provinces or territories in Canada can be enforceable and deemed to be an order of the Manitoba court, whether or not the order is registered here. This legislation is based on a model uniform Act developed by the Uniform Law Conference of Canada. As other Canadian jurisdictions enact legislation along this model, Manitoba protective orders will become enforceable outside the province, should the applicant relocate elsewhere in Canada.

To date, four other provinces have enacted similar legislative provisions regarding the enforceability of civil protection orders made by courts in other Canadian jurisdictions: Saskatchewan (the *Enforcement of Canadian Judgments Act,* 2002, S.S. 2002, c. E-9.1001), Prince Edward Island (the *Canadian Judgments (Enforcement) Act*, R.S.P.E.I. 1988, c C1.1), Nova Scotia (the *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c. 30, in force as

of July 1, 2006) and B.C. (the *Enforcement of Canadian Judgments and Decrees Act*, S.B.C. 2003, c. 29, in force as of April 1, 2007, and which now specifically refers to civil protection orders).

5. Other Types of Orders of Protection

In some circumstances, such as assault situations, criminal charges are also appropriate. Persons subjected to violence should call the police immediately. If the abuser is arrested and criminal charges are laid, release conditions can be imposed as part of a recognizance or undertaking (such as no contact or communication with the victim). These conditions remain in place so long as the criminal charge is pending.

If the abuser pleads guilty or is found guilty of a criminal offence, the abuser may be sentenced to a period of probation, which can also include conditions that provide protection for the victim.

A person can also apply for a recognizance (peace bond) under section 810 of the *Criminal Code*, which can prohibit contact and harassment. A peace bond may be granted where the person applying has reasonable grounds to fear that another person will cause personal injury to them or to their intimate partner or child, or will damage their property. The defendant is entitled to a summary hearing.

If the justice is satisfied that there are reasonable grounds for the fear, the court may order the defendant to enter into a recognizance to keep the peace and be of good behaviour for a period of not more than 12 months. If the defendant refuses, imprisonment of up to 12 months may be ordered.

Conditions may be added to the recognizance, such as a requirement to abstain from drugs or alcohol, prohibitions on weapons and prohibitions on contact or communication, and attendances at places where the complainant, partner or child may be.

Peace bonds may be useful in situations where criminal charges are not warranted and *The Domestic Violence and Stalking Act* does not apply (for example, to address harassing conduct between neighbours).

> Abused persons who need support and information about services such as shelters can contact the Winnipeg Klinic crisis line at 204-786-8686 or toll free 1-888-322-3019. The Trafficking hotline can be reached at 1-844-333-2211.

6. Other Relief – Actions based on Tort Law

In the Ontario Superior Court family decision of *Ahluwalia v. Ahluwalia,* 2022 ONSC 1303, the court recognized a common law tort of family violence, seemingly for the first time in reported Canadian case law. In the case, the parties separated after 16 years of marriage. At the trial in their divorce proceeding, the parties were dealing with issues related to child and spousal support, division of property and the mother's claim for damages from the father in relation to his alleged physical, verbal, emotional and psychological abuse during the marriage.

The wife alleged consistent physical and mental abuse by the husband towards her. The trial judge found that the parties' marriage was characterized by violent abuse by the husband as well as a pattern of coercion and control that existed throughout their marriage. In considering the mother's claim, the judge specifically referenced the 2021 amendments to the *Divorce Act* which recognized the impact that family violence has on children and families.

The court determined that as the family violence perpetuated by the husband could not be compensated through an award of spousal support, the wife was entitled to a remedy in tort law. The court concluded that only a damage award in tort could properly compensate the wife for the family violence she had suffered at the hands of the husband. The court was of the view that the common law should recognize a new legal basis for liability regarding family violence based on existing case law related to spousal battery among other factors.

The Ontario Court of Appeal heard an appeal in this case on March 23, 2023. At the time of this writing, the decision remained on reserve.

As the common law tort of family violence is a recent development in Canadian case law, family lawyers will have to monitor the issue as the potential scope and application of the new tort is determined by Canadian courts. The tort of family violence may provide victims with another legal option by which to seek relief against an abusive partner.

> Manitoba law has had a statutory tort of stalking in place as part of *The Domestic Violence and Stalking Act* since the Act came into effect in 1999. Section 26 of the Act provides that a person who stalks another person commits the tort of stalking against that other person. It enables a person subjected to stalking to be able to sue their stalker for damages.

E. SOLE OCCUPANCY AND POSTPONEMENT OF SALE

1. *The Family Law Act*

Under *The Family Law Act*, both common-law partners and spouses are able to obtain orders of exclusive occupancy of the family home and postponement of sale.

Section 80(2) of the Act provides that the court may make an order for exclusive occupancy even where both parties, or the other spouse or partner alone is the owner or lessee of the property. The property owner's right to sell or lease the property may be postponed.

> ***80(2) Order of exclusive occupation of family home***
> *(a) that one spouse or common-law partner be given exclusive occupation of the family home for a specified period, even if the other spouse or partner is the sole owner or lessee of the home or if both spouses or partners together are the owners or lessees;*
> *(b) that the right that the other spouse or common-law partner may have as owner or lessee to apply for partition or sale, or to sell or otherwise dispose of the family home, be postponed.*

A sole occupancy order does not give a person greater rights than the property owning/leasing spouse or partner as set out in section 80(3):

> ***80(3) Limit on exclusive occupation of family home***
> *An order under subsection (2) does not grant to a spouse or common-law partner any right that continues after the rights of the other spouse or partner, or of both spouses or partners, as owner or lessee are terminated.*

See *England v. Nguyen*, 2013 MBQB 196 for a discussion of the discretionary remedy of assessing occupation rent in the context of a sole occupancy order.

2. *The Domestic Violence and Stalking Act*

Section 14(1) of *The Domestic Violence and Stalking Act* provides the court can make a prevention order with "any terms or conditions it considers appropriate to protect the subject or remedy the domestic violence or stalking," including, pursuant to clause (d), an order of temporary exclusive occupation of a residence. An order of exclusive occupation under this Act is subject to any sole occupancy order that may be granted under *The Family Law Act.*

Section 14(2) provides that where a prevention order includes an order of sole occupancy, *The Family Law Act* provisions regarding sole occupancy apply "with necessary modifications."

Essentially an order of sole occupancy does not give the person occupying the residence greater rights than the owner/lessee had. The court may also postpone rights of sale.

Note that relief under *The Domestic Violence and Stalking Act* is available to people in family and other types of relationships as well as spouses and common-law partners and this Act does not require a specific period of cohabitation to qualify (s. 2(1)).

3. *Family Homes on Reserves and Matrimonial Interests or Rights Act*

Provisions of the Federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* respecting exclusive occupation of a family home situated on a reserve came into force on December 16, 2014 and apply to First Nations communities in Manitoba if a First Nation has not passed their own matrimonial real property laws.

The provisional Federal rules in the legislation address the family home and family property on a reserve in terms of the use and occupation of the family home, during a marriage or common-law relationship, on the breakdown of such a marriage or relationship and on the death of a spouse or common-law partner.

The Manitoba Court of King's Bench (Family Division) has jurisdiction to grant orders of exclusive occupation and reasonable access to a family home on reserve under this Federal law.

On application by a spouse or common-law partner, whether or not that person is a First Nation member or an Indian, the court may grant an order giving the person exclusive occupation and reasonable access to the family home. The court may also grant an interim order pending the determination of the main application.

A process is also in place to permit the Court of King's Bench (Family Division) to grant exclusive occupation applications on an urgent, without notice basis in circumstances involving family violence or similar emergency situations. These forms include the notice of application for exclusive occupation order (Form 70E.1) and an affidavit for exclusive occupation order (Form 70E.2).

Generally speaking, an interim order of exclusive occupation that has been granted on an urgent, without notice basis will be made for a short amount of time, to allow the issue to be decided on an interim or final basis once notice has been given to the other affected parties who are entitled to participate in the court proceeding.

Section 20 lists considerations including:

- the best interests of children who habitually reside in the home;
- the terms of any agreement;
- how long the applicant has resided in the home;
- the financial and medical situation of the parties;

- the availability of other accommodations;
- family violence, psychological abuse against a partner, child or other resident of the home;
- the interests of any elderly or disabled resident of the home; and
- the collective interests of the First Nation.

An order can also require a partner or any other resident to vacate the home, for either partner to repair and maintain the home or requiring the applicant to contribute to the cost of alternate accommodation.

For additional information on the *Family Homes on Reserves and Matrimonial Interests or Rights Act see New Rights, New Obligations: An Introduction to FHRMIRA* found on the Law Society of Manitoba's CPD on Demand, Members Only CPD Resources *website*.

F. APPENDIX

1. A Sample ChildView Printout, with Explanatory Notes

The attached ChildView printout (which follows these notes) shows the basic calculations for child and spousal support for 2 minor children, residing with Jane, the spousal support recipient. Jane earns employment income of $50,000 annually and the payor John earns employment income of $150,000. The parties' relationship was of 17 years' duration.

Child support - Pursuant to section 3 of the *Child Support Guidelines*, the table amount of child support to be paid by John to Jane for the 2 children based on his income of $150,000 is $1992 per month. This is shown on the third page of the printout.

The particulars of the payment of any section 7 expenses would appear on the second and third pages and the resulting totals would appear on the first page chart in Column G. This sample does not include any section 7 expenses.

Spousal support – with child formula - In order to leave Jane with between 40 and 46% of the parties' combined **I**ndividual **N**et **D**isposable **I**ncomes (INDIs) as provided in the **with child formula**, the range of spousal support is between $404 and $1513 per month, which will be taxable to Jane and deductible by John. These figures are shown on the large chart on the first page in the Monthly Spousal Support column and the INDI % column. (Annual Spousal Support Column J, divided by 12)

The mid-range of $959 per month gross (before tax) will give Jane 42.95% of the parties' combined INDIs net, or after tax.

With the mid-range of spousal support, Jane will have a total of $6924 per month to support herself and the children. This includes her own income shown in Column B, child support shown in Column C, and spousal support shown in Column J.

John will have $5613 per month to support himself after the payment of spousal support and child support (shown in the columns noted above) to Jane.

The net dollars available to Jane and to John are shown in the Monthly Cash Projection Column and also on the second page of the printout. Jane will have 55.23% of the total monthly "family" cash and John will have 44.77%.

These figures take into account the taxes and other deductions that will be paid by John and Jane on their own incomes, and in relation to the spousal support. The taxes and deductions

to be paid by each are shown in Column H. The Benefits and Credits (for example Jane will claim the children as her dependents) are shown in Column I.

Duration - The minimum recommended duration for spousal support is 8.5 years. This is the greater of the number of years until the youngest child starts school (2 years) or .5 year per year of the relationship (8.5 years).

The maximum recommended duration is 17 years. This is the greater of 1 year per year of the relationship (17 years) or the number of years until the youngest child finishes high school (15 years).

The initial order would be for an indefinite (not specified) duration, subject to variation and/or review.

The duration information appears below the chart.

ChildView Printout - Document follows on next page.

File: Doe.dat

By: Sarah Thurmeier

CHILDVIEW - 2022.1.1

The Spousal Support Advisory Guidelines

With Child Support Formula-2022 Calendar Year Calculations

Date: June 06, 2022
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John Doe vs Jane Doe

Basic Information

	Name	Province	Age	Years of Cohabitation	Income Net of Prior Support	Deductions
Payor	John Doe	MB	40	17	$150,000	$4,453
Recipient	Jane Doe	MB	40		$50,000	$3,441

Quantum INDI (A) = B - C - D - E + F - G - H + I +/- J (Using 2017 Tables)

Party	INDI %	INDI (A)	Income (B)	Child Support (C)	Notional Child Support (D)	Sec 7 Child Support Paid (E)	Sec 7 Child Support Received (F)	Gross Sec 7 Expense (G)	Taxes & Deductions (H)	Benefits & Credits (I)	Annual Spousal Support (J)	Monthly Spousal Support	Monthly Cash Projection (Sch D)	% of Monthly Cash
John	60.01%	$71,117	$150,000	-$23,904	$0	$0	$0	$0	-$50,441	$312	-$4,850	-$404	$5,926	47.13%
Jane	39.99%	$47,386	$50,000	$0	-$8,484	$0	$0	$0	-$10,540	$11,560	$4,850	$404	$6,648	52.87%
John	57.05%	$67,351	$150,000	-$23,904	$0	$0	$0	$0	-$47,553	$312	-$11,503	-$959	$5,613	44.77%
Jane	42.95%	$50,698	$50,000	$0	-$8,484	$0	$0	$0	-$12,817	$10,496	$11,503	$959	$6,924	55.23%
John	54.00%	$63,586	$150,000	-$23,904	$0	$0	$0	$0	-$44,666	$312	-$18,156	-$1,513	$5,299	42.35%
Jane	46.00%	$54,176	$50,000	$0	-$8,484	$0	$0	$0	-$15,094	$9,598	$18,156	$1,513	$7,214	57.65%

Minimum Duration - greater of:

(a) 0.5 * years of cohabitation	8.5*
(b) Estimated number of years till youngest child starts full time school	2

Maximum Duration - greater of:

(a) Spousal cohabition >= 20 years	N/A
(b) 1.0 * years of cohabitation	17*
(c) Estimated number of years till youngest child finishes high school	15

*Initial orders would be for an indefinite (not specified) duration, subject to variation and/or review, with a suggested minimum duration of 8.5 years and a suggested maximum duration of 17 years.

Revisions to Child Support	John	Jane
Monthly Section 3 table amount revised to:	NA	NA
Monthly Section 3 Notional Amount revised to	NA	NA
Monthly Section 7 Expenses revised to	NA	NA

CHILDVIEW - 2022.1.1

2022 Calendar Year Calculations

Summary of Child Support

(This document is not an official court form)

Children of the Relationship

Names	Birthdate	Residing with (for tax purposes) Payor	Recipient	Shared CSG	CTB Claimed By
Michael Doe	12/2/2019	☐	☑	☐	Jane
Nancy Doe	7/3/2017	☐	☑	☐	Jane

Calculation of Guideline Income

	Payor	Recipient
	John	Jane
Province of Residence	MB	MB
Guideline Income Details		
Employment income	$150,000	$50,000
Spousal support from this relationship	$0	$11,508
Sch III-3(a) Spousal support received from the other spouse	0	($11,508)
Total Guideline Income for purposes of the applicable table:	**$150,000**	**$50,000**

Section 7 Special Expenses - Annual Amount

	Gross Expense		Net Expense	
	Payor	Recipient	Payor	Recipient
Child Care Expenses	$0	$0	$0	$0
Medical/Dental Premiums	$0	$0	$0	$0
Health Related Expenses	$0	$0	$0	$0
Primary or Secondary School Expenses	$0	$0	$0	$0
Post Secondary School Expenses	$0	$0	$0	$0
Extra Curricular Activities Expense	$0	$0	$0	$0
Total Annual Section 7 Expenses	$0	$0	$0	$0
Total Monthly Section 7 Expenses	$0	$0	$0	$0

Summary:

Section 3 2017 table amount payable by:	$1,992	$0
Proportionate Share (%) of Section 7 Expenses	71.87%	28.13%
Section 7 monthly expenses payable by:	$0	$0
Total Section 3 and Section 7 amount payable by:	$1,992	$0
Net monthly child support payable by:	**$1,992**	
Household Income Ratio (per Schedule II)	6.46	4.11
Net Monthly Cash Projection:	$5,612	$6,924

Departing from Guidelines: No

Different Amount:	NA	NA
Reasons for departing:		
Revised Household Income Ratio:		

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By: Sarah Thurmeier

CHILDVIEW - 2022.1.1

2022 Calendar Year Calculations

June 06, 2022
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Summary of Child Support

(This document is not an official court form)

Children of the Relationship

Names	Birthdate	Residing with (for tax purposes) Payor	Residing with (for tax purposes) Recipient	Shared CSG	CTB Claimed By
Michael Doe	12/2/2019	☐	☑	☐	Jane
Nancy Doe	7/3/2017	☐	☑	☐	Jane

Calculation of Guideline Income

	Payor	Recipient
	John	Jane
Province of Residence	MB	MB
Guideline Income Details		
Employment income	$150,000	$50,000
Total Guideline Income for purposes of the applicable table:	**$150,000**	**$50,000**

Section 7 Special Expenses - Annual Amount

	Gross Expense		Net Expense	
	Payor	Recipient	Payor	Recipient
Child Care Expenses	$0	$0	$0	$0
Medical/Dental Premiums	$0	$0	$0	$0
Health Related Expenses	$0	$0	$0	$0
Primary or Secondary School Expenses	$0	$0	$0	$0
Post Secondary School Expenses	$0	$0	$0	$0
Extra Curricular Activities Expense	$0	$0	$0	$0
Total Annual Section 7 Expenses	$0	$0	$0	$0
Total Monthly Section 7 Expenses	$0	$0	$0	$0

Summary:

Section 3 2017 table amount payable by:	$1,992	$0
Proportionate Share (%) of Section 7 Expenses	78.41%	21.59%
Section 7 monthly expenses payable by:	$0	$0
Total Section 3 and Section 7 amount payable by:	$1,992	$0
Net monthly child support payable by:	**$1,992**	
Household Income Ratio (per Schedule II)	7.08	3.68
Net Monthly Cash Projection:	$6,155	$6,454

Departing from Guidelines: No

Different Amount:	NA	NA
Reasons for departing:		
Revised Household Income Ratio:		

2. *The Child Support Service Act*: Procedure for Client Enrollment

Where the child support order is granted under *The Family Law Act* no recalculation clauses are required to be included in the order as subsection 17(a) of the *Child Support Service Regulation* requires just the Recalculation and Enforcement King's Bench Form 70W (Rule 70.31(15)) be completed and submitted with the draft order when it is filed in the court registry.

Once the parents are enrolled with the Child Support Service, recalculation will automatically occur under the timelines set out in section 21 of the *Child Support Service Regulation*.

If the parents decide to forego enrollment with the Child Support Service when the child support order is signed, there is still the option of making an application for recalculation in the future under subsection 19(1) (one parent) or section 43 (joint application) of the *Child Support Service Regulation* for a recalculation of child support. The application is made directly to the Child Support Service. There is no fee to apply for recalculation. There are some restrictions, such as the prohibition against retroactivity in the recalculation prior to the date of application.

For child support orders made under the *Divorce Act*, there is the requirement to complete Recalculation and Enforcement KB Form 70W for automatic recalculation.

<u>Child Support Agreements</u>

Section 5(1)(c) of *The Child Support Service Act* allows child support payable in a child support agreement to be recalculated by the Child Support Service should the agreement have a provision in it requiring or permitting child support to be recalculated by the Child Support Service. There is no prescribed clause set out in the Act. A suggested clause to be inserted into a child support agreement is a modified version of the general clause for a child support order that states:

> The child support payable in this agreement is eligible for recalculation by the the Child Support Service subject to the provisions of *The Child Support Service Act* and the *Child Support Service Regulation*.

An application to the Child Support Service is required under subsection 19(1)(c) of the *Child Support Service Regulation* to trigger the actual recalculation of child support payable in the child support agreement or in a family arbitration award. There is no fee to apply for the recalculation.