The Law Society of Manitoba

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JURISDICTION IN FAMILY LAW

Practice Area Fundamentals

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INTRODUCTION

Jurisdiction is a very real issue. It is the starting point. The court must have both the jurisdiction to hear the matter and the jurisdiction to grant the order that you seek, or you will be doomed before you start. This module will assist you in determining these fundamental matters in relation to some of the most common family law matters.

For more information on specific subject matters, see the *Family Law & Child Protection* materials in the Law Society's Education Center.

A. CONSTITUTIONAL CONSIDERATIONS

Constitutional considerations impact jurisdiction. For example, divorce is within federal competency, while property matters are within provincial jurisdiction.

Where there is dual jurisdiction in matters such as parenting and support, the doctrine of paramountcy means that *Divorce Act* proceedings will prevail over those under provincial legislation.

> Most jurisdiction is conferred by statute, supplemented by the common law. Jurisdiction cannot be conferred solely by consent or by attornment.

Parens patriae jurisdiction is available if there are gaps – especially to protect children and vulnerable adults. The SCC confirmed this in *Beson*, an adoption case. (*Beson v. Director of Child Welfare* (NFLD.), [1982] 2 S.C.R. 716).

B. COMMON LAW RULES

The common law generally requires that there be a real and substantial connection between the party and the jurisdiction. This may be reflected in the legislation.

If there is jurisdiction in more than one place, *forum conveniens* allows for a determination of which forum will be the most convenient place to have a hearing, generally based on the existence of evidence, unless there are statutory rules which govern jurisdiction.

In *Kornberg,* 1990 CanLII 8025 (Man. CA), the Manitoba Court of Appeal considered whether Manitoba or Minnesota, both with jurisdiction (due to one party's residency) in the divorce proceedings, was the most convenient forum. In deciding that neither forum was "distinctly more appropriate", the court declined to enjoin the wife from proceeding in Minnesota or to stay the husband's proceedings in Manitoba. They permitted both proceedings to continue.

Under common law principles, the court has inherent jurisdiction to control its own process.

C. COURT RULES

You also must consider which court within the province has the jurisdiction to deal with a particular issue.

In and around Winnipeg, Selkirk and Brandon, the Court of King's Bench (Family Division) has exclusive territorial jurisdiction in all family law matters.

Because of constitutional and statutory limits on the Provincial Court, the Court of King's Bench also has exclusive jurisdiction throughout the province in matters involving:

- divorce;
- property rights and division;
- exclusive occupancy of homes and prohibition, i.e. matters related to the use of or access to property; and
- inherent jurisdictional matters such as prerogative orders, *parens patriae*, trust or equitable remedies.

If you are in a rural area, you generally have the choice of proceeding in the King's Bench or the Provincial Court in parenting matters, support and protection orders. In these matters the Provincial Court may be more readily available because there are resident judges in more places and they sit more often than the King's Bench (Family Division).

The Provincial Court also uses a simpler and cheaper procedure. However, as noted above, there are substantial areas of relief that are not available in this court.

Matters may be transferred at the instance of either party from the Provincial Court to the Court of King's Bench.

> To answer questions as to jurisdiction, refer to sections 41 and 42 of *The Court of King's Bench Act*, supplemented by Manitoba Regulation 247/89, and to sections 19 and 19.1 of *The Provincial Court Act*, as well as to the specific legislation governing the relief which you are seeking, as the various pieces of legislation also specify the jurisdiction of the courts to deal with them.

Court rules may contain jurisdictional provisions, including those dealing with service.

Rules may differ from place to place, so be cautious if reviewing case law from elsewhere. For example, in Manitoba under King's Bench Rule 60.10, a motion for contempt must be served personally unless the court orders otherwise, and a contempt order cannot be granted in relation to failure to pay money. In some other provinces, contempt orders are heard *ex parte* and are routinely granted for failure to pay money, including support orders.

King's Bench Rules 17.02 – 17.07 deal with service outside Manitoba. Rule 17.05.1 provides for service outside Canada, including service under the Hague Service Convention. Rule 17.06 specifies that a person who files a motion to set aside service or stay the proceeding, on grounds that include that Manitoba is not the most convenient forum in which to determine the matter, shall not be held to have submitted to the jurisdiction of the court by virtue of that motion.

King's Bench Rule 21.01(3) permits a defendant to bring a motion to stay or dismiss a proceeding where the court has no jurisdiction over the subject matter of the action.

King's Bench Rule 37 specifies the matters that are to be heard by a judge or by a master:

> ***37.02(1)***
> *A judge has jurisdiction to hear any motion in a proceeding.*
>
> ***37.02(2)***
> *A master has jurisdiction to hear any motion in a proceeding, except a motion,*
> *(a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;*
> *(b) to set aside, vary or amend an order of a judge;*
> *(c) to abridge or extend a time prescribed by an order that a master could not have made;*
> *(d) for judgment on consent in favour of or against a party under disability;*
> *(e) relating to criminal proceedings or the liberty of the subject;*
> *(f) in an appeal; or*
> *(g) for interim relief in a family proceeding in respect of custody, access, support or property.*

Be sure your proceedings are brought in the proper court and before the appropriate decision maker.

D. STATUTORY BASES

1. Jurisdiction Under the *Divorce Act*

Jurisdiction under the *Divorce Act* changed with the amendments that came into force on March 1, 2021. Take note that the amendments apply to matters "not finally disposed of" by March 1, 2021 (s. 35.3). Therefore, if you are proceeding with matters filed before that date which have not been concluded, the amended provisions of the *Divorce Act* will govern.

a) Jurisdiction Based on Habitual Residence

Pursuant to section 3, a court in a province has jurisdiction to deal with a divorce proceeding, including corollary relief, where at least one spouse has been habitually resident in the province for at least one (1) year immediately preceding the commencement of the proceeding.

"**Habitual residence**" replaced the previous term "ordinary residence" but is not defined in the *Divorce Act*.

In *Hiebert v. Fingerote*, 2021 ABQB 807, the Alberta court considered the meaning of "habitual residence". The court noted that the materials published by Justice Canada in relation to the *Divorce Act* amendments stated "case law indicates no practical difference in meaning between "ordinarily resident" and "habitually resident"."

The court looked at the following features of "habitual residence" set out by the Ontario Court of Appeal in *Korutowska-Wooff v. Wooff,* 2004 CanLII 5548 (ON CA), (para 8):

- the question of habitual residence is a question of fact to be decided based on all of the circumstances;
- the habitual residence is the place where the person resides for an appreciable period of time with a "settled intention";
- a "settled intention" or "purpose" is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.

In *Sidhu v. Kaur*, 2022 ABQB 390 (CanLII), the question was whether a husband had been habitually resident in Alberta for a year prior to commencing divorce proceedings.

The couple had arrived on visitors' visas, initially intending only a short stay. Later the pregnant wife returned to India. The husband remained in Alberta, obtained a work permit and later filed a Statement of Claim for divorce.

The wife did not wish to be divorced. She commenced proceedings in India – not for a divorce – but for child and spousal support and other relief related to the return of her dowry, and an order enjoining the husband from becoming engaged to anyone else. She argued that her rights in India would be prejudiced by a Canadian divorce. The wife also argued that the husband was dragging his feet in completing matters in India.

The court found that the husband had formed the intention to settle permanently in Alberta, and had lived and worked there for more than a year. The court had jurisdiction for the divorce.

The court then looked at the issue of *forum conveniens*. The onus was on the wife to show that another jurisdiction was "clearly more appropriate".

The court agreed it would be appropriate for child and spousal support matters to be heard in India where the wife and child resided, and held that child support needed to be determined before the Alberta court could grant the divorce (s. 11(1)(b)). It was also important that the husband had attorned to the jurisdiction in India, by defending against the wife's proceedings there.

The divorce proceedings in Alberta were stayed until the earlier of 6 months or when the support proceedings (but not the dowry or other issues) in India were resolved. The husband was given leave to return to court if the proceedings in India were not completed within 6 months.

Quigley v. Willmore, 2008 NSCA 33 considered the meaning of "ordinarily resident". The wife lived in Nova Scotia, where she practiced law. The husband lived in Texas, where the wife and child visited him. In 2005, the wife moved to Texas, bringing her furniture, her ten horses, and her employee who cared for them. She reduced her law practice in Nova Scotia, going there for short trips to look after matters. She started a horse riding business in Texas, took courses and registered the child for school.

About ten months later, she decided to end the marriage. She returned to Nova Scotia and filed for divorce, saying she'd always intended to return to Nova Scotia if the relationship didn't work out. The husband then filed a Petition for Divorce in Texas and moved to strike the wife's Nova Scotia proceedings for lack of jurisdiction.

The court found that the wife was ordinarily resident in Texas until she returned to Nova Scotia, taking her horses, re-enrolling the child in school and obtaining new employment.

They held that ordinary residence means "residence in the course of the customary mode of life … in contrast with special or occasional or casual residence. The general mode of life is relevant. Ordinary residence is the place where in the settled routine of his life he regularly, normally or customarily lives. A sojourn would be where he unusually, casually or intermittently visits or stays."

The court held that ordinary residence is where a person lives as an inhabitant as opposed to a visitor.

The Court of Appeal ultimately upheld the decision that the wife had not been ordinarily resident in Nova Scotia. They upheld the decision that all interim Orders made in Nova Scotia for custody, access, and child and spousal support were void.

After the wife had in fact been in Nova Scotia for a year, she filed a new Petition for Divorce and the Texas court held that custody and access should be determined in Nova Scotia. The Nova Scotia court agreed that Nova Scotia was then the *forum conveniens* and made interim Orders for custody and access. (*Quigley v. Willmore*, 2008 NSSC 96 (CanLII)).

Williams, J. stated that if he was in error in assuming jurisdiction under the new Petition (the wife's appeal of the earlier Order finding no jurisdiction in Nova Scotia not yet then having been determined), then he was exercising his *parens patriae* jurisdiction in the child's best interests with respect to custody and access. He stated that the *parens patriae* jurisdiction could be exercised to rescue a child in danger or bridge a legislative gap, or the jurisdictional gap which would leave no court with jurisdiction.

The dual proceedings in Texas and Nova Scotia continued to vex the court (*Quigley v. Willmore*, 2008 NSSC 353 (CanLII)). The Texas court granted the divorce. The wife appealed that order, and asked that a divorce be granted by the Nova Scotia court. The Nova Scotia court recognized the Texas divorce and declined to order a divorce in Nova Scotia. Given that the Texas order was under appeal, the Nova Scotia court stayed the wife's request for divorce. In the result, the Nova Scotia court retained jurisdiction over custody and access matters and real property in Nova Scotia, while the Texas court retained jurisdiction over property in Texas. The issue of child support was to be determined in Texas, and was stayed in Nova Scotia.

In discussing the jurisdiction for custody and access matters, the court concluded that there was jurisdiction under the *Divorce Act* to make interim orders until the Texas order might become final. Thereafter, there might or might not be jurisdiction under section 4 of the *Divorce Act* to make a final custody order following a foreign divorce. (This issue is further discussed below.) The court concluded that if there was no such jurisdiction, this would create a jurisdictional gap. The court noted the residency of

the wife, both parties' agreement, and the direction of the Texas court that custody and access matters be determined in Nova Scotia where the child resides, and found jurisdiction to make an interim custody order under the *Divorce Act* and a final order pursuant to its *parens patriae* jurisdiction.

b) *Civil Marriage Act* Divorces

Under *The Civil Marriage Act*, the court in a province can also grant a divorce to non-residents who married in that province and who reside in and have resided for at least one year in a place which does not recognize the validity of the marriage and so cannot grant a divorce.

c) Bigamous Marriages

Before a divorce can be granted, there must be a valid marriage. Accordingly, parties to a subsequent bigamous marriage cannot obtain a divorce or any relief under the *Divorce Act*. This means they must turn to provincial statutes for relief, which may or may not provide the same relief (for example, entitlement to support could be different).

d) Corollary Relief and Variation

Divorce Act - Section 4(1) and Section 5(1)

A court has jurisdiction to grant or vary corollary relief where a divorce has been granted in Canada, if either former spouse habitually resides in the province at the commencement of the proceeding or if both former spouses accept the jurisdiction of the court.

Therefore, if parties obtained a bare divorce in Canada (without any order dealing with corollary relief), or if parties obtained a bare divorce and have also obtained an Order under provincial legislation, they may seek a corollary relief Order under the *Divorce Act* at any time.

i. Varying an Interim Order

According to the *Divorce Act* section 17, Variation Orders can be granted to "former spouses". This begs the question of whether an Interim Order can be varied under section 17.

Section 16.1(2) (dealing with parenting) and section 16.5(2) (dealing with contact orders) specifically state that Interim Orders can be made. Section 17 does not contain that provision. Nonetheless, courts have found the jurisdiction to vary Interim Orders.

Justice Carr stated in *Cloutier-Chudy v. Chudy*, (2008 MBQB 155 (CanLII):

> *...though courts across the country as a matter of practice have entertained motions to vary interim orders under the Divorce Act, jurisdiction to do so is not found in the statute and a variety of tests have been used depending on whether the judge sees the application as a variation, a review or simply "another" interim order.*

In *Shwaykosky v. Pattison*, 2015 ABCA 337 (CanLII), the Alberta Court of Appeal considered an interim order that had been varied by the case management judge in chambers without viva voce evidence. The judge had also ordered that no further application for custody could be brought without leave for 12 months.

The Court of Appeal did not endorse the procedure, but didn't have a problem with the variation of an interim order.

The Court of Appeal said that the order respecting further motions:

> *was not intended to prevent access to the courts where there was a material change of circumstances as that term has been defined. There will always be access to the courts in the case of material change.*

In *VLN v. SRN*, 2019 ABQB 849 (CanLII), Lema, J. summarized the principles for the variation of interim support orders:

- a material change of circumstances is a threshold condition for varying interim support;
- even with a material change of circumstances, an interim order that allows needs to be adequately met should usually not be varied. Any necessary adjustments can be made at trial or by agreement between the parties. Resources are better devoted to that than a variation application.

ii. Interim Variation of a Final Order

Similar arguments have been made with respect to interim variations of Final Orders. The Saskatchewan Court of Appeal in *Dorval v. Dorval*, 2006 SKCA 21 (CanLII) held that subsection 17(1)(b) of the *Divorce Act* and the *parens patriae* jurisdiction conferred the power to make an Interim Variation Order and that the reference in subsection 17(1)(b) to "make an Order to vary" (the current wording is "make an order varying") encompassed both interim and Final Orders.

The court rejected the possibility that the legislation intended to deny the court the power to make Interim Variation Orders and held that this could thwart the ability of the court to protect the interests of the children and implicitly negate the court's *parens patriae* jurisdiction.

In *Vargas v. Berryman*, 2009 BCCA 588 (CanLII), the British Columbia Court of Appeal took a different view. They found that the only authority to make an interim custody Order is contained in section 16, where an original application for custody or access has been made.

The court found that section 17(5) which requires a material change of circumstance does not contemplate an Interim variation of a final order pending determination. The court stated that the absence of provisions for interim variations is consistent with the legislative purpose of the *Divorce Act*, which is to ensure a stable environment for children, once custody Orders have been made.

However the court went on to state:

> *This is not to say that there will be cases of urgency where allegations of serious harm are made and a prima facie case falling short of satisfactory proof will invoke the parens patriae jurisdiction of the court to order what is in effect an interim variation.*

e) Foreign Divorces

Problems can arise where a divorce is granted outside of Canada.

Section 22 of the *Divorce Act* permits the recognition of foreign divorces. It does not allow for the granting of orders or the variation of foreign orders for corollary relief under the *Divorce Act* where the divorce has been granted in a foreign jurisdiction.

In *Rothgiesser v. Rothgiesser*, 2000 CanLII 1153 (ON CA), the parties were divorced in South Africa. A Final Order was granted, which included non-variable spousal support terms.

After the Husband moved to Toronto the parties entered into a consent Order in Ontario under the *Divorce Act* which provided for increased spousal support.

Some years later husband obtained a second Order in Ontario terminating spousal support and the wife appealed on the basis that there was no jurisdiction.

The court concluded that both Ontario orders were nullities as the court had no jurisdiction to order corollary relief following a foreign divorce.

In *Cheng v. Liu*, 2017 ONCA 104 (CanLII), the wife and child lived in China and the husband in Ontario for most of the marriage. The wife sought a divorce and corollary relief for custody, child support, spousal support and property division in Ontario. The husband sought a divorce and the same items of corollary relief in China. The husband sought a stay of the wife's Ontario proceedings.

Ontario had jurisdiction based on the husband's residency. However, the court found that the central issues were child custody and support which should be determined in China where the wife and child resided. The wife's Ontario proceedings were stayed on terms requiring husband to cooperate with the Chinese proceedings, and make proper disclosure. The wife had leave to apply to the court in the event the husband did not do so.

The husband failed to disclose. The Chinese court granted the divorce but would not make any support Orders in the absence of disclosure and held that the application could be made in Canada.

Given the foreign divorce, Ontario did not have jurisdiction to make Orders under the *Divorce Act*, but could only make orders under provincial statutes for child support and property division.

In *Harman v. Harman*, 2009 ABCA 410 (CanLII), the parties were divorced in 2004 in Spokane, Washington and child support was ordered. Shortly thereafter, the wife and child moved to Alberta. The support order was varied by the Washington court in 2007. In 2009, the wife registered the child support order in Alberta and obtained a variation order in Alberta. The Court of Appeal agreed with the husband that Alberta had no jurisdiction vary the child support order made in the foreign divorce.

A support order made in a divorce proceeding in a foreign jurisdiction that is a reciprocating jurisdiction under Manitoba's *ISO Act* may be registered in Manitoba, and may be varied in Manitoba if the factors set out in section 35 of the *ISO Act* are present. However, even if the Manitoba court has jurisdiction to vary the registered foreign support order, a Manitoba variation order may not be recognized and enforceable in the foreign jurisdiction. Principles such as "continuing exclusive jurisdiction" in the United States are relevant to these types of questions where the support order was made in a divorce proceeding in an American state.

For information on the United States' view of Continuing Exclusive Jurisdiction, see "*Enforcement between provinces, territories and countries*".

f) More Than One Court with *Divorce Act* Jurisdiction

Where more than one court in Canada has jurisdiction, the *Divorce Act* prescribes the method for determining where to proceed.

i. Proceedings Commenced on Different Days

If there are two proceedings for divorce, corollary relief or variation that were commenced on **different** days in two courts with jurisdiction, the court in which the first proceeding is filed has jurisdiction (unless discontinued) and the second proceeding is deemed discontinued. There is no time limit for the discontinuance of the first proceeding.

See section 3(2) for divorce; section 4(2) for corollary relief; and section 5(2) for variation proceedings.

Prior to the *Divorce Act* amendments in March 2021, there was a 30 day time limit for discontinuance of the first proceeding. The deletion of the time limit allows time to discover duplicate proceedings and try to reach agreement on jurisdiction. If there is no agreement, the place where the first proceeding was filed still has jurisdiction.

ii. Proceedings Commenced on the Same Day

If there are two proceedings commenced for divorce, corollary relief or variation on the **same** day in two Canadian courts with jurisdiction, there is a forty day deadline for discontinuance of one proceeding, failing which the Federal Court will determine the jurisdiction generally based on habitual residence.

See section 3(3) for divorce; section 4(3) for corollary relief; and section 5(3) for variation proceedings.

If at least one proceeding includes an application for a parenting Order, jurisdiction is where the child is habitually resident.

If there is no application for a parenting Order, jurisdiction is where the spouses last had a common habitual residence, provided that one spouse remains habitually resident there;

In any other case, the Federal Court will determine which jurisdiction is most appropriate.

g) Parenting Matters

i. Transfer of Parenting Proceedings – Section 6

If a parenting Order is sought under the *Divorce Act* in a divorce, a proceeding for corollary relief or variation, the court may transfer the proceeding to the jurisdiction where the child is "habitually resident". See section 6(1) for divorce; section 6(2) for corollary relief or variation proceedings.

There is no requirement that the application for a parenting order be opposed, which gives the court flexibility in transferring matters, especially on its own motion. This should generally accord with the principle that the child's best interests will be best met by the court having the best evidence available.

ii. Contact Orders – Section 6.1

A contact order (*Divorce Act* s. 16.5(1)) provides a person who is not a spouse, contact with a child in the form of visits or by any means of communication with any terms the court considers appropriate. For example, terms might include supervised visits, contact only via telecommunication or restrictions on removal.

A court that is seized of an application for a parenting Order is the **only** court with jurisdiction for a contact Order (s. 6.1(1)).

There is **no jurisdiction** to make an application for a contact Order **if there is no parenting Order.** A non-spouse has no standing under the *Divorce Act*, except as authorized by the statute (ss. 6.1(1) and 6.1(3)).

iii. Variation of Parenting Orders

If there is no pending variation proceeding relating to a parenting Order, the court where the child is habitually resident has the jurisdiction to hear an application for a contact Order or a variation of a parenting plan or contact Order. However, the court can transfer the proceeding to another province if the court considers the other province a better place to hear the application (s. 6.1(2)).

iv. Removal or Retention of a Child – Section 6.2(1)

Relocation provisions (found in ss. 16.9 to 16.96 of the *Divorce Act*) contain notice requirements (as well as factors to be considered on relocation and burdens of proof). If the child is removed or retained in a province contrary to these provisions (or contrary to provincial law, or an order, award or agreement), the court where the child was habitually resident, that would have had jurisdiction immediately before the removal or retention, has the jurisdiction to hear an application for the parenting Order.

The court where the child was habitually resident **must transfer** the proceeding to the new province where the child is present if satisfied that:

a) all persons who are entitled to object to the removal or retention consented or acquiesced;

b) there has been undue delay in contesting the removal or retention; or

c) the court where the child is present is better placed to hear and determine (s. 6.2(2)).

This aims to prevent parental abduction and encourage compliance with the relocation provisions. The court where the child was habitually resident before the removal or retention will generally hear the matter. This also discourages forum shopping and self-help.

If the court where the child was habitually resident determines that another court shall hear the parenting matters, it shall transfer the parenting matters. It also may (but not must) transfer other related proceedings such as child or spousal support.

If a child is removed or retained and two proceedings are commenced on the same day, in different provinces, the Federal Court will determine which court shall hear the proceeding (s. 6.2(3)). This provision prevails over sections 3(3), 4(3) and 5(3).

See *Bhangoo v. Bhangoo*, 2019 MBQB 23 (CanLII), determined under the former provisions of the *Divorce Act.* The wife and child moved to Manitoba, where the husband was employed, bringing their belongings. The wife quit her job in Ontario, registered her car in Manitoba, obtained a Manitoba driver's license and registered with Manitoba Health. The child was registered in school. After marital difficulties, the parties signed an agreement drafted by the again pregnant wife which stated that the child was a Manitoba resident and that the wife could take her to Ontario for vacation until a specific date. Upon arrival in Ontario, the wife advised the husband that she would not return to Manitoba.

Proceedings were filed by the husband in Manitoba under the *Divorce Act*. The Manitoba court ordered the return of the child to Manitoba. The wife did not comply, and brought proceedings in Ontario under provincial legislation. The Ontario court held that the child was habitually resident in Manitoba and declined jurisdiction. The child was returned to Manitoba. The wife remained in Ontario where she gave birth to the parties' second child.

The husband asked the Manitoba court to determine the custodial matters for both children in his *Divorce Act* proceedings. The wife sought a transfer of the proceedings to Ontario. Ultimately, Allen, J. found the first child most substantially connected to Manitoba and declined to transfer. She stayed the husband's Manitoba proceedings with respect to the baby, who was most substantially connected to Ontario.

v. Children Habitually Resident Outside Canada

1) Making An Order for Children Habitually Resident Outside Canada

If a child is not habitually resident in Canada, the court that would otherwise have jurisdiction to make or vary a parenting order may only do so in exceptional circumstances *and* if the child is present in the province (s. 6.3(1)).

Section 6.3(2) provides:

> *In determining whether there are exceptional circumstances, the court shall consider all relevant factors, including:*
> *(a) whether there is a sufficient connection between the child and the province;*
> *(b) the urgency of the situation;*
> *(c) the importance of avoiding a multiplicity of proceedings and inconsistent decisions; and*
> *(d) the importance of discouraging child abduction.*

2) Recognition of Foreign Order That "Varies" a Parenting or Contact Order

Section 22.1(1) directs a court with a "sufficient connection to the matter", to "recognize" foreign decisions that effectively vary *Divorce Act* parenting or contact orders unless:

> *(a) the child is not habitually resident in the foreign jurisdiction that made the order;*
> *(b) the child was not provided with an opportunity to be heard (except in an urgent case);*

(c) a person claims the decision negatively affects their parenting time, decision-making responsibility or contact with the child and that person was not given an opportunity to be heard;
(d) recognition would be contrary to public policy, taking into consideration the best interests of the child; or
(e) the decision is incompatible with a later decision that fulfils the requirements for recognition under this section.

Such a "recognized" foreign decision is deemed to be a *Divorce Act* variation order, with legal effect across Canada (s. 22.1(2)). Similarly, a court's decision not to recognize foreign decision also has legal effect across Canada (s. 22.1(3)).

vi. *The Hague Abduction Convention and the Child Custody Enforcement Act*

The concept of habitual residence is compatible with the1980 Hague Convention on the Civil Aspects of International Child Abduction ("Hague Abduction Convention") and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ("1996 Hague Children's Convention").

The 1996 Hague Children's Convention is not yet in force in Canada. Section 31 of Bill C-78 includes provisions to implement the 1996 Convention federally. However, no proclamation date has been set for new sections 30 – 31.3 of the *Divorce Act* and other new provisions relating to this Convention.

The Hague Abduction Convention is in force in Manitoba, pursuant to the *Child Custody Enforcement Act*, to which it is attached as a Schedule.

Pursuant to section 4 of the *Child Custody Enforcement Act,* the court in Manitoba may make a custody order that is different than an order made by an extra-provincial tribunal where the child affected does not, at the time the application is made, have a real and substantial connection with the place where the custody order was made or was last enforced, provided that the child has a real and substantial connection with Manitoba or all the parties affected by the custody order are habitually resident in Manitoba.

The Family Law Act, in force as of July 1, 2023 includes consequential amendments to *The Child Custody Enforcement Act* with respect to terminology. The definitions of custody and access accord with *The Family Law Act* and the *Divorce Act*. "Custody order" includes a parenting order under *The Family Law Act* or the *Divorce Act* (Canada) or a corresponding order made by an extra-provincial tribunal. "Access" includes contact with a child (see s. 1).

Section 5 gives the court the extraordinary power to make an order that is different than one made by an extra-provincial tribunal if the court is satisfied that a child would suffer serious harm if the extra-provincial order was enforced.

Section 7 permits a court that has recognized an extra-provincial order to make such orders under *The Family Law Act* or *The Child and Family Services Act* as are necessary to give effect to the order.

In *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 (CanLII), the SCC discussed the Hague Abduction Convention. The child's habitual residence is a key initial issue.

The objectives of the Hague Abduction Convention are to enforce custody rights and to secure the "prompt return" of children who have been wrongfully removed or retained.

Prompt return of children protects against the harmful effects of wrongful removal or retention, discourages parental abduction to a new place where they might be able to obtain a custody order, and provides for a more rapid resolution on the merits, in the place where the child habitually resides.

In *Balev*, the SCC directed that a "hybrid approach" be used. The hybrid approach is based on the entirety of the child's circumstances, encompassing both parental intention and the circumstances of the children.

In *Ludwig v. Ludwig*, 2019 ONCA 680 (CanLII), the Ontario Court of Appeal applied *Balev*. The court stated that the aim of the "hybrid approach" is to determine the "focal point of the child's life – the family and social environment in which its life has developed – immediately prior to the removal or retention".

In *Ludwig*, the parties raised their children in Germany and moved to Ontario. At the time of the move, they were uncertain as to whether or when they might return to Germany. They brought their important possessions, and purchased cars and a home which they renovated and furnished. The children went to school, participated in activities, made friends and forged close family ties.

Following the wife's decision about a year later to separate, the husband wished to return to Germany with the children. The wife brought divorce proceedings seeking custody of the children in Ontario. The husband brought an application under the Hague Abduction Convention seeking an order returning the children to Germany. The Application Judge determined that the children were habitually resident in Ontario and dismissed the application.

On appeal, the Court of Appeal provided a detailed analytical framework for determining a child's habitual residence. The court endorsed a two-step approach to habitual residence. The first step is to determine when the alleged wrongful removal or retention took place, and the second step is to determine where the children were habitually resident immediately prior to that removal or retention.

The husband had agreed that the children could remain in Ontario until the start of school in September 2018 and alleged that the children were wrongfully retained thereafter. The Court of Appeal agreed with the Application Judge that the children were habitually resident in Ontario prior to that date, and therefore the wife's retention of them there was not wrongful.

Had the court determined that the children's habitual residence was in Germany at that time, the wife's retention of them in Ontario would have been wrongful. The court would then have been required to order their return to Germany, unless one of the exceptions to return applied. An exception would have allowed the court to exercise its discretion and refuse to order a return.

In *Balev*, at para. 29, the SCC summarized the exceptions:

> *(1) The parent seeking return was not exercising custody or consented to the removal or retention (Article 13(a));*
> *(2) There is grave risk that return would expose the child to physical or psychological harm or place the child in an intolerable situation (Article 13(b));*
> *(3) The child of sufficient age and maturity objects to being returned (Article 13(2));*
> *(4) The return of the child would not be permitted by fundamental human rights and fundamental freedoms of the requested state (Article 20); and*
> *(5) The application was brought one year or more from the date of wrongful removal or retention, and the judge determines the child is settled in the new environment (Article 12).*

The impact of *Balev* in non-Hague cases and when legislation defines "habitual residence" is not yet known. See *Kong v. Song,* 2019 BCCA 84; *Z.A. v. A.A.*, 2019 ONSC 5601; *Smith v. Smith*, 2019 SKQB 280; *Geliedan v. Rawdah* (2020) 38 R.F.L. (8th) 261 (Ont. C.A.); *Iron v. Zagorodnyaya*, 2022 ABQB 323.

2. *The Inter-jurisdictional Support Orders Act*

Under *The Inter-jurisdictional Support Orders Act*, C.C.S.M. c.I60, (*ISO Act*), a person seeking to obtain or vary a support order involving a person who lives in a reciprocating jurisdiction outside Manitoba has access to a process that can result in a support or variation order being made in the other person's jurisdiction. Most proceedings under the *ISO Act* and the inter-jurisdictional support provisions (inter-provincial and international) of the *Divorce Act* will involve the designated authority.

The Family Law Section, Legal Services Branch, Manitoba Justice is the designated authority under both the *ISO Act* and the inter-jurisdictional support provisions of the *Divorce Act*. For questions and assistance, they may be contacted at: *ISOQuestions@gov.mb.ca*.

The Inter-jurisdictional Support Orders Amendment Act received royal asset as part of Bill 17 and is in force as of July 1, 2023. The amendments bring relatively minor changes, including some terminology to align with *The Family Law Act* and *The Family Support Enforcement Act* (also in force as of July 1. 2023). The provisions harmonize procedures with the *Divorce Act* inter-jurisdictional support application provisions and the *Court of King's Bench Rules.*

a) Jurisdiction of the Manitoba Court

Pursuant to section 5(1) of the *ISO Act*, where a claimant resides in Manitoba and the respondent habitually resides in a reciprocating jurisdiction, the claimant may start a process in Manitoba that may result in a court in the reciprocating jurisdiction making a support order against the respondent. Pursuant to section 7(1), if the reciprocating jurisdiction requires a provisional order, the Manitoba court may make such an order.

The list of reciprocating jurisdictions is found in the *Schedule to the Inter-jurisdictional Support Orders Regulation*.

Pursuant to section 35(1) the Manitoba court may vary a support order made or registered in Manitoba:

(i) if both the applicant and respondent accept the Manitoba court's jurisdiction, or
(ii) if the respondent is habitually resident in Manitoba.

The Manitoba court may also vary any support order, if the applicant is habitually resident in Manitoba and the respondent

(i) is no longer habitually resident in a reciprocating jurisdiction, or
(ii) is habitually resident in a reciprocating jurisdiction that cannot, or will not, facilitate the determination of a support variation application in that jurisdiction.

Part 1, Division 2 contains similar provisions where a claimant who resides in a reciprocating jurisdiction outside Manitoba may begin a process to establish or vary a support order against a respondent who is habitually resident in Manitoba.

Part 2 allows for the registration and enforcement of an order made in a reciprocating jurisdiction outside Manitoba or outside Canada. Section 19(5) details the basis on which the Manitoba court must consider the foreign court to have jurisdiction.

The court may also set aside the registration, as set out in section 19(3), in which case, pursuant to section 20(1), upon the request of the party who sought the registration, the matter is to be treated as if it were a support application (s. 9) or support variation (s. 29).

For additional information, including forms, see:

Support Where the Other Person Lives Outside Manitoba | Province of Manitoba

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In *Floyd v. Rodger*, 2023 MBKB 3 (CanLII), the mother resided in Oklahoma and the father in Manitoba. The Oklahoma court made a custody order and an order of child support order against the father. Since Oklahoma is a reciprocating jurisdiction, the order was registered in Manitoba and served upon the father.

The father's application to have the registration set aside was granted. The court said:

> *As the father never lived in Oklahoma, under Manitoba law, the father would only be subject to that court's jurisdiction regarding child support if he had a real and substantial connection to Oklahoma. … Although the Oklahoma District Court was clearly of the view that they had jurisdiction to make a child support order, their jurisdiction is not recognized under Manitoba law.*

The court acknowledged and confirmed that the Oklahoma court did have jurisdiction to make the custody order because the child's habitual residence was Oklahoma.

Having set aside the registration of the Oklahoma order, the Manitoba court went on to consider the mother's application for child support under section 20 of the *ISO Act*, which provides that if the registration of a foreign order is set aside, the court must consider the foreign order as if it was a support application from a reciprocating jurisdiction.

Accordingly, the Manitoba court made a support order pursuant to the child support provisions of *The Family Maintenance Act* (which was then in force), resulting in both ongoing support and retroactive support in amounts larger than those that had been awarded in the Oklahoma order.

b) Inter-jurisdictional Proceedings in the *Divorce Act*

i. Former Spouses Habitually Resident in Different Provinces

The *Divorce Act* contains inter-jurisdictional support provisions which took effect along with other amendments on March 1, 2021. Where former spouses reside in **different provinces**, either party may commence an ISO-like proceeding under section 18.1 to obtain, vary, rescind or suspend, retroactively or prospectively, a support order. They may also seek recalculation of child support where that service is provided in the province where the other former spouse habitually resides (ss. 18.1 and 18.2).

The application is in the initiating party's own province, and will be determined in the province in which the respondent habitually resides. See also KB Rules 70.39.1 and 70.39.2.

For more information, see:

Introduction and General Information Guide | Province of Manitoba

ii. Conversion to Section 18.1 Proceeding

Section 18.2 (1) of the *Divorce Act* provides that if an application for a variation order under section 17(1)(a) is made to a court in a province for a variation of support and the respondent habitually resides in a different province, the respondent may, within 40 days after being served with the application, request that the court convert the application into an ISO-like section 18.1 proceeding. See also KB Rule 70.37(6.1.1).

It will then be transmitted to, and determined in, the responding party's province rather than that of applicant.

The court may decline to convert the matter if parenting issues are involved (s. 18.2(3)).

If the respondent former spouse has not filed an answer or requested that the matter be converted, the court to which the application was made shall hear and determine the matter in the respondent's absence, provided that there is sufficient evidence to do so, taking the interests of any order assignee into account.

If there is insufficient evidence to proceed, the court may direct that the matter be treated like a section 18.1 proceeding (s. 18.3(1)).

Any proceedings involving inter-provincial provisional variation orders that were not finally disposed of before March 1, 2021, are deemed to be support variation applications made under section 18.1(3) (s. 35.9).

Former Spouses Habitually Resident Outside Canada

Section 19 of the *Divorce Act* contains provisions allowing a former spouse who habitually resides in a designated jurisdiction **outside Canada** to make an ISO-like application against the other former spouse who resides in a province. The *ISO Act* determines which countries are "designated" jurisdictions (i.e., reciprocating jurisdictions).

Such post-divorce corollary relief support applications or support variation proceedings use an ISO-like forms based process. A document received from another jurisdiction which is in a different form or uses different terminology must be given broad and liberal interpretation for the purpose of giving effect to it (ss. 18.1(17) and 19(16)).

Where such an application includes a foreign provisional order, the court may consider, but is not bound by, the order (s. 19(14)).

Section 19.1 allows for the recognition, registration and enforcement of a support order made in a foreign designated jurisdiction that has the effect of varying a *Divorce Act* support order. This type of foreign support order is most likely to be made when one or both of the former spouses reside in the foreign designated jurisdiction and the support payor moves back to a Canadian province.

The *ISO Act* provisions respecting the registration of foreign decisions, notice, applications to set aside registration and recognition apply (s. 19.1(2)). Once recognized (registered), such an order is deemed to be a *Divorce Act* variation order with legal effect throughout Canada (s. 19.1(3)).

c) Inter-jurisdictional Applications to Set Aside the Registration of Foreign Orders

If the registration of a foreign order in accordance with section 19.1 of the *Divorce Act* is set aside, unlike under ISO, there are no specific provisions in the *Divorce Act* providing for the foreign order to be treated as a support variation application, therefore a separate application may be needed.

There are limited grounds to set aside registration of foreign orders.

Registration might be set aside where the was a lack of notice, or the respondent did not have a chance to be heard, where the order is contrary to public policy, or where the foreign court lacked jurisdiction. Jurisdiction exists if both parties are habitually resident there or the non-resident party is subject to the court's jurisdiction.

d) Non-ISO applications under Provincial Legislation

> *The Inter-jurisdictional Support Orders Act* does not impair other remedies.

Applications for support can arise under provincial legislation when the respondent lives outside of the province.

If the respondent is a non-resident, ensure that you have complied with requirements for valid service ex juris. Consider whether the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the *Hague Service Convention*) applies.

Consider whether the respondent has attorned to the jurisdiction by responding. If the out-of-province party does not respond, the court may find that there is a basis to assume jurisdiction.

In determining whether to assume jurisdiction the court will consider whether Manitoba is the *forum conveniens*, including whether there is sufficient financial disclosure to make an order, whether there will be enforcement/recognition issues in the respondent's jurisdiction, and whether there are any constitutional limitations or concerns.

In international cases, the court may make a final variation order on *ex juris* service. The manner of service and foreign law impact recognition and enforcement. Foreign states may or may not recognize the basis upon which jurisdiction was exercised.

There is no jurisdiction for one province to simply set aside an order made under another province's legislation. Franks & Zalev, in the March 27, 2023 edition of *This Week in Family Law*, discuss this issue and *Joudrey v. Joudrey*, 2023 ONSC 1398 (CanLII).

The parties separated in New Brunswick in 2016. In 2020, the wife brought an application there under *The Family Law Act*, and a final consent order that provided for mutual waivers of support was granted.

The parties soon moved; the wife to Ontario and the husband to British Columbia.

In Ontario, the wife brought an Application seeking to set aside the New Brunswick Order.

The husband responded to the wife's Application and sought a declaration that the Ontario court did not have jurisdiction to set aside the Order made under another province's legislation. The court agreed. Costs were later awarded to the husband.

While the *Divorce Act* provides in sections 18 – 20 for the variation of support orders granted under the *Divorce Act* in one province to be varied by a court in another province, a court in one province does not have the jurisdiction to simply set aside a support order under provincial legislation from another province. Support orders issued under provincial legislation are only variable in another province under a province's *Inter-jurisdictional Support Orders Act.*

The wife argued that when the husband responded to her Ontario proceedings, he had attorned to Ontario jurisdiction. However, attornment or consent cannot create jurisdiction where there is none.

Franks and Zalev note that, having lived in Ontario for more than a year, it would be open to the wife to apply for a divorce in Ontario, and seek a corollary relief support order under the *Divorce Act*. The Ontario court would then have jurisdiction in the divorce proceeding to determine spousal support in consideration of the factors in section 15.2(4) of the *Divorce Act*, which include "(c) any order, agreement or arrangement relating to support of either spouse." (See *Miglin v. Miglin*, (2003), 34 R.F.L. (5th) 255 (S.C.C.).)

3. The Hague Maintenance Convention

The Hague Maintenance Convention is intended to facilitate the international recovery of child support and other forms of family maintenance. Manitoba, B.C. and Ontario have passed provincial implementing Acts. See *The International Child Support and Family Maintenance (Hague Convention) Act*, S.M. 2022, c. 29, to which the Convention is attached as a schedule. The Act applies *ISO* procedures to applications made under the Convention.

Section 30 of the *International Conventions* section of Bill C-78 includes provisions needed to implement the 2007 Hague *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* federally. No proclamation date has been set for federal provisions respecting this Convention as Canada cannot ratify the Convention until at least one province has an implementing Act that is in force or has a fixed date to come into force.

The Convention will come into force for a province with an implementing Act that is in force on the first day of the month following the expiration of three months after ratification and extension to the province by Canada. Manitoba's implementing Act was proclaimed May 31, 2023 with a coming into force date of January 1, 2024, therefore, the Convention could come into force in Manitoba as early as January 1, 2024.

4. *The Family Law Act*

The Family Law Act and *The Family Support Enforcement Act* came into force on July 1, 2023, at which time the prior provincial statute, *The Family Maintenance Act*, was repealed in its entirety. Amendments were also made to *The Inter-Jurisdictional Support Orders Amendment Act*.

The Family Law Act is a provincial statute which covers basically the same matters as corollary relief under the *Divorce Act* (parenting, spousal support and child support), for parties who were not married or who are not seeking a divorce.

The Family Law Act also covers other matters such as the occupation of the family home, declarations of parentage, assisted reproduction and surrogacy.

a) Jurisdiction of the King's Bench and the Provincial Court

Section 85 of *The Family Law Act* sets out the courts' jurisdiction under that Act:

> ***Jurisdiction of King's Bench (Family Division)***
> ***85(1)*** *An application may be made to the Court of King's Bench (Family Division) for any order under this Act.*
>
> ***Limited jurisdiction of Provincial Court (Family Division)***
> ***85(2)*** *An application may be made to the Provincial Court (Family Division) for any order under this Act except the following:*
> *(a) an order under item 2 of section 74 that a lump sum payment of support be made in trust;*
> *(b) an order under item 12 of section 74 that payment of support be secured by a charge on property;*
> *(c) an order under subsection 80(2) respecting occupation of the family home or postponing rights respecting the family home.*

Accordingly, the King's Bench can make any orders under *The Family Law Act*. The Provincial Court's jurisdiction under that Act is more limited, and cannot make orders dealing with sole occupancy of a family home or postponement of sale.

b) Jurisdiction Over the Parties

The Family Law Act is provincial legislation which applies to parties with a personal connection to the province. It applies *in personam.* Orders can be made relating to parties within the province, or where one party is in the province and the other party attorns to the jurisdiction.

For information on processes whereby support orders can be obtained or varied when parties are habitually resident in different provinces, see the discussion of the *ISO Act*.

c) Jurisdiction for Particular Relief

Under *The Family Law Act* (s. 69), applications for spousal support may be made by a spouse. Section 63 of *The Family Law Act* defines "spouse" to include a common law partner, and section 64 specifies that a former spouse may apply for a spousal support order.

Where a court has made a support order, it has jurisdiction to vary it, upon a material change in circumstances. (*The Family Law Act* s. 73(1)).

The court has the jurisdiction to make orders that are interim and even *ex parte.* (*The Family Law Act* s. 90).

Where spouses or common law partners have separated and one of them has released rights to spousal support or agreed to a fixed amount of support in writing, there is no jurisdiction to make a support order, except in limited circumstances. (*The Family Law Act* ss. 68(1) and 68(2)).

Sections 31- 33 of *The Family Law Act* set out rules for the recognition of declaratory orders respecting parentage made in another province or outside Canada. The keys to recognition include that a parent or the child was habitually resident in, or had a real and substantial connection with the extra-provincial jurisdiction which made the order.

The Family Support Enforcement Act provides jurisdiction for the enforcement of all "support orders" made after January 1, 1980. "Support orders" are widely defined in section 1, and include orders made under *The Family Law Act*, *The Child and Family Services Act, The Inter-jurisdictional Support Orders Act,* the *Divorce Act,* decisions of a child support service, orders registered in Manitoba as well as support provisions contained in family arbitration awards and written agreements. It also applies to orders made pursuant to *The Family Maintenance Act,* the *Child Welfare Act* and the *Wives' and Children's Maintenance Act*, all of which have been repealed.

The rights contained in *The Family Law Act* are in addition to rights in other Acts, and there is no limitation period that bars any right to obtain or enforce an order made thereunder. (*The Family Law Act* ss. 98 and 99).

There are many other sections which set out requirements for the exercise of jurisdiction. Always read the statute.

5. *The Child and Family Services Act*

Part III of *The Child and Family Services Act* governs child protection proceedings. Where the child is indigenous, the federal *An Act Respecting First Nations, Inuit and Metis children, youth and families* (Bill C-92) also governs. This Act establishes national standards for Indigenous children that prevail over the provincial law. This Act also affirms rights of Indigenous communities to exercise self-government and pass and enforce their own laws regarding any aspect of child and family services.

An Act Respecting Child and Family Services (Indigenous Jurisdiction and Related Amendments) (Bill 32) received Royal Assent on May 30, 2023 and gives the Manitoba courts jurisdiction to hear and determine family proceedings brought under an Indigenous law. (See s. 41.1 of *The King's Bench Act* and s. 19.1 of *The Provincial Court Act*).

Section 28 of *The Child and Family Services Act* permits a judge or master, on application made prior to a hearing, to transfer any proceedings under that Part to a court in another jurisdiction where appropriate. Section 28(2) permits a judge or master, on application made prior to a hearing, to substitute another agency for the agency that apprehended the child for the purpose of the hearing.

Where an agency believes that contact between a person and a child may lead to the child being in need of protection, a court may make an order prohibiting such contact. The court also has the jurisdiction to make an interim order. An Indigenous Service Provider (ISP) also has the jurisdiction to make an application (see s. 20).

Where a child abuse committee is of the opinion that a person has abused a child, a notice of intention to register that person's name on the child abuse registry is served. The Court of King's Bench (Family Division) has jurisdiction to hear an application to object to the entry in the registry. (See ss. 19(3), (3.2) and (3.3)).

The court has no jurisdiction to make an order pursuant to which the director or an agency is appointed the guardian of a child jointly with any other person (see s. 38.1).

Under section 39, parents and guardians can seek access to a child who is subject to a permanent or temporary order. However, the court has no jurisdiction to grant such an order where the child has been placed for adoption (see s. 39(6)).

There are also limits on the length of time for orders of temporary guardianship. Section 41 provides that a judge may extend an order of temporary guardianship for a period not exceeding 24 months. An order of temporary guardianship may be extended one or more times.

There are many other sections which set out requirements for the exercise of jurisdiction. Always read the statute.

6. *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20)

Most property statutes are provincial. That led to a gap in the law as provincial property statutes do not apply to First Nations property held on reserves. That necessitated the creation of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (*FHRMIRA*).

The *FHRMIRA* does not apply in all cases. Section 43 sets out the rules respecting which court has jurisdiction to hear the matter. There is jurisdiction under sections 42(2) and (3) if the court is seized of a pending application respecting divorce or relationship breakdown.

If there is no pending application, a court has jurisdiction if all lands and structures are in the jurisdiction. If the lands and structures are in more than one jurisdiction, the court where the parties habitually resided, or where they agree, has jurisdiction (s. 43(4)).

7. *The Family Property Act*

The Family Property Act C.C.S.M. F25 deals with who has the right to claim property relief and sets out limitation periods. Applications are brought in the King's Bench (see s. 18), most commonly at the same time as a Petition for Divorce or Petition dealing with other matters arising out of a separation. However, applications may also be brought while the parties continue to cohabit (see s. 16).

a) Jurisdiction

The court has jurisdiction under *The Family Property Act* (s. 2(1) and s. 2.1(1)) if:

- the habitual residence of both spouses or common law partners is in Manitoba;
- the last joint habitual residence of the spouses or common law partners was in Manitoba; or
- if they have not established a joint habitual residence since the time of marriage or cohabitation but the habitual residence of each of them at the time of marriage or commencement of cohabitation was in Manitoba.

It is possible to have jurisdiction for property relief in more than one place. For example, under Alberta's *Family Property Act*, there is jurisdiction when a divorce proceeding is brought in Alberta, irrespective of the parties' habitual residence. In such a case, the onus would be on the party who sought to move the jurisdiction to show that the other jurisdiction was "distinctly more appropriate".

This is basically a *forum conveniens* test, based on which jurisdiction has the closest "real and substantial connection", and where it would be most convenient for the case to proceed.

The Family Property Act does not apply to married relationships that terminated or to individuals who died before May 30, 1977, or before June 30, 2004 for common law relationships, unless after separation the parties resumed cohabitation for more than 90 days after the applicable date. (See ss. 2(4), 2.1(2), 25 and 25.1).

The court may include the value of property in other provinces but cannot make orders respecting the property itself (s. 12). *The Family Property Act* does not apply to First Nations property held on reserves (see the discussion of the *FHRMIRA* above).

Interim orders can be made, including orders for the payment of an amount in a lump sum or by installments, or the delivery or transfer of an asset (s. 18.1).

The court may also make an order for preservation of assets if one of the parties has committed or is about to dissipate assets or is about to abscond with assets. Such an order can be made *ex parte* (see s. 21).

b) Limitation Periods

Limitation periods for making an application under *The Family Property Act* are set out in section 19.

An application for a family property order must be made no later than 60 days after a divorce takes effect (s. 19(1)) or 60 days after an appeal of a declaration of nullity is concluded or the appeal period expires (s. 19(2)).

Limitation periods for common law partners are set out in section 19.1(3). Applications for a family property order must be made no later than 60 days after a dissolution of relationship if the common law relationship was registered under *The Vital Statistics Act.* Where the relationship was not registered, an application must be brought no later than 3 years after the date of separation.

Circumstances that permit the court to extend the limitation periods are set out in section 19(3) for married parties and section 19.1(4) for common law couples.

c) Death

In the case of death of one party, only the surviving spouse may seek an order for a family property order. The application must be brought no later than 6 months from the grant of letters probate or letters of administration, subject to the court extending this time period (s. 29).

No such application may be made by the personal representative of the estate, however where an application was brought but not completed prior to the death of one or both parties, the application can continue (s. 28).

There is no jurisdiction for the court to order unequal division in the case of death (s. 40).

8. Pension Legislation

As a result of the Constitutional division of powers, the responsibility for regulating pension plans in Canada is shared between the federal and provincial governments.

Pension division can be triggered under *The Family Property Act*, or pursuant to the applicable pension legislation itself. It is crucial to determine which statutes apply in a given case in order to ensure that the court has the jurisdiction to make the order that you seek.

Federal pension standards legislation applies to members employed in sectors that fall within federal areas of constitutional authority which include, but are not limited to, aviation and airlines, banks, broadcasting and telecommunications, interprovincial transportation, marine navigation, shipping and rail (i.e., "included employment").

The pensions of members in "included employment" are divisible on the breakup of a marriage or common-law relationship according to the requirements of section 25 of the *Pension Benefits Standards Act*, Divorce, Annulment, Separation or Breakdown of Common-Law Partnership. Section 25 states that applicable provincial property law will apply to members' pensions and pension benefit credits.

Employees of the federal public service, and certain corporations, participate in pension plans that are constituted under acts of the federal government. These plans are not bound by provincial pension standards legislation. Some of these pension plans include:

- *Public Service Superannuation Act* and *Supplementary Retirement Benefit Act*
- *Canadian Forces Superannuation Act*
- *Members of Parliament Retiring Allowances Act*
- *Royal Canadian Mounted Police Superannuation Act*

The pension benefits of these employees are divisible according to the requirements of the *Pension Benefits Division Act*.

Provincial pension legislation, *The Pension Benefits Act*, C.C.S.M., c. P32 applies to members employed in sectors that fall within provincial areas of constitutional authority.

The Family Property Act gives spouses and common-law partners the right to apply for an accounting and equalization of family property, which includes rights under a pension or superannuation scheme or plan. However, section 31(2) of *The Pension Benefits Act* requires that pensions and pension benefit credits be divided in accordance with the regulations. The court does not have the jurisdiction to order a division in any other fashion.

For married or common-law partners who separate on or after October 1, 2021, the current provisions of the Act provide two options regarding division of a pension:

- divide a pension up to a 50% basis. Parties must either have a written agreement or obtain a court order which specifies the percentage of the pension up to 50% to be divided in favour of the other party; or
- not divide a pension by specifying in a written agreement or court order that a pension member's spouse or common-law partner is not entitled to any portion of the member's pension.

Section 31(3) limits the application of section 31(2) to:

> *(a) spouses who began living separate and apart after 1983;*
> *(b) common-law parties who*
> *(i) began living separate and apart on and after June 30, 2004;*
> *(ii) began living separate and apart on and after 1983 but before June 30, 2004, if the relationship had been declared according to section 31(5) of the Act as it read before June 30, 2004; or*
> *(iii) were living separate and apart on June 30, 2004, but resumed cohabitation after June 30, 2004 for at least 90 days.*

Note that the definition of "common-law partner" in the Act differs from that in *The Family Property Act*. *The Pension Benefits Act* provides a mechanism for those parties who meet the cohabitation criteria in *The Pension Benefits Act*, but not *The Family Property Act* to obtain an order that a member's pension or pension credit be divided and trigger credit-splitting under section 31(2), thus giving the court jurisdiction to make such an order outside *The Family Property Act*.

The parties must have cohabited with each other for at least one year but less than three years while neither of them was married. Further, their relationship must not have been registered under section 13.1 of *The Vital Statistics Act*; and their last common habitual residence or the last place they lived together must have been in Manitoba.

An application must be made within three years after the common-law partners last began to live separate and apart; or within six months after the grant of letters probate of the pension member's will or of letters of administration, whichever occurs first.

The court may order the division if it is satisfied that the requirements of the Act have been met.

> Be cautious to ensure that the appropriate legislation is referenced with respect to pensions and that there is jurisdiction in the legislation or the pension act itself to make the type of Order that is being requested.

The ability to waive rights to the division of **Canada Pension Plan** credits differs from province to province. Waivers are permitted only in Saskatchewan, Quebec, BC and Alberta. Waivers are not valid in Manitoba, and the court cannot order that CPP credits not be shared.

CONCLUSION

It is crucial that the court has both the jurisdiction to hear the matter and the jurisdiction to grant the order that you seek. Always read the statute!