

FAMILY LAW AND THE BLENDED FAMILY: AN INTRODUCTION TO THE BASIC LAW

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I. INTRODUCTION

With the generous divorce rate currently prevailing and the unprecedented number of people becoming involved in long-term unmarried relationships, the similarly unprecedented rate of repartnering is perhaps to be expected.¹ However, although people entering new long-term relationships are perhaps older and wiser, they often enter their relationship with Spouse 2.0 encumbered with the flotsam left over from the breakdown of their relationship with Spouse 1.0, along with that resulting from any improvident dalliances during or in between. This detritus may be legal in nature, in the form of continuing legal duties and entitlements, or it may manifest as an aversion to the yet-unrealized legal obligations suggested by the new relationship. In the case of the former, Spouse 2.0 will be concerned about the extent of his or her liability for any financial obligations brought into the relationship; with respect to the latter, cohabitation and marriage agreements are often the preferred prophylactic.

This paper will review the law on child support, spousal support and the care and control of children as it relates to step-parents, and review a few issues particular to the breakdown of significant relationships later in life.

II. CHILDREN FROM PREVIOUS RELATIONSHIPS

Access to relief under the federal *Divorce Act*² is largely restricted to persons who are or were legally married to each other.³ Under this act, persons qualifying as “spouses” are responsible for supporting, and may apply for custody of or access to, persons qualifying as “children of the marriage.”⁴

“Spouse” is defined at s. 2(1) as “either of two persons who are married to each other.” This definition is expanded at s. 15 to include former spouses for the purposes of claims relating to child support, custody and access.

A “child of the marriage” is defined at s. 2(1) as “a child of two spouses or former spouses” and, at s. 2(2), includes:

- (a) any child for whom they both stand in the place of parents; and
- (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

Section 2(1) captures both biological and adoptive children within the definition of child of the marriage; s. 2(2) is meant to capture step-children, but only when the non-parent spouse “stands

in the place of a parent.”⁵ When a spouse is found to stand in the place of a parent, his or her obligations to the child under the act are identical to those which would be owed to a natural child.

Provincial family law legislation may not require a similarly qualitative inquiry. Under the British Columbia *Family Relations Act*,⁶ for example, although relief relating to child support and the care and control of children is available to “any person,”⁷ only persons qualifying as “parents” may be obliged to pay child support and parental status is determined by nature of the legal and economic relationship between the spouses rather than the nature of party’s social relationship with the step-child.

“Parent” is defined at s. 1(1) as including:

- (a) a guardian or guardian of the person of a child, or
- (b) a stepparent of a child if
 - (i) the stepparent contributed to the support and maintenance of the child for at least one year, and
 - (ii) the proceeding under this Act by or against the stepparent is commenced within one year after the date the stepparent last contributed to the support and maintenance of the child;

The definition of “stepparent,” mentioned in the definition of parent, is provided at s. 1(2) and captures both married and unmarried spouses:

For the purpose of paragraph (b) of the definition of ‘parent’ in subsection (1), a person is the stepparent of a child if the person and a parent of the child

- (a) are or were married, or
- (b) lived together in a marriage-like relationship for a period of at least 2 years and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender.

A. DURING THE CURRENT RELATIONSHIP

Legal obligations brought into a new marriage can be source of significant stress and inconvenience for many reasons, including:

- a) unsought and unwelcome child care and child transportation duties;
- b) the step-parent’s perceived impotence in decision-making;
- c) the step-child’s exploitation of the emotional dynamics between the step-parent and the natural parents;
- d) the unpleasant necessity of the spouse’s ongoing relationship with his or her former spouse; and,

- e) financial issues about child support and payment of the step-child's special expenses.

As a result, new spouses will often have questions about the orders and agreements burdening their spouses. To what extent are they bound by their spouses' obligations? Will their income be considered in determining support liabilities? Are they entitled to participate in parenting the step-children?

1. Custody and Access

Orders and agreements about custody of and access to a child are binding only between the parties to the order or agreement, presumably the child's natural parents. In the absence of a further order or agreement, the marriage of a custodial parent does not vest the new spouse with custodial rights nor dilute the parent spouse's custodial rights.⁸

Regardless of these legal niceties, step-parents inevitably wind up being called upon to shoulder some of the burdens of child rearing, whether their spouse is the parent with the child's primary residence or not, including tending to the children's homework and transportation, participating in health care and discipline decisions, and managing some measure of the contact with the other spouse. Although step-parents are not bound to the obligations of their spouses, they should nevertheless refrain from hindering such orders and agreements, not because of the mischief which will befall them, but because of the mischief which may befall their spouses.

Crafty former spouses will seek to co-opt new spouses in the task of child rearing, thereby distributing the burden on the principle that many hands make light work; all too often, however, former and current spouses join each other in a cycle of mutually destructive conflict.⁹ Crafty step-parents will seek to avoid this conflict by acknowledging the primacy of the parenting roles played by the natural parents, supporting parenting decisions unpopular with the step-children, and discouraging references to themselves as "mom" or "dad."

2. Child Support

New spouses are not obliged to pay child support for the benefit of a step-child, including in circumstances of their spouse's default. Likewise the income of new spouses is generally irrelevant in determining the quantum of support, whether the spouse is the payor or recipient of support, except in a few limited situations:

- a) arguably, whenever the Child Support Guidelines¹⁰ require consideration of the means of one or both natural parents;¹¹ or,
- b) when a natural parent applies for relief from the Guidelines tables on the basis of undue hardship under s. 10 of the Guidelines.¹²

The "means" of a parent are taken into account when determining the amount of support payable for an adult child,¹³ the parents' obligation to contribute to a particular expense,¹⁴ or the amount payable when the parents have shared custody of a child.¹⁵ This may require the new spouse to provide evidence of his or her income even though he or she is not a party to the proceeding.

B. AFTER THE CURRENT RELATIONSHIP

A new spouse may wish to advance claims in respect of a child who is the subject of an order or agreement between the parent spouse and his or her former spouse, seeking rights of contact or custody of the step-child and, in rare circumstances, child support for the benefit of any step-children who remain in the new spouse's care following separation.

1. Custody

The right to custody of a child is presumptively allocated between the child's biological or adoptive parents.¹⁶ Step-parents are generally precluded from advancing such claims in deference to the child's natural parents unless one or both of the child's natural parents are deceased or are demonstrably incapable of parenting the child.¹⁷ Where a step-parent makes a claim attacking the fundamental adequacy of the natural parents any presumptions in favour of the natural parents will usually assume a secondary importance to the child's best interests.¹⁸

A married step-parent may apply for custody of a stepchild under s. 16(1) of the *Divorce Act* as of right, by virtue of his or her standing as a "spouse" as defined by s. 2(1).¹⁹ Where there is an extant order for custody between the child's biological parents, a step-parent should seek leave under s. 17(2) to apply to vary that order and be joined in those proceedings for the purpose.

2. Access

A step-parent making a claim for access to a child seeks a right of visitation without further parental authority. Such claims admit the essential soundness of the child's living arrangements and place the step-parent at a profound disadvantage to the wishes of the child's natural parents as a result:²⁰ the question of with whom a child spends time falls squarely within the discretion of the natural parents to direct the course of the child's upbringing, and the burden lies on the step-parent to establish that the proposed contact will redound to the child's benefit. In general:

- a) step-parents and other non-parents have no *prima facie* right to access to a child, and the extent of their contact with the child is largely at the discretion of the natural parents;²¹
- b) non-parents awarded access will usually be awarded only a parsimonious amount of access;²² and,
- c) where a non-parent is awarded access, his or her access will usually be fixed within the time allocated to the step-parent's former spouse so that the time allocated to the other natural parent is not infringed upon.²³

A married step-parent may apply for access to a stepchild under s. 16(1) of the *Divorce Act* as of right, by virtue of his or her standing as a "spouse" as defined by s. 2(1).²⁴ Where there is an extant order for access between the child's biological parents, a step-parent should seek leave under s. 17(2) to apply to vary that order and be joined in those proceedings for the purpose.

3. Child Support

Step-parents may be obliged to pay child support for the benefit of a child. Questions about this obligation generally arise when the step-parent and natural parent have separated and the parent spouse claims support.²⁵

Under the *Divorce Act*, non-parent spouses must be found to “stand in the place of parent” before the step-child will qualify as a “child of the marriage” entitled to benefit from the payment of child support. *Chartier v. Chartier* remains the leading case on this issue and prescribes a non-exhaustive list of factors to be taken into account in assessing whether a spouse stands in the place of a parent:²⁶

- a) whether the step-child participates in family life as a biological child would participate;
- b) the degree of the non-parent’s financial support for the step-child;
- c) whether the non-parent spouse disciplines the child as he or she would discipline a biological child;
- d) the non-parent spouse’s representations of him- or herself, impliedly or expressly, as the step-child’s parent; and,
- e) the nature and quality of the step-child’s relationship with the non-parent spouse.

Although, as a general principle, a step-parent’s obligation to pay child support is identical to that of a natural parent once liability is established, s. 5 of the Child Support Guidelines provides that:

Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent’s legal duty to support the child.

This section has been interpreted as giving the court an advisory discretion to award an amount of child support against a step-parent less than that presumptively required by the Guidelines tables as may be appropriate in the circumstances,²⁷ considering the other natural parent’s support obligation.²⁸

A step-parent’s liability will usually be determined based on the child’s standard of living and be treated as a top up of the other natural parent’s obligation.²⁹ Other, less common means of determining a step-parent’s obligation include deducting the other natural parent’s payments from the step-parent’s payments,³⁰ apportioning child support determined on the cumulative income of the other natural parent and step-parent or on other mathematical calculations,³¹ or simply awarding an amount equal to the Guidelines tables amount.³²

III. SPOUSES FROM PREVIOUS RELATIONSHIPS

Orders for spousal support may be varied where there has been a material change in circumstances since the original order was made.³³ A “material change in circumstances” is a important and meaningful change which, if known of at the time of the original order, would have resulted in a different order being made.³⁴

As the court is not bound by private agreements when exercising a power delegated to it by statute, the court may make *de novo* orders for spousal support on terms different than those set out in a family law agreement,³⁵ although it will generally do so with some degree of deference to the parties’ agreement.³⁶

The repartnering of a spouse may be relevant to an existing spousal support obligation where:

- a) the repartnering spouse is the recipient of support and the payor wishes to terminate his or her obligation on the grounds of the recipient’s new relationship; or,
- b) the repartnering spouse is the payor of support and wishes to terminate his or her obligation on the grounds of a newly reduced ability to pay support.

A. REPARTNERING RECIPIENTS OF SPOUSAL SUPPORT

Orders and agreements for the payment of spousal support will usually make one of the following provisions for the termination of the obligation:

- a) termination at a fixed date;
- b) a review of the obligation at one or more fixed dates;³⁷
- c) termination or review upon a specific event in the recipient’s life, such as the recipient’s death, remarriage or cohabitation in a marriage-like relationship, receipt of employment income in excess of a certain amount, or receipt of pension income; or,
- d) support will be paid indefinitely and never terminate.

Absent a clause terminating a support obligation upon a spouse’s remarriage or an imminent review date, the repartnering of a recipient of spousal support does not create a presumption that the spouse has become economically self-sufficient, thereby disentitling him or her from further support payments.³⁸ However, where a payor applies to terminate a support obligation as a result of the recipient’s repartnering, the recipient will usually have to demonstrate a continuing entitlement,³⁹ an exercise which will involve disclosure of the new spouse’s income and a consideration of the new family’s collective capacity to see to the self-sufficiency of the former spouse.⁴⁰

An application to terminate a support obligation as a result of the recipient’s repartnering may result in the immediate termination of the obligation,⁴¹ the termination of the obligation at a date

in the future,⁴² the reduction of the obligation,⁴³ or a dismissal of the application and the continuation of the obligation.⁴⁴ Even where the recipient is unable to demonstrate a present continuing entitlement to spousal support, however, the court may be reluctant to terminate the payor's obligation altogether in the event that further payments become necessary in the future.⁴⁵

B. REPARTNERING PAYORS OF SPOUSAL SUPPORT

Orders and agreements for the payment of spousal support may also provide that support will terminate or be reviewed upon a specific event in the payor's life, such as the payor's death, the payor reaching a certain age, or the payor's retirement. For obvious reasons, orders and agreements rarely contemplate a termination or review upon the payor's repartnering although such an event, if resulting in a decrease of the payor's disposable income, would likely constitute a material change in circumstances sufficient to justify a variation application.⁴⁶

“The quantum awarded, in the sense of both amount and duration, will vary with the circumstances and the practical and policy considerations affecting particular cases. Limited means of the supporting spouse may dictate a reduction. So may obligations arising from new relationships in so far as they have an impact on [the payor's] means.”

When a material change in the payor's circumstances can be demonstrated,⁴⁷ an application to terminate a support obligation as a result of the payor's repartnering may result in the termination of the obligation,⁴⁸ the reduction of the obligation,⁴⁹ or a dismissal of the application and the continuation of the obligation.⁵⁰

IV. ANTICIPATING THE BREAKDOWN OF NEW RELATIONSHIPS

People entering a new spousal relationship after enduring the breakdown of a previous relationship are understandably more inclined to explore options for the management of separation than first-time spouses. Marriage agreements will be contemplated where marriage is anticipated, while cohabitation agreements may be considered where the parties plan to live together without marrying.⁵¹

Marriage agreements and cohabitation agreements are contracts whose negotiation, execution, enforcement and interpretation are governed by the general common law on contracts. Unlike most other private contracts, the usual subject matter of family law agreements is separately governed by statute and assigned for adjudication to the courts, and family law agreements will not be effective to contract out of statutory regime.⁵²

The potential topics of marriage and cohabitation agreements are unlimited in theory but are largely confined in practice, at least in British Columbia, to addressing issues about property and spousal support. In theory a marriage or cohabitation could:

- a) indemnify a new spouse from responsibility for the support of step-children, in respect of both the parent spouse and the former spouse;

- b) indemnify a new spouse from responsibility for contributing to the support of a former spouse;
- c) enumerate the property brought into the new relationship to insulate the new spouse's property from claims by the former spouse; and,
- d) generally indemnify a new spouse from claims brought by a former spouse.

The marginal probability that such provisions would prove useful generally results in the confinement of such agreements to issues more likely to arise on the breakdown of the new relationship, namely:

- e) the division (or not) of the assets brought into the marriage;
- f) the division of any assets acquired after the marriage; and,
- g) spousal support (or not).⁵³

A. MARRIAGE AND COHABITATION AGREEMENTS AND ELDER LAW

When one or both of the parties are repartnering later in life, considerations about incapacity and succession are brought into a sharper focus and should be squarely addressed whenever possible, including:

- a) the consequences of party's future illness and any caregiving role undertaken by the other spouse (spousal support, property division, estate planning);
- b) the cost of future medical care (property division);
- c) the management of future medical care and medical decision-making in the event of incapacity (guardianship);
- d) the continuance of medical and dental insurance following a party's death (estate planning);
- e) the management of financial issues in the event of incapacity (guardianship);
- f) where an entitlement to receive spousal support is anticipated, narrowing the ranges produced by the Spousal Support Advisory Guidelines (spousal support);
- g) the payment of spousal support following a party's death (estate planning);
- h) equitably apportioning the estate claims of a party against the interests of the decedent's adult children (estate planning); and,

- i) use of the family home and contents following the owner's death (spousal support, estate planning).

It will also be particularly important to provide for reviews of the agreement while the parties' relationship endures in order to address any significant changes in the parties' circumstances which might occur. Where a spouse is frail, in ill-health or expected to fall ill, it may be prudent to schedule fixed review dates.

B. SPOUSAL SUPPORT AND ELDER LAW

The basic spousal support analysis – assessing entitlement, and quantum and duration if entitlement is established – must address special factors for spouses separating later in life. It may be impossible for a dependent spouse to obtain employment; pensions may have been devalued by division with a previous spouse; support obligations arising out of a recent relationship may compete with ongoing obligations from previous relationships. In most cases, an emphasis must be placed on equitably dividing multiple but fixed sources of incomes to provide each spouse with as reasonable a standard of living as possible with no expectation of economic disentanglement.

1. The Spousal Support Advisory Guidelines

Once a spouse's entitlement to support has been established, the Spousal Support Advisory Guidelines may be used to determine the amount and duration of support payments.⁵⁴ The Advisory Guidelines prescribe two categories of formula, one to be used when there is no child support obligation and one for when there is a child support obligation, whether child support is actually being paid or not.

Under the basic "without child support" formula, the formula applicable to most elder couples, spousal support is determined based on the payor's gross income, the recipient's gross income, the length of the parties' cohabitation, and, perhaps most importantly, the age of the recipient.⁵⁵ With these numbers, the formula generates a range of results for quantum and for duration.

The range for quantum is capped at the amount which would give the recipient 50% of the parties' net disposable incomes, including government benefits but deducting income taxes, and will only be reached in longer relationships.⁵⁶

The maximum result for duration is "indefinite, duration not specified"⁵⁷ and will be reached upon the fulfilment of either of two mathematical triggers: when the parties have cohabited for 20 or more years; or, when the length of cohabitation is longer than five years and the number of years of cohabitation plus the recipient's age is equal or greater than 65.⁵⁸ For elder couples, the latter trigger may result in a spouse acquiring an indefinite entitlement to support after a relatively short relationship.

The results of the Advisory Guidelines formulae must not be applied reflexively. The Advisory Guidelines contains provisions allowing the results of the formulae to be restructured to address unfairness, and specific exceptions to the results for either or both quantum and duration are available to address previous spousal support obligations, the illness or disability of the recipient,

and the inability of a recipient to meet basic his or her basic needs in shorter marriages where the recipient has little or no income.⁵⁹ The advisability of restructuring the results and the applicability of the exceptions should be addressed whenever the Advisory Guidelines are used to determine spousal support for elder spouses.

2. Cohabitation and Marriage Agreements

Cohabitation and marriage agreements which anticipate an obligation to pay spousal support but which cannot or should not predict the amount payable can be used to fix the quantum and duration of support within the Advisory Guidelines ranges or otherwise manage the Advisory Guidelines calculations.

3. Security for Support

Spouses separating later in life will often be concerned about securing a spousal support obligation as an obligation to pay support generally dies with the payor, in the absence of an agreement or order to the contrary.⁶⁰

The spouses may agree that the support obligation will be binding on the payor's estate, however this may inconvenience the payor's heirs by tying up distributions pending exhaustion of the support obligation and may ultimately be ineffective if the payor transfers assets outside his or her estate. As an alternative, the spouses may agree that the recipient will be nominated as the irrevocable beneficiary of an insurance policy on the payor's life, however the cost or the state of the payor's health may be prohibitive. Ultimately, it may be necessary to establish an *inter vivos* trust for the benefit of the recipient, even though the assets placed in trust will usually be unavailable to the spouses during their relationship as a result.⁶¹

¹ See <http://www.statcan.gc.ca/daily-quotidien/050309/dq050309b-eng.htm>, accessed 3 May 2010. For a sociologist's perspective on changing norms in marriage and cohabitation, see S. Lauer & C. Youdanis, "The Deinstitutionalization of Marriage Revisited: A New Institutional Approach to Marriage" (2010) 2 *Journal of Family Theory & Review* 58; for an up to date statistical overview of Canadian trends, see A.-M. Ambert, "Divorce: Facts, Causes and Consequences" in CCH's Canadian Family Law Matters, June 2010 No. 324.

² *Divorce Act*, RSC 1985, c. 3 (2nd Supp.) ("DA").

³ Persons not qualifying as spouses, such as grandparents and other extended family members, may apply for relief under the *Divorce Act* in relation to custody or access, including on interim and variation applications, with leave of the court (*DA*, ss. 16(3), 17(2)). Non-spouses do not however have standing to apply for child support orders.

⁴ In this paper, I will refer to biological or adoptive children as "natural children" and their biological or adoptive parents as "natural parents" and "parent spouses," in contrast to the new spouses of parents whom I will refer to as "step-parents" and "non-parent spouses."

⁵ See the discussion of *Chartier v. Chartier* below.

⁶ *Family Relations Act*, RSBC 1996, c. 128 ("FRA").

⁷ "Persons" includes "parents, grandparents, other relatives of the child and persons who are not relatives of the child" (*FRA*, ss. 24(1.1), 35(1.1)).

⁸ *FRA*, s. 34(2)(a), (b).

⁹ In a family law practice, the lawyer's objective third-party perspective is often of the highest value. In the emotionally-laden context of a former spouse's complaints about a new spouse, be sure to test the validity of the client's complaints as the client's emotional fog often obscures the gravity of the actual offence.

¹⁰ Federal Child Support Guidelines, SOR/97-175 ("CSG").

¹¹ See *Baum v. Baum*, 2000 BCSC 1835 and *Speakman v. Willes*, 2003 BCSC 968.

¹² Determination of an undue hardship claim requires the court to compare the standard of living of the households of the payor and recipient according to a prescribed formula and defines “household” as including “any person 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” (CSG, Sch. II, s. 1).

¹³ CSG, s. 3(2)(b).

¹⁴ CSG, s. 7(1).

¹⁵ CSG, s. 9(c).

¹⁶ See *A.L. v. K.D.*, 2000 BCCA 455 and *Seymour v. Seymour*, [1994] B.C.J. No. 1970 (S.C.).

¹⁷ See, for example, *Racine v. Woods*, [1983] 2 S.C.R. 173, *King v. Low*, [1985] 1 S.C.R. 87, *L(A) v. K(D)*, 2000 BCCA 455, *Innis v. White*, [1987] B.C.J. No. 2404 (S.C.) and *Minshull v. Di Palma*, [1996] B.C.J. No. 291 (S.C.).

¹⁸ To be clear, the tension here is between parents’ right to raise their children and the extent to which that right may be compromised by considerations of the children’s best interests. It is not clear that the existence of this parental right gives rise to a presumption in favour of the parent; see *Chera v. Chera*, 2008 BCCA 374, distinguishing *A.L. v. K.D.*, and *C.B. v. S.B.*, 2009 YKSC 12.

¹⁹ When the child’s other natural parent is alive, any such order sought by a step-parent stands a reasonable chance of conflict with a prior *DA* custody order between the natural parents. Where the step-parent and the parent spouse are married, I suggest that the step-parent commence a new *DA* action against the parent spouse seeking custody of the child, an order joining the new proceeding with the natural parents’ *DA* action, and an order varying the prior custody order.

²⁰ In *Chapman v. Chapman*, [1993] W.D.F.L. 412 (B.C.S.C.), the leading case on this issue in British Columbia, the court held that:

- a) the onus is on the party seeking access to demonstrate that such access would be in the child’s best interests;
- b) the court should only interfere with a natural parent’s decision to withhold access if it is in the child’s best interests to do so; and,
- c) the court should avoid granting access if the access will expose the child to the conflict between the parent and the non-parent.

²¹ See *Lusher v. Lusher* (1988), 13 R.F.L. (3d) 21 (O.P.C.), *Lambrechts v. Lambrechts*, [1995] B.C.J. No. 1667 (S.C.) and *Yaghoobian v. Yaghoobian*, [1995] B.C.J. no. 2535 (S.C.), all cases dealing with grandparental claims for access but apply equally well to other people who are not a child’s natural parents, such as step-parents.

²² See *Lambrechts, Yaghoobian, Moreau v. Cody* (1995), 15 R.F.L. (4th) 174 (O.P.D.) and *McLellan v. Glidden* (1996), 23 R.F.L. (4th) 106 (N.B.Q.B.).

²³ See *Parmar v. Parmar*, [1997] B.C.J. No. 2094 (S.C.) and *Evans v. Larson*, 2004 BCSC 1511.

²⁴ When the child’s other natural parent is alive, any such order sought by a step-parent stands a reasonable chance of conflict with a prior *DA* custody order between the natural parents. Where the step-parent and the parent spouse are married, I suggest that the step-parent commence a new *DA* action against the parent spouse seeking custody of the child, an order joining the new proceeding with the natural parents’ *DA* action, and an order varying the prior custody order.

²⁵ Former spouses will not qualify as “spouses” with respect to the step-parent as a result of the definition of spouse at *DA*, s. 2(1), limiting a former spouse’s claim under that act to the other natural parent.

²⁶ *Chartier v. Chartier*, [1999] 1 S.C.R. 242. Other cases suggest additional factors, such as *A.M.G. v. T.M.G.*, 2005 BCPC 100, *Hertlein v. Hertlein*, 2004 SKQB 203 and *Hachey v. Dempster*, 2003 NBQB 118.

²⁷ See *Tyson v. Tyson*, 2004 SKQB 204. In *Squires v. Severs*, 2000 BCSC 853, the court cautioned against formulaic approaches to exercise of the discretion afforded by CSG, s. 5.

²⁸ See *Adler v. Jonas* (1999), 48 R.F.L. (4th) 288 (B.C.S.C.), *Nabigon v. Lavallee*, 2009 CarswellOnt 2092 (S.C.J.) and *Delargy v. Ciolfi*, [1999] B.C.J. No. 1335 (S.C.).

²⁹ See *U.V.H. v. M.W.H.*, 2008 BCCA 177 and *Singh v. Singh*, [1997] B.C.J. No. 2195 (S.C.).

³⁰ See *Lussier v. Hainstock*, [1998] B.C.J. No. 3146 (S.C.) and *Rolls v. Rolls*, 2000 ABCA 18.

³¹ See *Squires v. Severs, Adler v. Jonas* and *Mancuso v. Weinrath*, 2005 BCSC 1606.

³² See *Monkman v. Beaulieu*, 2003 MBCA 178 and *Pigeau v. Pigeau*, 2009 CarswellOnt 2012 (S.C.J.).

³³ *DA*, s. 17(4.1).

³⁴ See *L.G. v. G.B.*, [1995] 3 S.C.R. 370, in which the court adopted the material change in circumstances test articulated for applications to vary child support orders in *Willick v. Willick*, [1993] 3 S.C.R. 670, and *Murphy v. Murphy*, 2000 BCSC 974 interpreting *L.G.* For an excellent overview of this issue, see Andrea Duncan’s paper “Til

Remarriage Do Us Part?” published by the Federation of Law Societies of Canada in the materials for the 2010 National Family Law Program.

³⁵ See *Hyman v. Hyman*, [1929] A.C. 601 (H.L.) and *Pelech v. Pelech*, [1987] 1 S.C.R. 801.

³⁶ See *T.L.A.T. v. W.W.T.* and *Miglin v. Miglin*, 2003 SCC 24. Pursuant to *Miglin*, before making an order in the face of an otherwise valid agreement, the court will examine the circumstances surrounding the formation of the agreement and whether the agreement satisfied the statutory objectives for spousal support before turning to the present effect of the agreement and its continued compliance with the statutory objectives for spousal support. The objectives of a spousal support order are set out at *DA*, 15.2(6).

³⁷ See *Leskun v. Leskun*, 2006 SCC 25 for a discussion of the appropriateness of review provisions.

³⁸ See *L.G. v. G.B.*, [1995] 3 S.C.R. 370.

³⁹ See *Boudreau v. Bradbury* (1998), 38 R.F.L. (4th) 1 (B.C.S.C.). For a discussion of entitlement under both the *Divorce Act* and the *Family Relations Act* see *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. The effect of remarriage will be particularly influential when original order granted to support to meet the recipient’s financial needs rather than to satisfy a purely compensatory entitlement, see *Kelly v. Kelly*, 2007 BCSC 227.

⁴⁰ See *Range v. Range* (1995), 14 R.F.L. (4th) 11 (B.C.S.C.) and *Thombs v. Thombs* (1988), 15 R.F.L. (3d) 84 (O.U.F.C.).

⁴¹ See *McMullen v. McMullen* (1994), 5 R.F.L. (4th) 444 (N.B.C.A.) and *Babington v. Babington* (1993), 47 R.F.L. (3d) 296 (N.B.Q.B.).

⁴² See *Ryan v. Hardy*, 2004 NSSF 111.

⁴³ See *Juvatoplos v. Juvatoplos* (2004), 9 R.F.L. (6th) 147 (O.C.A.) and *Manson v. Manson*, 1990 CarswellINS 514 (F.C.).

⁴⁴ See *Gillham v. Gillham* (1993), 48 R.F.L. (3d) 156 (A.C.A.) and *Tabel v. Tabel* (1997), 35 R.F.L. (4th) 379 (S.Q.B.).

⁴⁵ See *Lee v. Lee*, 2005 BCSC 1776. See also the discussion in *B.G.D. v. R.W.D.*, 2003 BCCA 259 about issue estoppel and the effect of orders dismissing spousal support.

⁴⁶ *Bracklow v. Bracklow*, *supra*, at para. 53.

⁴⁷ See *Jacobs v. Jacobs* (1990), 29 R.F.L. (3d) 230 (O.G.D.) and *Underwood v. Underwood* (1987), 7 R.F.L. (3d) 447 (N.S.F.C.).

⁴⁸ See *Wolfe v. Wolfe* (1995), 15 R.F.L. (4th) 86 (B.C.S.C.).

⁴⁹ See *Burt v. Burt* (1990), 25 R.F.L. (3d) 92 (Nfld.T.D.).

⁵⁰ See *Smith v. Smith* (1989), 23 R.F.L. (3d) 89 (M.Q.B.) and *Greco v. Levin* (1991), 33 R.F.L. (3d) 405 (O.G.D.).

⁵¹ The rights and obligations of married and unmarried couples in respect of the care and control of children and child support are virtually identical in many jurisdictions.

⁵² See *Hyman*.

⁵³ Marriage agreements generally do not make provisions for care and control of any children born of the marriage or the payment of child support because of the unpredictability of the parties’ future circumstances and a concern that parties might cynically engineer the course of the breakdown of their marriage so as to ensure a specific outcome on separation.

⁵⁴ Rollie Thompson and Carol Rogerson, *Spousal Support Advisory Guidelines* (Ottawa: Department of Justice, 2008) (“SSAG” or “Advisory Guidelines”).

⁵⁵ For a review of the data required by the SSAG see John-Paul Boyd, *Obtaining Reliable and Repeatable SSAG Calculations* (Ottawa: Department of Justice, 2009)

⁵⁶ SSAG §7.4.

⁵⁷ See the important discussion of this term at SSAG §13.8 and the definition at Boyd, *supra*, p. 37.

⁵⁸ SSAG §§7.5 and 7.5.3.

⁵⁹ Restructuring and the exceptions to the formulae are discussed at SSAG §§10 and 12 respectively.

⁶⁰ The power to make an order securing a spousal support obligation is found at *DA*, s. 15.2(1).

⁶¹ Orders securing spousal support obligation have been made in British Columbia on the following terms, some of which may be available for use in marriage or cohabitation agreements: charging the payor’s RRSPs as security (*Quesnel v. Quesnel*, 1999 CanLII 6926 (B.C.S.C.)); the payor posting funds into court (*Ledoux v. Ledoux* (1983), 50 C.B.R. (N.S.) 241 (B.C.S.C.)); the payor granting a mortgage to the recipient (*Bjorndal v. Bjorndal*, [1987] B.C.J. No. 1016 (B.C.S.C.) and *Tyerman v. Tyerman*, [1999] B.C.J. No. 2327 (B.C.S.C.)); and, placing shares of the payor’s company in escrow (*Berg v. Berg*, [1999] B.C.J. No. 63 (B.C.S.C.)).