Marriage, Divorce, and the Family
Family Law

- Family Law deals with the various relationships between family members, including husband and wife, parents and children, and more recently same-sex partners.
- The need for family law usually begins with the marriage breakdown—grounds for divorce.
- The Constitution Act, 1867 gives the federal government authority to define the essentials of marriage, and provincial governments the jurisdiction over the solemnization of marriage (the procedures required for a legal marriage).
Changing Times

• For many years, the traditional “nuclear family” was the dominant model for most homes.
• A nuclear family consists of a mother, father, and their children.
• Over the years this model has become less dominant and several newer models have emerged to create a diversity among families that is unprecedented.
• Newer family models include: same-sex couples with children, single parents, married couples without children, unmarried couples in common law relationships, and, most recently, three-parent families.
Marriage

- A **marriage** involves a legally binding contract between two people.
- A **divorce** terminates the contract.
- Similar to other contracts, each spouse has rights and obligations:
  - Each spouse has a right to live in the family home.
  - Spouses have a mutual obligation of financial support and an individual obligation of self-support.
  - Spouses have rights to share in an estate; one spouse gains rights to the estate if the other spouse dies.
  - If there are children, the partners must determine care, custody, and support in the event of a divorce.
Requirements of Marriage

• Most of the essential requirements of marriage are recognized through common law, and each province has its own *Marriage Act*.

• The essential requirements of marriage:
  1. Mental capacity
  2. Genuine consent
  3. Minimum age
  4. Close relationships
  5. Unmarried status
Capacity & Consent

Mental Capacity

• For a marriage to be legal, each person must have the mental capacity to understand the nature of the marriage.

• Someone who lacks mental capacity because of illness, drugs, or alcohol cannot legally marry.

Genuine Consent

• A marriage is not valid if either person did not freely consent, or agree to being married.

• If either person is under duress (forced to marry) or if there is a mistake (marrying the wrong twin, communication problems), the marriage is not legal.
Minimum Age

• In Canada, the English common law **minimum ages** for marriage have been adopted: 14 years old for males, and 12 years old for females (2 years younger because girls were thought to mature faster).

• However, each province has its own version of the **minimum age**, all of which are higher than the common law ages, except for Québec.

• Very young people who wish to be married require their parents’ permission by law.
Close Relationships

• In Canada, a person cannot marry someone who is closely related to him or her (consanguinity).
• A man cannot marry his...
  – mother
  – daughter
  – sister or half-sister
  – grandmother or granddaughter
• A woman cannot marry her...
  – father
  – son
  – brother or half-brother
  – grandfather or grandson
• Close relationships include adoptions.
Status

• Both persons must be unmarried at the time of their ceremony.
• In Canada, monogamy (being married to one person) is the only legal form of marriage.
• Bigamy means being married to two people at the same time and is illegal.
• Polygamy means being married to two or more people at the same time and it is also illegal.
• If a person wants to remarry, that person must prove that his or her previous marriage has officially ended.
Solemnization

• The formal requirements of marriage, known as solemnization, include
  – issuing a marriage licence or banns.
  – performing the marriage ceremony.
  – establishing age requirements.
  – registering the marriage officially.
• The banns of marriage refers to an announcement of an intended marriage read in a couple’s church.
• A ceremony may be civil or religious.
• Before a wedding, a couple will obtain a marriage licence, and following the ceremony they receive a marriage certificate that registers their marriage.
Same-Sex Marriages

• In 2005, the federal government passed the Civil Marriage Act, which changed the previous definition of marriage ("the lawful union of one man and one woman to the exclusion of all others") to include same-sex couples.

• The definition now speaks of "the lawful union of two persons" instead of "one man and one woman."

• Gay men and lesbian women successfully used their Section 15 Equality Rights in the Charter of Rights and Freedoms to have the definition changed.
A Spouse’s Name

• One of the spouses, usually the wife, may choose to change his or her surname.

• The options are:
  – Assuming the spouse’s surname.
  – Assuming a combination of one’s own surname and the spouse’s surname (with a hyphen in between).
  – Keeping one’s own surname and not changing it.

• Each province has a *Change of Name Act*.

• Today, it is common for women to keep their own surnames or combine them with their spouses’ surnames.
Annulment

• An **annulment** is a court order to set a marriage aside by arguing the marriage was not legal in the first place.

• The grounds for an **annulment** are very specific and may involve the following:

  1. A *missing requirement* of marriage such as genuine consent or mental capacity.

  2. A *legal defect* in the ceremony.

  3. *Non-consummation* of the marriage (no sex).

• Marriages of convenience, such as marrying someone for immigration purposes, may be allowed to stand even if there is no consummation.
Separation

• A separation occurs when a married couple decides not to live together anymore with the intention of formally ending the marriage.

• Some couples never divorce for religious or other personal reasons.

• Separation itself does not end a marriage; only divorce does.

• A couple can reconcile (get back together) if they can live together again for up to 90 days.
Divorce

- A **divorce** is the process that legally ends a marriage.
- The **applicant** is the spouse that initiates the divorce action in court.
- The **respondent** is the spouse being sued for divorce.
- The application has to contain the **grounds** (reasons) for the divorce.
- A valid ground for divorce is **adultery**—voluntary sexual intercourse with someone other than a spouse; a **co-respondent** is the third party that participated in the adultery.
Divorce Applications

• A **divorce application** contains the following information:
  
  – where and when the marriage occurred
  – the ground(s) for divorce
  – if there are any children, their names and ages
  – custody of and access to any children
  – financial support for any children
  – financial support for the applicant, if necessary
  – division of property and assets
Children and Divorce

- A sensitive aspect of parents seeking a divorce is the effect that terminating their marriage will have on their children.
- The following things must be determined.
  1. **Custody**: the care and control of the child(ren) awarded to one or both parents.
  2. **Access**: how much visitation the non-custodial parent is entitled to, and how much financial support he or she must provide.
  3. **Best Interests of the Child**: the guiding principle that a judge uses to make decisions regarding child custody and access.
A Child’s Best Interests

• When determining custody and access, a judge considers these factors in determining the best interests of the child:
  – the child’s needs
  – the stability of the home environment
  – keeping siblings together
  – parent-child relationships
  – the child’s culture and religion
  – the abilities and conduct of each parent
  – support available from relatives and friends
  – the child’s own wishes (depending on age and maturity)
Shared Parenting

• Shared parenting, also known as joint custody, is an arrangement between the divorcing parents to have equal or similar rights in their child’s care and custody.

• A positive aspect of shared parenting is that the relationship between the parents is often less bitter and it focuses on the children.

• In recent years, Canadian courts have moved in a new direction: if parents involved in a bitter divorce cannot compromise or resolve their differences, neither may receive custody of their children.
Access

• When one parent is granted sole custody of a child, the non-custodial parent is usually granted a degree of **access**, or visitation, to the child.

• **Access** includes spending time with the children and receiving information about them, such as their progress in school, and advance notice if the custodial parent intends to move.

• **Reasonable access** entitles the non-custodial parent to regular visits with his or her children.

• **Defined access** entitles the non-custodial parent to a series of scheduled visits.

• **Supervised access** is the most strict type; visitation by the non-custodial parent must be supervised by a third party.
Mobility Rights

- A custodial parent may be allowed to move, over the objections of the non-custodial parent, if the move is thought to be good for the children.

- Custodial parents may wish to move if
  - they plan to marry someone who lives elsewhere.
  - they want to be closer to family and friends.
  - their job is relocated or they get a new job.
  - they experience serious problems with the non-custodial parent and wish to move further away.
Family Mediation

- **Mediators** are used frequently when a marriage breaks down.
- **Family mediation** attempts to resolve family disputes, such as custody or the division of assets, while avoiding a court battle.
- Mediators in family law are usually social workers, psychologists, or lawyers.
- The main point of family mediation is to provide a safe and supportive setting for the spouses to resolve their issues, especially regarding any children they may have.
- It encourages co-operation and compromise.
Child Abuse

• All parents have the right to raise their children according to their own beliefs and values without government involvement.

• However, in recent years Canadian courts and other public officials have increasingly intervened in cases that they believe involve child abuse.

• Child abuse is behaviour that endangers a child’s physical or emotional well-being.

• None of the various types of child abuse are acceptable in Canada. Parents may lose custody of their children if they are found to be abusive to them.
Types of Child Abuse

**Physical:** using deliberate force against a child; includes hitting, biting, choking, shaking, Poisoning, and burning a child.

**Sexual:** sexual activity with a child; incest or any type of sexual exploitation of the child.

**Emotional:** attacking a child’s self esteem; includes terrorizing or humiliating a child.

**Neglect:** failing to look after a child’s basic needs.
Wardships

- If a child is being abused by his or her parents, authorities may remove the child from the parents’ custody, and the court can issue a temporary or permanent wardship order.
- A temporary wardship, also known as a society wardship, provides legal custody of a child to a child protection agency until it is deemed that the parents are fit to resume their responsibility.
- A permanent wardship, also known as a Crown wardship, provides permanent legal custody of a child to the Crown, who is represented by a child protection agency.