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Good Morning!

Welcome to
Devry Smith Frank *LLP's*
FAMILY LAW SEMINAR

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Child Support:

Who pays? How much? And what does this include?

By: Julie Tyas
B.A. (Hons.), LL.B.



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Who pays child support?

- Very simplistically, when parents separate, the parent who is not continuing to live with the children must pay child support to the parent with whom the children reside.
- Child support usually begins when the parents physically separate (i.e. one or both parents move out of the home).
- “Parent” means the natural or adopted parent.
- Child support is governed by the Federal and Provincial *Child Support Guidelines*.

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Do step-parents have to pay child support?

- **Typical Lawyer's Answer: Potentially!**
- Anyone who assumes the role of a parent of a child also becomes liable for child support under section 5 of the *Child Support Guidelines*.
 - If the step-parent has taken an active role in parenting the child (i.e. they have participated in making major decisions for the child, they have disciplined the child, they have provided financial assistance to the child, they refer to the child as “my child” and they have a close relationship with the child), they become liable for child support.
- It is possible for a child to have three or more parents for the purposes of child support (particularly in blended, same-sex, or other “modern” families).



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How much do I have to pay?



- **Typical Lawyer's Answer: It Depends!**
- In a simple scenario, where the child lives with one parent primarily,
the other parent will pay child support pursuant to the *Child Support Guidelines*.
 - This is called the “Table” or “Base” amount of child support.
- The Table varies by province and is a grid based on the paying parent's income and the number of children for which child support is payable.
- www.mysupportcalculator.ca
- Only in limited circumstances can payors opt out of paying child support in accordance with the *Child Support Guidelines*.



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When parents spend equal time with the children: split custody

- Where each spouse has custody of one or more children (i.e. Child 1 lives primarily with Mom and Child 2 lives primarily with Dad), the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.
 - Section 8 of the *Child Support Guidelines*.
 - Results in a “set-off”.
 - i.e. If Mom earns \$50,000 and Dad earns \$80,000, Mom would pay child support to Dad of \$743 per month and Dad would pay child support to Mom of \$1,172 per month, resulting in a net difference payment of \$429 per month from Dad to Mom.



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When parents spend equal time with the children: Shared custody

- Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account:
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- Section 9 of the *Child Support Guidelines*.
- “Split” custody approach can apply (i.e. the “set-off” approach) but some adjustments may be made to allow for comparable standards of living in both parents’ homes.



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Where does my child support go?

- **Typical Lawyer's Answer: Who Knows?!**
- Technically speaking, the paying parent will never really know how their child support is being spent.
- It should be spent on any additional shelter costs for the child, clothing, toiletries, food (including lunches for school), transportation expenses for the child to go to school or his/her activities, diapers, school supplies and other personal care items.
- Child support is not tax deductible for the payor, nor is it tax inclusive for the recipient.



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Special and/or extraordinary expenses: do I have to pay these too?

- A.K.A. “Section 7 Expenses” (Section 7 of the *Child Support Guidelines*).
- These are paid on top of the Table Amount of child support.
- These expenses must be “extraordinary”, “necessary” and “reasonable”, based on the parents’ incomes:
 - Child care expenses;
 - Medical and dental expenses not covered by insurance that exceed \$100/year;
 - Special education (i.e. tutoring) expenses;
 - Extraordinary (i.e. competitive level) extra-curricular activities; and,
 - Post-secondary education expenses (after a reasonable contribution from the child is deducted).
- These expenses are often shared in proportion to each parent’s income.



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Failure to pay: Arrears accumulate

- **Attention Payors: If you are not making your child support payments, it does not mean they are not accruing and potentially with interest!**
- The recipient spouse can apply to the Family Responsibility Office (“FRO”) to enforce the child support order or separation agreement, retroactively to when payment ceased or was unilaterally reduced under the court order.
- <http://www.mcass.gov.on.ca/en/mcass/programs/familyResponsibility/>
- FRO may enforce child support by garnishing the payor’s bank accounts, suspending the payor’s driver’s license, or starting a default hearing, which could result in up to 180 days of jail time.
- Not paying child support when you have been ordered to pay it or when you have agreed to pay it will result in an unhappy judge. Good luck.



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Income for child support

- If you are an employee who receives a T4, your Line 150 Income on your last Income Tax Return is the starting place to determine how much you should be paying in child support (although it may be more appropriate to take an average income over the past three years).
- If you are self-employed, regardless of whether you pay yourself a T4 or not, your income for child support purposes may be more than your reported income on your Income Tax Return, largely due to the tax benefits you receive.
- Your reported income may be “grossed up” to the salary that you would have had to earn to have the same after-tax money in your hands, prior to applying the Table amount of child support.
- This calculation can be very complicated and will require the assistance of a lawyer and possibly an accountant.



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Incomes over \$150,000

- Where the income of the payor spouse is over \$150,000, the amount of a child support order is:
 - (a) the Table amount; or
 - (b) if the court considers that amount to be inappropriate,
 - (i) the Table amount on the first \$150,000 of the spouse's income; and,
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
 - (iii) the amount, if any, determined under section 7.
- Section 4 of the *Child Support Guidelines*.





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Payors who quit their jobs: Off the hook from paying child support?

- **Absolutely not!**
- A parent cannot simply avoid paying child support by quitting his or her job.
- The *Child Support Guidelines* specifically deal with situations in which paying parents are unemployed or underemployed as a result of their own actions.
 - Section 19(1)(a) of the *Child Support Guidelines*.
- A court may require that parent to pay child support on the income he or she would be earning if he or she were fully employed: “imputing income”.
- There are a number of other ways in which a court may impute a higher income to a child support payor.
 - Section 19(b) to (i) of the *Child Support Guidelines*.



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Will the amount of child support ever change?

- **Typical Lawyer's Answer: Probably!**
- Child support can and should change for a number of reasons:
 - Annually, based on the parents' prior annual income;
 - When the special or extraordinary expenses change;
 - If a child moves away from home to attend university or college;
 - If the payor loses his or her job; and,
 - If the child's residence changes and the child moves in primarily with the other parent or begins spending approximately equal time with each parent.
- The *Guidelines* require that parents continue to exchange complete financial information about their incomes for so long as there is a child support obligation.
 - Income Tax Returns, Notices of Assessment, most recent statement of earnings (if T4 employee).
 - Business financial statements, breakdown of salaries/wages, etc. (if self-employed).
 - Trust, pension or other relevant income documentation.



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Will child support ever end?

- **Typical Lawyer's Answer: Yes!** (subject to some considerations)
- It should end when the child turns 18, unless the child is unable to become self-supporting due to illness, disability, education, or other cause;
- It should end when the child dies or marries;
- It should end when the child no longer resides with the recipient parent;
- It should end when the child becomes self-supporting;
- It may end when the child obtains one post-secondary degree or diploma (but depending on the parents' education backgrounds, it could continue through to the second degree or diploma); or,
- One of the parents dies, providing there is sufficient security (i.e. life insurance) in place at the time of death to cover future child support obligations.



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Spousal Support In Ontario

- A Brief History

By: F. Timothy Deeth
Old Fart



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The dark ages – pre – 1968

- No Divorce Law in Canada
- Marriage is a Life-Long Contract
- No Support for Wives Unless “Fault-Free”
- No Support for Husbands at All



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1968 – 1985 – No fault divorce arrives

- Patience Required
- Spousal Support a Very Discretionary Two-Way Street



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1985 Divorce Act

- Spousal Support - Factors to Be Considered
 - Objectives Outlined
- Causal Connection (Disadvantage caused by marriage? – *Pelech v. Pelech*, [1987 S.C.J. No 31])
- Clean – Break Approach (Short-Term Duration Awards)
- Compensatory Support (Lost Opportunity – *Moge v. Moge* [1992] 3 S.C.R. 813)
- Non-Compensatory Support (Need Based – *Bracklow v. Bracklow* [1999] 1 S.C.R. 420)



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The *Family Law Act* (Ontario)

- Expanded Definition of Spouse
- “Needs and Means” Based
- Purpose of Support Order



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The Spousal Support Advisory Guidelines (SSAG)

- Complicated
- Advisory only, but in favour with the Courts
- Must still pass entitlement test
- Very useful for settlement purposes
- The future of support



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Kids and Custody in the 21st Century

Who Makes the Decisions?

By: John P. Schuman
C.S., LL.M., LL.B. B.A.H. EMCA(A)



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Kids and custody in the 21st century – who makes the decisions?

- What does “custody” mean? Why do people think it matters?
- What is the difference between sole, split, and shared custody?
- Should parenting be decided by the kids, by the court, at home or with a social worker?
- How do we hear what the kids want? Does that even matter?



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What does the term custody mean?

- Not where a child lives
- But, who makes important decisions
 - Education – school, program placement
 - Major Medical
 - Religion
 - Extracurricular activities
- Can be important under *Hague Convention*





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Why fight over “custody”?

- Important as a label
- More important that other parent not have it
- Often avoid the term “custody” in consents
- “Joint custody” means *both* parents have to agree on the big decisions
- But, who has final say may be important in high conflict

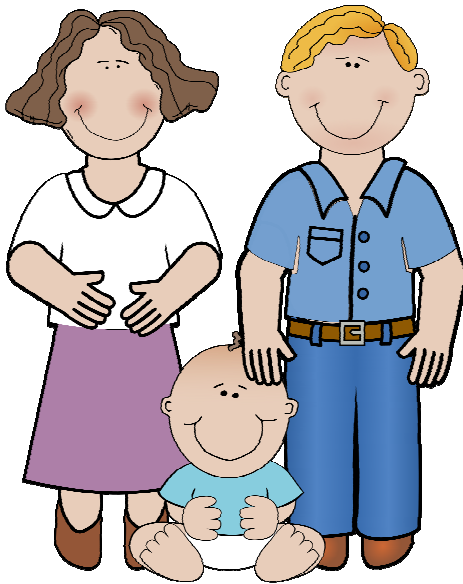




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Parenting time is what matters: shared and split custody



- **Shared custody** means time is divided roughly equally between the parents
 - There is no specific formula for this
- **Split custody** means one child lives more with one parent and other child(ren) spend more time with the other.
- Either can be combined with **parallel parenting**, where final decision making is divided between parents



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How do judges decide?

Children's Law Reform Act, s. 24

24. (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child, in accordance with subsections (2), (3) and (4). 2006, c. 1, s. 3 (1).

Best interests of child

(2) The court shall consider all the child's needs and circumstances, including,

- a) the love, affection and emotional ties between the child and,
 - (i) each person entitled to or claiming custody of or access to the child,
 - (ii) other members of the child's family who reside with the child, and
 - (iii) persons involved in the child's care and upbringing;
- b) the child's views and preferences, if they can reasonably be ascertained;
- c) the length of time the child has lived in a stable home environment;
- d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
- e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
- f) the permanence and stability of the family unit with which it is proposed that the child will live;

- b) the ability of each person applying for custody of or access to the child to act as a parent; and
- c) the relationship by blood or through an adoption order between the child and each person who is a party to the application. 2006, c. 1, s. 3 (1); 2009, c. 11, s. 10.

• **Past conduct**

(3) A person's past conduct shall be considered only,

- a) in accordance with subsection (4); or
- b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent. 2006, c. 1, s. 3 (1).

• **Violence and abuse**

(4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,

- (a) his or her spouse;
- (b) a parent of the child to whom the application relates;
- (c) a member of the person's household; or
- (d) any child. 2006, c. 1, s. 3 (1).

Same

(5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse. 2006, c. 1, s. 3 (1).



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When do judges order joint or shared custody?

- Where conflict, judges order sole custody 80% of the time

BUT

- *Andrade v. Kennelly* 2006 (2006), 33 R.F.L. (6th) 125 (O.N.C.A.)
- *Cox v. Stephen* (2002), 30 R.F.L. (5th) 54 (O.N.C.A.).
- *Lefebvre v. Lefebvre* (2002), 167 O.A.C. 85 (Ont. C.A. [In Chambers]),
- *Ursic v. Ursic* (2006) 32 R.F.L. (6th) 23 (O.N.C.A.).
- *Roy v. Roy* 2006 CarswellOnt 2898 (S.C.J.).
- *Batsinda v. Batinda* 2013 ONSC 7869
- *Etc. etc.*



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Some general trends re joint custody

- Courts try to maintain the same type of relationship as the kids had with their parents prior to separation (unless there were problems with it).
- Joint custody is only appropriate where both parents are competent parents.
- For shared parenting, parents must live close to each other – just for logistics of school, friends, activities, etc.
- No joint custody in high conflict UNLESS one or both parents are trying to create conflict to get advantage.
- No joint custody where one parent is alienating the children from the other parent,
- No joint custody where domestic violence or significant power imbalance or a history of one parent being controlling,
- No joint custody where one parent cannot support the other parent's parenting.
- No Joint custody where one or both parents have a history of breaching court orders
- The idea of equality of parents is NOT persuasive to judges
 - parent's don't have rights – kids have rights/expectations
- Joint custody is appropriate if it will de-escalate conflict
- A LOT depends on the judge's perception of each parent.



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Who really decides?

- Parents together?
- Social Workers or Psychologist?
- The Kids?
- The Court?

The more “buy-in” the better the chance of long term success.



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Should we hear what kids want?

G. (B.J.) v. G. (D.L.) 20010 YKSC 44

- 3 The *Convention*, which was ratified by Canada, with the support of the provinces and territories, in 1991, says that children who are capable of forming their own views have the legal right to express those views in all matters affecting them, including judicial proceedings. In addition, it provides that they have the legal right to have those views given due weight in accordance with their age and maturity. There is no ambiguity in the language used. **The *Convention* is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it** because of the particular circumstances of the case or the view the decision maker may hold about children's participation.
- 4 **A key premise of the legal rights to be heard found in the *Convention* is that hearing from children is in their best interests.** Many children want to be heard and they understand the difference between having a say and making the decision. **Hearing from them can lead to better decisions that have a greater chance of success. Not hearing from them can have short and long term adverse consequences for them.** While concerns are raised by some, they can be dealt with within the flexible legal framework found in the *Convention*.



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How do we hear what kids want?



- Judges Interviewing the child in chambers (or another private place)
- Permitting the child to testify
- Through the evidence of trained professionals (social workers/psychologists)
- Through the evidence of lay witnesses (parents and their supporters)
- Through a legal representative appointed for the child



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How important is it to give kids a voice?

- Bala and Birenbaum – study going on 5 years
 - Some kids don't want to have any input, but most do
 - Do not want to make decisions, just want their concerns heard
 - Judges comfort with this varies by geography
- Quebec, Ohio, California, New Zealand, Germany all have children speaking directly to judges.
 - All the judges who speak to children find it helpful, even if discussion is not forensically relevant
 - Often the child's comments (not necessarily opinion) are helpful in settlement discussions





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Authority for hearing the child

- Judge's interview
 - *Children's Law Reform Act* s. 64
 - Also provides rules – must be recorded, child entitled to representation
- Through a professional
 - *CLRA* s. 30 authorizes an assessment, but does not speak to reporting child's views
 - *CJA* s. 112 – authorized the Children's Lawyer to investigate and provide a report on *all matters* concerning custody or access
 - Rule 21 sets out the rules and procedures, including the procedure to oppose a report
 - *R. v. Khan* - necessity and reliability
- Permitting child to testify
 - *Evidence Act (Ontario)* s. 18
 - *B. (A. D.) v. E. (D.)* 2007 NSSC 182 – calling child is evidence of bad parenting
 - *Vasquez v. To*, [2005] AJ No 1486 (QB) – permitted child to testify on narrow issue



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Authority for hearing the child

- Through lay witnesses
 - On motions: *Family Law Rules*, Rule 18(19) – permits hearsay in affidavits
 - At trial: *R. v. Khan* – *necessity and reliability*
- Through a legal representative
 - *Courts of Justice Act*, s. 89(3.1)
 - Rule 4(7) of the *Family Law Rules*
 - Role of the child's counsel is a contentious issue
 - Advocate for the child's view – *Strobridge v. Strobridge* (1994), 4 R.F.L. (3d) 169 (O.N.C.A.)
 - Advance best interests regardless of child's views – *L. (A.G.) v. D. (K.B.)* (2009), 65 RFL (6th) 146 (O.N.S.C.)



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Keeping best interests in mind

- Separation and divorce does not harm kids, conflict harms kids
- Reaching a settlement that reflects the family's situation is almost always better than having someone impose one
- Listening to the kids can bring settlement, but allowing kids to be manipulated can feed conflict
- In high conflict, use comprehensive orders to address all possible future concerns – but avoid giving “fighters” something to fight over or a forum in which to fight.
 - Conflict is usually over day-to-day issues and not the big decisions (Birenbaum & Fidler), so sweating the details is worth it when settling
- Do not get emotionally involved – parents are emotional in separation, you need to be their voice of reason.



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Time for a break...
Grab a coffee!



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Divorce in the 21st Century

The ADR options that stop the bleeding and
save the kids – and when only a court can do that.

By: Todd Slonim

B.A., LL.B., Acc. FM.



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Range of options

- Kitchen Table Negotiation
- Negotiation with Lawyers
- Mediation
- Mediation and Arbitration
- Collaborative Practice
- Court



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Ways to avoid the adversarial approach to family law disputes – ADR and Collaborative Practice

- [Voice of the Child of Divorce](#)
- Separation and divorce is a complex process – parties experience many emotional and psychological stages similar to the grieving process.
- Most parties prefer to obtain efficient results and want to avoid protracted litigation
- Avoid long-term negative emotional and psychological repercussions for children and parents – protracted litigation intensifies emotional and psychological strain on all parties, and most significantly can have negative consequences on the children.
- Parties who focus on cooperation between each other advance a commitment to insulate the children from negative outcomes.



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Private negotiations

- Parties discuss their concerns and needs together – kitchen table
- Prepare terms of settlement that reflect the family's needs and concerns
- Can be used as a framework for a comprehensive agreement (i.e. separation agreement)
- Potential problems:
 - Parties are not family law lawyers – lack of family law knowledge
 - May not appreciate legal rights – settlement terms may be inconsistent with the law
 - If children are involved – settlement terms should be fluid to reflect ages and stage of development



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Negotiation with lawyers - four-way meeting

- Clients and lawyers attend meeting
- Meeting can be very productive provided that parties are willing and able to discuss range of options and advance reasonable positions without the assistance of a third-party
- Cost efficient - provided that parties and lawyers are prepared to discuss issues – exchange full financial disclosure



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Why family law lawyers are helpful to advance resolution of issues

- Help explain acceptable results to clients – avoid or reduce buyer's remorse
- Understand acceptable ranges of settlement
- Provide independent legal advice (ILA) – parties must each have a lawyer – parties benefit from solicitor-client privilege
- Prepare enforceable agreement – avoid ongoing conflict and fighting over same issues
- Explain Agreement – ensure that client understands terms - little weight given to agreements without ILA
- Ensure that negotiation is free from coercion, undue influence and other problems



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Alternative dispute resolution - mediation

- Mediation
 - Parties meet with a mediator to resolve issues between them
 - Involves an impartial professional, selected by the parties who helps them reach a voluntary settlement designed by them – it reflects their needs and what they want for their family
 - the mediator does not make a decision like a judge or arbitrator.
 - Parties generally more accepting of agreements that they design – reflects what they want as opposed to what is imposed upon them
 - Emphasis on cooperation – reduced tension – more likely to support future cooperative behaviour



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Alternative dispute resolution - mediation

- Settlements tend to be more fair and reasonable – avoids concept of “winner” or “loser”
- Expertise of mediator is vital when considering appropriate candidate mediators
- Two types of Mediation: “Closed” and “Open”
 - Closed Mediation :
 - Mediator's report only includes the issues that were resolved - There is no comprehensive report to an arbitrator or judge
 - If there is no settlement – report only includes information about the agreement reached, if any, and a statement about what issues remain outstanding – all other information provided to the mediator remains confidential
 - The mediator may not be called as a witness to give evidence in any subsequent litigation



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Alternative dispute resolution - mediation

– Open Mediation :

- Mediator provides a report to the lawyers, court or arbitrator - report provides information about what the issues are between the parties, obstacles to settlement and if parties were acting unreasonably
- If there is agreement on issues – report often restricted to the issues that were resolved
- The mediator may not be called as a witness to give evidence in any subsequent litigation



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Alternative dispute resolution - mediation

- Issues to consider when selecting “Open” or “Closed” Mediation
 - Closed Mediation – some assume that the total confidentiality of the process may make the parties more open to disclose information - Confidential to disclose personal information
 - Others believe that there may be less incentive to be honest – use process to incur more fees to hurt other party; which limits effectiveness to resolve issues
 - Open Mediation – potentially keeps party’s more genuine – but parties may feel exposed and may not disclose all relevant information – if there is a breakdown in the process – report is prepared outlining barriers to settlements and positions



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Alternative dispute resolution - mediation

- Open Mediation – one or both parties may request mediator to make recommendations about ways outstanding issues may be resolved – Mediator's expertise is important
- Open Mediation – all information disclosed may be used in the report
- Closed Mediation – only information about agreement between the parties and a statement about or what outstanding issues remain unresolved



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Alternative dispute resolution - mediation

- Mediation is inappropriate when:
 - A power imbalance will lead to an abuse of power
 - Inequality of bargaining process between spouses
 - Either party is physically violent; addiction issues (e.g. alcohol or drugs) exist
 - A party is not able to resolve the ending of the marriage
 - “Winner takes all” mentality – Inability to compromise



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Alternative dispute resolution - arbitration

- Arbitration
 - Neutral third party selected by the parties
 - Usually retain a highly competent family law professional (senior family lawyer)
 - Arbitrator has quasi-judicial powers – makes binding decisions on outstanding issues before him or her
 - Arbitrator must apply law of Ontario or of another Canadian jurisdiction - no religious laws or from a foreign country (unless permitted by law of Ontario)



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Alternative dispute resolution - arbitration

- Arbitrator holds a hearing – usually less formal process than court – but can be designed like a trial setting
- Benefits to Arbitration
 - Usually more cost effective, avoid long delays, flexibility
 - Parties select arbitrator for issues to be disputed (lawyer, mental health professional)
 - Parties define the issues – define the limits of the arbitrator's powers
 - Design process – can range from dealing with issues in a summary way or conduct a formal arbitral hearing
 - Enforceable
 - Hearing conducted in private – avoid public documents



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Alternative dispute resolution - arbitration

- Disadvantages to Arbitration
 - Voluntary process – cannot force parties to arbitrate
 - Costs – Arbitrator generally requires retainer (up-front costs)
 - Does not help to advance development of the law
 - Fairness – some concern that if arbitration is part of a mediation-arbitration process – potential bias of the arbitrator who has heard information at the mediation stage
 - Two tier Family Law – arbitration tends to be selected by more affluent parties – leaves the court system to deal with less affluent parties



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Alternative dispute resolution – arbitration

- Arbitration is inappropriate where:
 - Domestic violence or a significant power imbalance exists
 - Parties cannot afford Arbitrator's fees
 - Parties will not attend screening for domestic violence and power imbalance or obtain ILA on the Arbitration Agreement
 - Parties cannot agree on the terms of the Arbitration Agreement



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Alternative dispute resolution – arbitration

- Arbitration is inappropriate where:
 - The parties refuse to apply Canadian law
 - A party is unlikely to comply with the arbitral award
 - A court is required to compel financial disclosure
 - A case requires the appointment of the Office of the Children's lawyer
 - A case involves the rights or obligations of third parties



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Alternative dispute resolution – mediation- arbitration

- Mediation-Arbitration:
 - The process commences as a mediation. If the parties reach an impasse, mediation terminates and arbitration commences.
 - Mediator's role is to help settle issues - The Arbitrator will decide issues in accordance with the laws of Ontario and provide a final and binding decision. The final results can be different than the issues discussed at mediation.



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Alternative dispute resolution – mediation- arbitration

- Benefits to Med-Arb process:
 - Majority of cases resolve at the mediation phase – the knowledge that a binding process follows failed negotiations can be an incentive to advance resolution.
 - Negotiated agreements generally respected more than judgements imposed by the Court.
 - Usually more cost efficient, quicker.



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Alternative dispute resolution – mediation- arbitration

- Disadvantages to Med-Arb process:
 - Fairness – Arbitrator deemed to bring a “fresh mind” to the issues in dispute despite receiving significant information during the mediation.
 - Potential disclosure concerns – party concerned about prejudice at the arbitration phase.
 - A party may try to persuade the mediator towards favouring his or her position with a view to influence the arbitration phase.



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Collaborative practice

- Collaborative Team Practice (CTP)
 - Process designed to help families who are involved in separation and need professional assistance to settle the issues.
 - A team of professionals assist the clients.
 - A commitment is made in a CTP that:
 - Negotiations will be principled, dignified and respectful.
 - Issues will be resolved without attending Court or threatening litigation.



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Collaborative practice

- A commitment is made in a CTP that:
 - Parties will exchange full disclosure.
 - Parties will be assisted in exploring as many options for settlement as possible.
 - Lawyer and other professionals will help the parties to reach a settlement that best meets each of their goals and priorities.



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Collaborative practice

- Lawyers do not act in their traditional roles as advocates – Facilitators for discussion of options and points of view.
- Parties agree not to go to court – if they back out of process, parties need to retain new lawyers and new documents and they cannot rely on anything said or done during the CTP meetings.



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Collaborative practice

- Advantages to CTP:
 - Issues resolved sooner
 - Often less expensive - team approach
 - Parties are in charge – interests determined not positions
 - Private forum
 - Speak freely – avoid concern that information will be used in court
 - Lose counsel if decide to litigate - incentive to stay in process – Professional can stay only on consent



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Collaborative practice

- CTP is inappropriate where :
 - Domestic violence or a significant power imbalance exist.
 - Untreated psychological issues exist.
 - Untreated alcohol or drug addiction.
 - Parties will not commit to working together.
 - Dishonesty, acting in bad faith, concealing important facts or information.
 - Unable to make decisions or take responsibility for personal behaviour.



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Court

- Court is the most financially and emotionally draining of the dispute resolution processes.
- It is an adversarial process.
- Divorce does not necessarily harm children – it is the fight – Court often polarizes positions.
- One party can drag the other party to court without consent.



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Court

- Why parties should avoid court, if possible:
 - Court takes the decision-making away from the parties.
 - Court resources are limited and limit the judge's knowledge of the family.
 - Courts can only deal with legal issues – not emotions or feelings.
 - Courts often make disagreements worse before anything is resolved.



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Court

- Why parties should avoid court, if possible:
 - Court is expensive and time consuming.
 - Court is public – your documents are open to prying eyes.



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Court

- Court may be necessary where:
 - Party is being unreasonable and lacks ability or refuses to compromise.
 - Uncooperative spouse.
 - Domestic violence.
 - Significant power imbalance.
 - Mental or substance abuse.
 - Party will not follow through with commitments or awards – need court to force order; need police enforcement; restraining orders.



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Alternative approaches

- Where Possible:
 - Primary focus should always be on the best interests of the children – self-entitlement and lack of insight devastates families.
 - Focus on maintaining relationship with spouse – rehabilitate relationship as parents.
 - Learn to co-parent.
 - Avoid long-term emotional and psychological harm that often occurs with bitter conflict.



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Domestic Contracts

Requirements for Enforceable Domestic Contracts and
Limitations on Marriage Contracts

By: Rachel Healey
B.A., J.D., LL.B.



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What is a Domestic Contract?

- Part IV of the *Family Law Act* governs all domestic contracts.
- Defined under s. 51 of the *Family Law Act* as a marriage contract, separation agreement, cohabitation agreement, paternity agreement or family arbitration agreement.



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Enforceability of contracts

- Not all Domestic Contracts are enforceable
- Strict Rules which must be followed to make Domestic Contracts enforceable
- Rules from both Statute and refined by case law



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What can happen if the rules are not followed?

Depending on the error a court may:

- Vary the offending clause or clauses
- Strike out one or more clause out of the agreement
- Declare the entire contract null and void





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Worst case scenario

- If no one tells the Parties, then one party may have their rights seriously violated.
- The Parties may spend thousands in legal fees fighting over matters both Parties have already spent countless hours negotiating.



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Basic requirements

- Requirements for a Domestic Contract to be enforceable:
- Basic requirement:
 - Must be in writing, signed and witnessed; s. 55(1)



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Additional requirements

- Both Parties must fully disclose all of their significant assets and liabilities; s. 56(4)(a)
- Both Parties must fully understand the nature or consequences of the domestic contract; s. 56(4)(b)
- Must fully comply with the law of contract; s. 56(4)(c)



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Disclosure of assets and liabilities

- Financial Statement – Form 13.1
 - Income: All sources of income including any benefits the Party receives through their employment;
 - Also identifies whether or not the individual is self-employed or a T4 employee.
 - Assets: Depending on the type of Agreement, all assets and their values from dates of Separation, Marriage, and Cohabitation (including those to be excluded or deducted from NFP) .
 - Liabilities: All debts and values from dates of Separation, Marriage and Cohabitation (as applicable).



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Understanding the nature and consequences of agreement

- Both Parties should each have advice about the agreement from a Family Law Lawyer prior to signing;
- One lawyer cannot give advice to both Parties;
- Fully explain each Parties' rights and obligations under the agreement;



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Complying with the law of contract

Main Concerns

- Misrepresentation/ Fraud
- Unequal bargaining power
- Duress/ Undue Influence
- Fundamental Breach



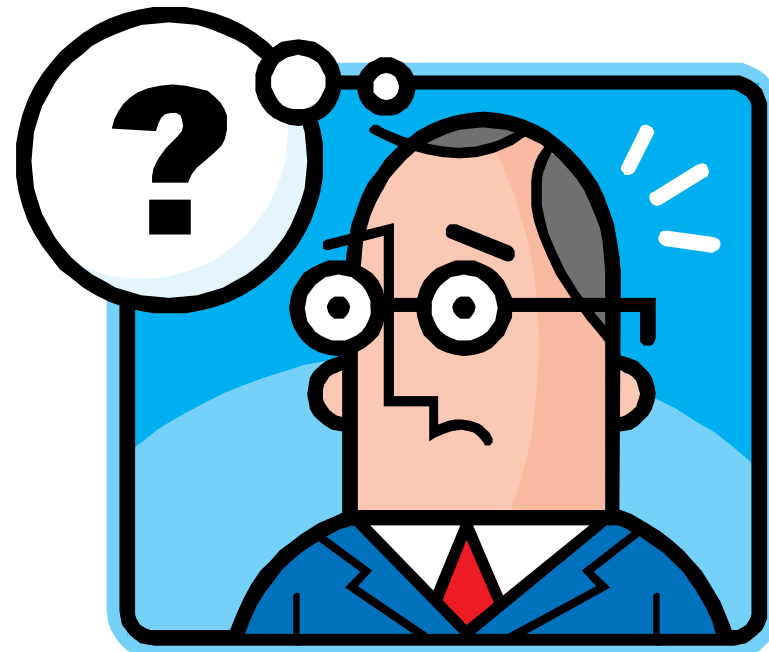


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What can you include In a domestic contract?

- Depends on the Contract





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Can't include in any domestic contracts

- Chastity Clauses
- Clauses preventing the remarriage of one of the Parties





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Separation agreement subjects

- Equalization of Net Family Property
- Custody and Access of Any Children
- Child Support
- Spousal Support





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Cohabitation and marriage contracts subjects

- Spousal Support
- Most Property and Equalization Issues
- CANNOT deal with
 - Custody and access of children (although it may be possible to demonstrate one Parties intention not to stand in the place of a parent to a child – ultimately subject to the best interests of the child)
 - Child Support
 - Possession of the Matrimonial Home
 - Agreement not to go to court after separation





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Caveats re: enforceability of marriage contracts

- Spousal Support Releases
- Terms which provide for the release of Part II rights under the *FLA*
- Any clauses which directly or indirectly effects the Best Interests of a “Child of the Marriage”
- Terms which prospectively affect the right of a Party to go to Court
- If timing of the agreement is too close to date of marriage, enforceability of the entire agreement may be in question.



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Marriage contracts: cases where prospective spousal support releases may not be enforced

- Language is crucial
- Standard is a *Miglin* release (*Miglin v Miglin*)
- Court can still over-turn the release in cases where enforcing the release is inequitable.
 - Where the intention of the Parties from the context of the agreement, would no longer be upheld if the release was enforced.
 - le. Where one Party has suffered economic disadvantage because of child-rearing and that person needs extra support as a result;



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All domestic contracts: how to protect clients

- Ensure that Both Parties Have Had ILA.



A lawyer will ensure:

- the agreement is negotiated in unimpeachable circumstances;
- The contract fully complies with all of the requirements under legislation and most up to date case law
- Both Parties have made, to the best of the lawyer's knowledge, full financial disclosure
- Both Parties understand all risks and obligations under the agreement.



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**Thank you for your time, and we are
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