

ALBERTA:
MARRIAGE,
SEPARATION,
AND DIVORCE:
UNDERSTAND YOUR RIGHTS

Jean McBean, QC

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INTRODUCTION

Laws related to the family affect us all, whether we are married or widowed, divorced or living in a common-law or same-sex relationship. This is a book about family laws that apply to people who live in the province of Alberta. Chapter 1 includes information on alternative dispute resolution and the federal and provincial laws as they pertain to the family, while chapter 2 is about finding and working with a lawyer and chapter 3 outlines the procedures for acting as your own lawyer. Starting with chapter 4, each chapter is devoted to a different area of family law.

Some people who read this book may simply have inquiring minds and want to learn more about family law. However, others will read it because they have a family problem that needs to be fixed. In 1975, when the first edition of this book was written, it only dealt with solving the problem by means of going to court. Some problems are so difficult, or sometimes the people who are arguing about them are so difficult, that going to court is still the only way to arrive at a solution. However, the trend since the 1980s has been to reach out-of-court settlements by means of *alternative dispute resolution* (ADR). So as well as explaining what the law is in particular areas, this book will try to give creative ideas that may help people avoid ending up before a judge.

The book is intended both as a guide for people involved in family disputes who have been unable or unwilling to hire a lawyer and as a supplementary source of information for those who have a family law problem and have a lawyer who is representing them. Whether you fall into the first or second category of readers, remember that the book provides general advice. There may be peculiarities about your situation that will make the general information inapplicable. For this reason, it is a good idea to ask a lawyer for legal advice that relates to your particular problem, even if you decide not to hire the lawyer on an ongoing basis.

Whether you end up in the adversarial court system or in some form of alternative dispute resolution, you need to understand what the law is. Agreements are only reached “in the shadow of the law,” which means that even when they are resolving issues through ADR, lawyers or laypeople take into account what a judge would likely do if faced with a particular problem.

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NAVIGATING THE LEGAL SYSTEM

Before you embark on a family court case, it's a good idea to know which levels of government make family law and how the court system is set up. This chapter includes this information, as well as descriptions of forms of alternative dispute resolution that may help you avoid having to go to court.

1. WHICH GOVERNMENT MAKES LAWS RELATED TO THE FAMILY?

People interested in the Canadian system of government tell a joke about an international conference on the study of giraffes. Experts from each country focused on an aspect of the giraffe that was of interest to their country. Thus, the French delegate gave a paper on "The Sex Life of Giraffes," while the English delegate gave a paper on "Giraffes — Where They Fit into Darwin's Theory of Evolution," and an African delegate gave a paper on "Adaptation of Giraffes to Game Parks." The Canadian delegate, however, gave a paper that puzzled most of the delegates. It was entitled "Giraffes — A Provincial or Federal Responsibility?"

The Canadian delegate's topic reflects the focus of Canadian constitutional debates since Canada achieved independence. Since the British Parliament passed the British North America (BNA) Act in 1867, most court cases in which there were challenges to the validity of a law have revolved around the question of whether the subject matter of the law is under the control of the federal government or the provincial

governments. Family law is no exception. The federal government has power over marriage and divorce. The provincial governments have control over property and civil rights and the solemnization of marriage. In 1867, it looked like there would be no conflict, but in fact there are a number of areas of family law where both levels of government have been found to have the power to make laws. Sometimes the laws of one government can thwart the laws of the other level of government.

Marriage is an example. Under the constitution, the federal government has the right to say who can marry and what are the minimum requirements for there to be a valid marriage (including how old the persons must be and whether the spouses in the marriage have to be of the opposite sex). However, provincial governments have the right to pass laws on how marriages are to be solemnized and on the requirements to be met before a marriage licence will be issued, requirements that usually include the age of the bride and groom. A few years ago, the Alberta government, citing its power over how marriages were to be solemnized, passed a new law stating that marriages could only be solemnized between two people of the opposite sex. The Alberta law was irrelevant until the federal government, as a result of court orders from several courts of appeal, decided to allow people of the same sex to marry. Of the ten provinces of Canada, only Alberta has decided to continue the fight against same-sex marriage. It plans to rely on the law it passed to prevent marriage licences being issued to two people of the same sex. Most legal observers believe that when the Alberta law is challenged, the courts will find it is unconstitutional because the question of whether marriage requires two people of the opposite sex refers to the issue of capacity, a federal power, and not to the provincial power over the solemnization of marriage. (This is why even the Alberta Minister of Justice joined with the opposition parties to vote against the private member's bill that enacted this law.) However, it might take years and thousands of dollars to obtain a declaration that the Alberta law is unconstitutional.

Divorce is another example. Until 1968, the federal government had not enacted a comprehensive divorce law. When it did, the 1968 Divorce Act contained provisions related to custody of children and support for children and spouses.

Prior to 1968, only the provincial governments had passed laws on these matters, based on their power over issues of property and civil rights. However, when the Divorce Act was challenged under what was then called the BNA Act (and which is now called the Constitution Act, 1867), the Supreme Court determined that the federal government did have the power to pass laws related to custody and access, provided that such laws were “corollary” to the granting of a divorce (that is, the application for custody or support is part of the divorce application). But it took a lot of money, and many years elapsed before the Supreme Court made it clear that the Divorce Act provisions were valid. Because both governments have the power to enact laws related to custody and support, it means that a parent who wishes to claim custody of a child or support for that child will often have the choice of making the claim under the federal Divorce Act or under provincial legislation.

As each family law topic is discussed in this book, there will be reference to both the federal and the provincial laws that apply.

2. HOW DO I CHOOSE THE COURT IN WHICH TO START MY ACTION?

When the provincial government passes a law, the law must specify whether it will be enforced by the Court of Queen’s Bench, which is staffed by federally appointed judges, or the Provincial Court. The Table on the following page illustrates the Alberta court system as it relates to family law problems and as it exists in the winter of 2004.

Plans are being made to set up a unified family court in Alberta, similar to such courts that exist in the other provinces. Both the federal and Alberta governments have approved the establishment of a unified family court, which is scheduled to start in 2005. It will deal with all family law problems, whether the law that applies to the problem was passed by the federal government or the Government of Alberta.

Even before the unified family court comes into existence, the proposed new provincial Family Law Act will repeal or alter almost every provincial family law, with the exception of the child welfare legislation. It is not clear whether the Family Law Act will come into effect before the implementation of the

TABLE THE CANADIAN COURT SYSTEM IN FAMILY LAW

As It Applies to Residents of Alberta — Winter 2004

Supreme Court of Canada (located in Ottawa)

Hears appeals from provincial appeal courts

Court of Appeal of Alberta

Hears appeals from the Alberta Court of Queen's Bench

Alberta Court of Queen's Bench

The Alberta Court of Queen's Bench deals with the following issues:

- Divorce cases, including applications for custody and support when such applications are part of the divorce application
- Applications to vary support and custody orders made in divorce judgments
- Applications for restraining orders and reviews of protection orders granted by the provincial court
- Support applications under provincial legislation for children and on behalf of formally married and informal spouses (whether heterosexual couples or same-sex couples)
- Custody applications under the provincial Domestic Relations Act
- Guardianship of children under the Domestic Relations Act
- Partition and sale actions
- Applications for the return of property
- Applications under the Matrimonial Property Act, whether for possession of the matrimonial home and contents or for a final division of matrimonial property
- Adoptions
- Appeals from provincial court orders
- Applications to rescind arrears of support

Provincial Court of Alberta, Family Division

The family division of Alberta's provincial court deals with the following issues:

- Support for children of married parents under the Domestic Relations Act
- Support for deserted spouses under the Domestic Relations Act
- Private guardianship of children under the Child Welfare Act
- Custody and access orders under the Provincial Court Act, including applications by grandparents for access
- Applications for protection orders after incidents of family violence
- Applications for temporary and permanent guardianship by the director of Child Welfare under the Child Welfare Act (in situations where child neglect is alleged)

unified family court. If it does, this could mean that some problems which are currently dealt with by the Court of Queen's Bench will move to the Provincial Court, and vice versa. Often, both courts will have jurisdiction to settle the problem, and it will be up to the litigants to choose which court will be the most convenient or most appropriate for their dispute. It is best to choose the court which is best for you in consultation with a lawyer who can review the facts of your particular case. However, there are general guidelines given throughout this book for those who cannot afford to consult a lawyer.

3. HOW CAN ONE AVOID GOING TO COURT?

Settling a legal dispute out of court is almost always preferable to a judge-imposed solution. The ideal arrangement is for two people to sit down and have a civilized, reasonable discussion that resolves their dispute without third parties doing the negotiations. Provided that the two people get legal advice before concluding the settlement, anyone who has been involved in the justice system will congratulate this couple for their maturity and reasonableness. Unfortunately, there are few people who can do this.

Some people in the legal system regard those who end up resolving their family law disputes through the courts as the failures of the justice system. However, lawyers and judges recognize that in many situations it is necessary to start a court action to get some immediate question decided or, sometimes, just to get the other person to pay attention to the seriousness of the issues. Sometimes there has been violence and it is necessary to get the violent person out of the home. Other times there is an immediate need for support and no agreement that any support should be paid, or if there is an agreement that support should be paid, there is a major dispute as to how much should be paid. But once the situation has stabilized, the people involved should attempt to reach a settlement without further litigation, perhaps by trying some of the alternative dispute resolution procedures (usually referred to as ADR) discussed in this chapter.

Settlement, whether with the help of ADR or by making an agreement without the help of third parties, is seen as a

preferable alternative to a judge-imposed solution because it is far more likely that a court order based on a settlement agreement will be obeyed than a decision imposed by a judge. Moreover, researchers who have interviewed people involved with the legal process have found that only 40 percent of those who have gone through a trial are satisfied with the result, whereas 77 percent are satisfied after a settlement is achieved through mediation or some other form of ADR. Even more important, only 20 percent to 30 percent of those involved in the adversarial system thought the system was fair, whereas 85 percent of those involved in ADR saw the process as fair. The adversarial system was said by 50 percent of the respondents to have worsened their relationship with the other person, but only 15 percent to 20 percent said that the ADR process had worsened their relationship.

4. WHAT IS ALTERNATIVE DISPUTE RESOLUTION (ADR)?

Alternative dispute resolution (ADR) means that people resolve their legal disputes themselves, rather than letting a judge or an arbitrator make the decision on how the dispute should be resolved.

There is no magic in any particular form of ADR. In some families, when there is a problem that needs to be resolved, the people involved sit down with some older members of the family and reach an agreement without the need for intervention from professional helpers such as mediators or collaborative lawyers. Others know that they need help from professionals, but agree right from the beginning that they will resolve their problems without a judge.

Even before alternative dispute resolution became a popular way of dealing with legal problems, lawyers involved in the adversarial system resolved 95 percent of their cases without going to trial. However, too often lawyers did not get around to addressing the issue of settlement until the eve of the trial. Today it is recognized that it is usually best for families to resolve matters quickly. And a quick resolution is often a cheap resolution.

In an effort to achieve resolution through ADR, a number of new techniques have been developed to keep matters out of

court, including collaborative law, mediation, judicial dispute resolution, and arbitration. These new approaches have achieved much success. No one technique is right for everyone, nor is any one necessarily cheaper or faster. In fact, sometimes the quickest and cheapest way of reaching a settlement is to have the people sit down with their lawyers in a four-way meeting right at the beginning of the litigation process. Even lawyers who spend much of their time in court are happy to help their clients settle matters without a judge.

4.1 Collaborative law

One of the newest forms of alternative dispute resolution is known as *collaborative law*. In the collaborative law process, a client retains a specially trained lawyer as settlement counsel only. Both clients to the dispute, and both of their lawyers, sign a binding legal contract at the start of the process, agreeing that no one will go to court, or even use threats of court, to solve the dispute. If the collaborative process fails, both lawyers and their law firms must withdraw from acting for their respective clients, and the clients must start over with new litigation lawyers before they enter the court process.

The collaborative law process is based on settlement meetings, with the focus on settlement from the beginning of the case. The lawyers help clients gather the information they need to make informed decisions, help them come up with as many options as possible that they can explore, and offer legal advice throughout the process. Ultimately, clients in a successful collaborative law process come up with a mutually acceptable solution. The lawyers then draft the agreement and, if the clients have not yet been divorced, prepare the papers for an uncontested divorce.

Deciding to settle your action through collaborative law may, but not necessarily will, save you money. Whether money is saved or not, lawyers suggest that clients who settle their issues through collaborative law have a greater feeling of satisfaction. There is no doubt that most of the people who decide to settle their issues using collaborative law are successful in avoiding court. However, in those cases where they do not reach a settlement, there is clearly additional expense because each person must retain new litigation counsel.

Collaborative law is a new process. As collaborative lawyers gain more experience with the process, they will become more experienced in screening out those people who are unlikely to reach agreement without resorting to a judge.

4.2 Mediation

Mediation is a process in which people meet with a mediator who helps them reach a mutually acceptable solution, sometimes by helping them develop options. The mediator does not impose an agreement on the people involved, but facilitates discussion between them. In mediation, people are given an equal chance to describe and discuss the case and the sources of conflict. Just getting people at the same table with a trained mediator who can ensure that there is a balanced discussion often leads to settlement of the dispute. Participants can bring their lawyers to mediation sessions if they wish, but most often only the people directly involved attend. Mediation is the ADR procedure that has been around the longest. (See chapter 6 for further discussion of what happens in mediation.)

If one of the people in a dispute that involves children earns less than \$40,000 gross per year, the couple can make an appointment at no cost through the provincial government's Alberta Family Mediation Services, which has offices in Edmonton and Calgary (phone numbers for all services mentioned here are listed in section 2. in the Appendix). Family Mediation Services also makes mediation available outside Edmonton and Calgary by contracting with private mediators, who then conduct the mediation without cost to the people involved. The mediators employed by Family Mediation Services are extremely competent, experienced, and highly regarded by all family law lawyers. Investing in this service has saved the Government of Alberta a great deal of money on salaries for judges and judicial personnel, as many cases are resolved through mediation without the need for lengthy trials.

It is possible to try mediation even before you start a court action. However, sometimes it takes a court action to get the attention of the other person. Once you have that attention, the two of you can then jointly decide to go to mediation. You do not need a referral from a lawyer or a judge; you can simply

make an appointment to go to mediation. The minimum requirement is that both of you must agree to see the mediator.

If you both earn more than \$40,000 a year, or if the dispute does not involve children, then you must use a private mediator. There are many mediators throughout the province, but not all are experienced in family issues. One way to find the names of local mediators who have experience in family law is to contact the Alberta Family Mediation Society at its toll-free number (see Appendix, section 2.). The Alberta society is linked with Family Mediation Canada, which has certified some mediators as family law mediators. These names will be available through the Alberta group. Another way to obtain a recommendation is to ask a lawyer who practises in the area of family law. There are some excellent psychologists, social workers, and lawyers who are experienced family law mediators and who can often help resolve family law disputes.

Before you make a decision about hiring a mediator, you will want to have answers to the following questions:

- What is the mediator's professional background or training in the area that needs mediating?
- What formal family mediation training has the mediator taken?
- Does the mediator have family mediation accreditation?
- What will the fees for the mediation be?
- Are there any conflicts of interest that might interfere with the mediator's ability to be neutral? For example, has the mediator ever had a professional or personal relationship with your partner? If there is the least doubt, choose another mediator.

It is important that you are comfortable using the particular mediator you hire, no matter what his or her credentials are. If you're not comfortable, look elsewhere.

Early in the first meeting, you should let the mediator know if there has been any physical or verbal abuse during or after the relationship, or if you have had other difficulties negotiating a voluntary agreement with your partner. You should tell the mediator what court proceedings have already occurred and indicate if there has been any restraining order

granted. Ask the mediator about his or her approach to mediating in circumstances where there is a background of violence or unequal power in the relationship.

You can agree to either open or closed mediation. In *closed mediation*, anything that is said by either person in the mediation is confidential, and neither of you can rely upon the statements in subsequent court applications. The mediator cannot be called as a witness. Usually you will be asked to sign a contract with the mediator agreeing to these restrictions. All mediation conducted through the Family Mediation Services is closed mediation, and that is frequently the case with private mediation also. Sometimes, however, you may wish to be able to call the mediator as a witness if the matter is not resolved in the mediation process. This is called *open mediation*. In open mediation, the mediator can become a witness to what went on in the mediation process. If this is agreed upon *before* the mediation commences, this type of mediation may work well. Whether the mediation is open or closed, just getting the people to the same table with someone trained in facilitating communication is usually beneficial.

4.3 Judicial dispute resolution

While mediation through the Family Mediation Services is usually conducted without lawyers being present, both the Provincial Court and Court of Queen's Bench also provide *judicial dispute resolution* (JDR). In this procedure, the people involved in a court case sit down informally with a judge to discuss what has happened. The judge will hear a summary of the case from the lawyers or their clients. The two people involved also have the opportunity to tell the judge what they think is important in the case, and then the judge will discuss the case with everyone at the table before giving an opinion of what decision he or she would make if this case and these facts were presented in the judge's court. Most of the time, the opinion of the judge is not binding, but it is hoped that hearing the judge's non-binding opinion will help the people and their lawyers reach a resolution without having to go to trial. An agreement is reached only if everyone agrees to accept the judge's opinion. The JDR judge is never the trial judge if the case goes to trial.

It is possible for people to agree prior to the JDR that the decision of the judge will be binding. This is usually only done with a JDR in the Court of Queen's Bench. If those involved agree that it will be binding upon them, and if the judge knows that in advance, both people sign a contract agreeing to be bound by the decision.

A major advantage of a JDR is that it speeds up resolution and is much cheaper than going to trial. In the Court of Queen's Bench, people who agree to a binding JDR have the additional advantage of knowing in advance who the judge will be, and sometimes they are able to choose the judge. Another benefit of a JDR is that people feel they have had their day in court, but there is a lot less stress to such a process because it is more like a working meeting with the judge than a court appearance. The judge does not wear robes as he or she would in court.

While it is possible for unrepresented people to schedule a JDR at either level of court, it is necessary to apply to a judge for special permission before a clerk will schedule a JDR in a case involving one or more unrepresented litigants. In the Provincial Court, the clerk who makes appointments for JDRs will help set up the special permission, or leave, application. Usually the unrepresented person wishing to schedule the JDR will have to appear in front of the judge. At the leave application, the judge will ask what the issues are, what efforts at settlement have been made, whether the people have attended mediation, and whether both of them wish to go to JDR. Unless they have previously attended mediation, unrepresented people will not usually be allowed to go to JDR. Each person must sign a consent to JDR before a JDR is scheduled in the Provincial Court.

In the Court of Queen's Bench, the person in the Trial Coordinator's Office who schedules JDRs will only do so in a case involving one or more unrepresented people if either the Chief Justice or the Associate Chief Justice has approved the case going to a JDR. If only one person is unrepresented, usually the lawyer representing the other person will make the application on behalf of both for a JDR. If both people are unrepresented, they would usually be requested to write a joint letter setting out the reasons why they think a JDR would be useful as a settlement tool in their case.

4.4 Arbitration

Another way to resolve a dispute without going before a judge is to choose an *arbitrator*. An arbitrator is a third party who is effectively given the powers of a judge to make a decision. The difference between a mediator and an arbitrator is in that decision-making power. Sometimes arbitration is referred to as “rent-a-judge” because it costs money to hire the arbitrator, whereas the judge is free. However, arbitration can be effective if there are only limited issues — such as how to divide the family furniture. Moreover, proceeding through arbitration can avoid some mandatory legal steps and allows people to get before a decision maker sooner. Thus, even though the arbitrator must be paid, it can be cheaper overall than going to trial. While arbitration has advantages, any process that ends up taking the decision making away from the people involved and giving it to a third party suffers many of the limitations of the trial process.

Sometimes an effective way of resolving an issue is to choose a person as a mediator/arbitrator. This person starts work on the file as a mediator, and only if a mediated agreement cannot be reached does he or she put on the hat of an arbitrator and impose a settlement. This gives the people in mediation a last chance to make their own decision, and like a four-way meeting on the eve of a trial, it often allows people to truly focus on their problem and figure out how to resolve it.