



**HAIDA GWAI (PORT CLEMENTS) COMMUNITY WORKSHOP:
Family & Child Protection Law, Aboriginal Services & Civil Law Issues**

**Port Clements Community Hall
120 Bayview Drive, Port Clements, BC V0T 1R0
Wednesday, April 22nd and Thursday, April 23rd, 2015**

AGENDA – Wednesday, April 22, 2015

Time	Session	Speaker	Facilitator
8:30–9:00	Registration & Breakfast		
9:00–9:15	Opening Ceremony & Welcome	<ul style="list-style-type: none">• Rev. Lily Bell	Baljinder Gill
9:15–10:45	Overview of the New Family Law Act and Protection Orders	<ul style="list-style-type: none">• Amanda Rose – Family Lawyer	Baljinder Gill
10:45–11:00	Break		
11:00–12:30	Overview of Child Protection Law and Child Protection Mediation	<ul style="list-style-type: none">• Amanda Rose – Family Lawyer• Rosanna Slipperjack-Farrell – Staff Family and Child Protection Lawyer	Baljinder Gill
12:30–1:30	Lunch		
1:30–2:30	Gladue, Restorative Justice and Circuit Courts	<ul style="list-style-type: none">• Trish Kumpf – Aboriginal Services Manager	Baljinder Gill
2:30–2:45	Break		
2:45–4:30	Working with LSS Intake and other Legal Resources	<ul style="list-style-type: none">• LSS Intake: Baljinder Gill – Community Training and Outreach Coordinator• Overview of PLEI: Lynn McBride – Community Engagement Coordinator• Overview of Aboriginal Services: Trish Kumpf – Aboriginal Services Manager• Click Law: Lynn McBride – Community Engagement Coordinator	Baljinder Gill

LSS-Community and Publishing Services

Suite 400
510 Burrard Street
Vancouver, BC V6C 3A8

Tel: (604) 601-6000
Fax: (604) 682-0965
www.legalaid.bc.ca

FAMILY LAW

Presenter: Rosanna Slipperjack-Farrell
Staff Lawyer
Legal Services Society

DO I HAVE TO GO TO COURT?

- Agreement



- Court Order



WHICH COURT DO I GO TO?

Provincial Court

- Guardianship
- Support
- Parenting arrangements
- Protection order

Supreme Court

- Divorce
- Property/debts
- Custody
- Adoption

AM I A SPOUSE?

- **Married** – you are a spouse if you were legally married.
- **Unmarried** – you are a spouse if you lived together in a marriage-like relationship for two (2) years.
- **For spousal support-liable** – if you have children with your partner, and lived together for **any** length of time.

I AM A PARENT

- What are the issues?



GUARDIANSHIP

- If the two parents **lived together** with the child, you are **automatically** joint guardians.
- A parent who **never lived** with the child isn't a guardian **unless** they regularly **cared** for the child or is made a guardian by the **court**.

- **PARENTING TIME**
 - **CONTACT**
-



Best interests of the child is the only consideration.



SUPPORT

- Child support – Federal child support guideline
- Spousal support – is **not a right**. The spouse asking for it must show that they should get it, depending on the circumstances.

PROTECTION ORDER

- Behaviour is recent and is escalating
- Order can have conditions:
 - No contact;
 - Stay away from home or place of employment;
 - Police escort to get personal belongings.

Terrace Regional Centre
207-3228 Kalum Street
Terrace, BC

Phone: 250-635-2133 or
1-800-787-2511
(no charge)

Legal Issues in Child Protection

Amanda J. Rose

Family Lawyer

Child Protection : The Basics

- **The Ministry for Child and Family Development** (MCFD) is the government branch that investigates child protection reports, and, if needed, can provide supports or intervene.
- Social workers do the investigations, and team leaders authorize more serious action that needs to be taken.
- “The Director” is the legal representative of MCFD, and appears for them in court.

Child protection Vs. Family law

- Child protection is a branch of family law, but there are two very different areas, governed by different law.
- (1) **Parent Vs. Parent** – when parents are in a dispute over children the law that governs this is the Family Law Act (FLA)
- (2) **Parent Vs. MCFD** – when there is a dispute over children between the parents and government social workers. Governed by Child Family and Community Services Act (CFCSA)

How do MCFD get involved?

Child Protection Report :
minor or no basis for
intervention

- Investigation: outcome: no action needed, file closed
- Investigation: outcome: support needed, supports offered (voluntary).

Child Protection Report –
report real, requires MCFD
help

- Investigation: report true/substantiated: supports offered to family, depending on seriousness.
- If Parent works with MCFD to resolve issues : file closed

Child Protection Report -
Serious and immediate
MCFD help needed

- Investigation: serious protection concerns found: Parent required to address immediately
- If parent does not address, child may be removed if there is no other way to ensure their safety.

The Law

- Child Family and Community Services Act (“CFCSA”)
www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96046_01
 - The act that governs all of child protection work
- Relatively short act.
- Sets out timelines – how long a child can be in care
- Sets out principles – what should govern the social workers work.
- Sets out legal framework (steps in a case).

Steps in Child Protection

- There is a great legal aid resource for parents who have MCFD involvement:
- <http://www.lss.bc.ca/publications/pub.php?pub=77>
- Parents rights, kids rights.
- Set out the law, and resources.

Principles of the Act

- Guiding Principles of the Act – this is important, the Court will assess the social workers actions in light of the guiding principles (if it goes to court).
- S2 of the CFCSA
- **Guiding principles**
- **2** This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:
 - (a) children are entitled to be protected from abuse, neglect and harm or threat of harm;
 - (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
 - (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
 - (d) the child's views should be taken into account when decisions relating to a child are made;
 - (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
 - (f) the cultural identity of aboriginal children should be preserved;
 - (g) decisions relating to children should be made and implemented in a timely manner.

Service Principles

- **Service delivery principles**
- **3** The following principles apply to the provision of services under this Act:
 - (a) families and children should be informed of the services available to them and encouraged to participate in decisions that affect them;
 - (b) aboriginal people should be involved in the planning and delivery of services to aboriginal families and their children;
 - (c) services should be planned and provided in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services;
 - (d) services should be integrated, wherever possible and appropriate, with services provided by government ministries, community agencies and Community Living British Columbia established under the [Community Living Authority Act](#);
 - (e) the community should be involved, wherever possible and appropriate, in the planning and delivery of services, including preventive and support services to families and children.

Best interests of the Child

- **Best interests of child**
- **4** (1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:
 - (a) the child's safety;
 - (b) the child's physical and emotional needs and level of development;
 - (c) the importance of continuity in the child's care;
 - (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
 - (e) the child's cultural, racial, linguistic and religious heritage;
 - (f) the child's views;
 - (g) the effect on the child if there is delay in making a decision.
- (2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

What can a social worker do?

- Their powers are pretty broad – they can:
 1. Talk to the school, neighbors
 2. Talk to the child alone
 3. review school reports or hospital reports about your child
 4. come to your home and ask to see the child. If you say NO, they can remove the child.

On what grounds can they remove a child?

- [Section 13](#) of the CFCSA governs this:
 - - can be a failure to protection from domestic violence
 - Neglect
 - Physical abuse
 - Sexual abuse
 - Psychological harm
 - List is not exhaustive.
 - Failure to provide medical care – blood transfusions etc.

What to do if your child is removed

- (1) Call Legal Aid – if a parent financially qualifies, they can get a lawyer to represent them.
- (2) Get as much information as possible to advise lawyer.
- (3) Don't fight with the social workers over it (leave that to the lawyer!)
- If possible, have a third party present (advocate, or calm family member) when meeting with a social worker.

Timelines after a child is removed.

- (1) Within 7 days, the Director must go to court for the “Presentation Stage” – this is where they file a report to the court about the circumstances under which a child is removed.
- (2) If a parent disagrees, they can ask for a Presentation Hearing, in which the Judge can assess if the child was removed with enough grounds. If not, the child has to be returned.

Reality: Presentation Hearings can take up to 6 months to happen due to court schedule. If the parent doesn't seek a hearing, the Director otherwise gets an “interim order” for 45 days.

Presentation Hearings are usually unsuccessful for the parent. If the parents evidence and the social workers evidence is different, the court basically has to accept the social workers evidence.

Ways to support parents who have children removed

- If they have a lawyer, ask the lawyer (and the parent!) if you can attend the meetings to help the parent understand what is going on, and to help create a plan.
- Lawyers are only a piece of the puzzle to fix it. Advocates/settlement workers, support workers can help the parent just as much by addressing the issues that might have led to a removal.

Ways Child Protection Disputes can be resolved

- (1) **Mediation** – Where a trained mediator works with the family and the social workers, usually over a full day, to identify the issues and discuss a way to resolve them.

At any stage of the proceedings, parents can request a mediation. If they have a lawyer, then their lawyer requests it and attends.

The benefits of mediation

- Can improve the relationship between the social worker and the parent
- Can help the parent or the social worker understand a little more about what happened. Often, both sides are in the dark about what has led to the situation.
- Can help create a “Plan” – or a mediated agreement, which is usually very helpful for the parent. The biggest complaint parents usually have in the process is that they are in the dark about what to do, and how long it will take.

Ways child protection disputes are resolved:

- Court – if the parent disagrees with MCFD about the removal or continued care of their child, they can have a trial on the issue.

The downsides of this:

- Time consuming – can take many months to get a hearing
- Success rates are usually fairly poor.
- Trial is usually very stressful for parents, and breaks them down even further.

Complaint's

- Parents do have the right to complain about the social worker. Complaints about MCFD are handled regionally, and internally.
- Complaint process is actually handled fairly well, but can be time consuming.
- Information can be found on MCFD website.

A parent should talk to their lawyer first before complaining.

Resources

- Parents Legal Center – Robson Square courthouse. A lawyer and advocate is there full time to assist in court and with investigations (supporting the parent). New program and run by an experienced child protection lawyer.
- Legal Aid: call the intake center (they also have translators)
- Legal Aid Publications – Child protection book for parents.
<http://www.familylaw.lss.bc.ca/resources/publications/pub.php?pub=77>

Resources

- Resources to help kids in care
- Representative for Children and Youth
- <https://www.rcybc.ca/>
- Not part of MCFD – they report directly to legislative assembly
- They can advocate and monitor services for youth who are in MCFD care or receiving services from MCFD

IMPROVING LEGAL SERVICES



FOR ABORIGINAL PEOPLES







COLONIZATION

- ▣ Government laws, policies and practices
 - ▣ that
 - ▣ discriminate against Aboriginal people

LEGACY OF COLONIALIST HISTORY

- ▣ INDIAN RESIDENTIAL SCHOOL GENERATIONAL IMPACT
- ▣ ILLITERACY
- ▣ ABORIGINAL CHILD APPREHENSION
- ▣ POVERTY
- ▣ FASD
- ▣ SEXUAL ABUSE



GLADUE IN A NUTSHELL



Instructs judges at sentencing to recognize the overrepresentation of Aboriginals in prison, take notice of the unique circumstances of Aboriginal offenders, and consider all available sanctions other than imprisonment

Criminal Code s. 718.2(e)

Principles:

(e) all available sanctions that are reasonable in the circumstances should be considered for all offenders, with particular attention

to the circumstances of aboriginal offenders.



GLADUE DECISION

JAMIE GLADUE

- 19 year old Cree woman
- 2nd degree murder
- Stabbing death of her fiancé



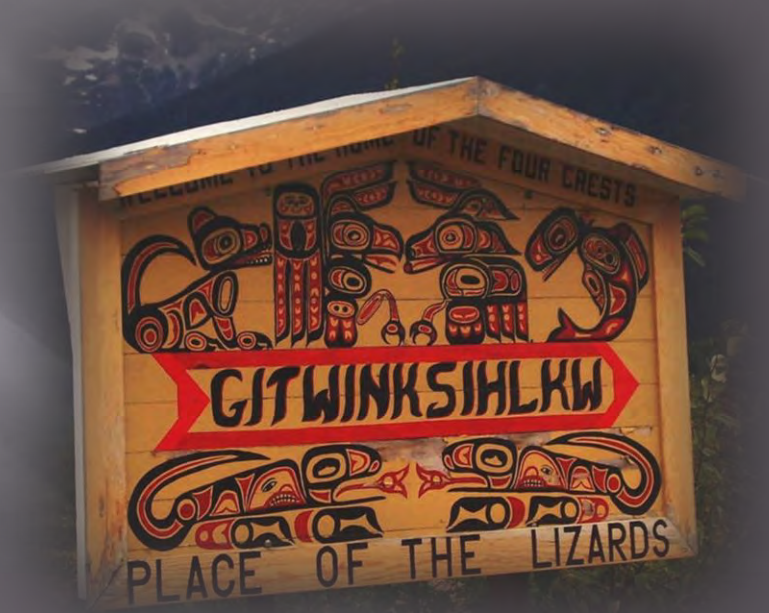
Plead guilty to manslaughter

- Party on her 19th birthday
- Pregnant with their 2nd child
- Convinced her fiancé was cheating with her sister
- Fiancé left the party with her sister



R. v. Gladue – The Offence

- Confronted them
leaving
the sister's residence
- Victim and defendant
argued
- He insulted her
- She chased him
and stabbed him in the
heart



R. v. Gladue – Sentencing

- **GUILTY PLEA**
- No criminal record
- 2 children and expecting her 3rd
- Family was supportive
- Alcohol abuse counselling
- Upgrading her education



R. v. Gladue – 3 Year Sentence

- Suspended sentence or conditional sentence was not appropriate
- Both were living in an urban area off-reserve
- No special circumstances arising from her Aboriginal status



Court of Appeal unanimously concluded that the trial judge had erred in concluding that s. 718.2(e) did not apply because the appellant was not living on a reserve



R. v. Gladue

Appeal Not Successful

- This was a serious crime
- vicious attack
- ‘near murder’ and
- Rowles J.A. agreed

...but



THE CHURCHES

DISCOUNT

Took a different approach

Considered

- Circumstances were tragic
- Provocation
- Treatment
- Remorse
- No history of violence
- Rehabilitation after charge
- Steps to maintain her
Aboriginal heritage



s. 718.2(e) invites recognition
and amelioration
of the impact which
systemic discrimination
in the criminal justice system



has upon aboriginal people.

***R. v. Gladue* –** **The Supreme Court of Canada**

Interpreted the sentencing provision

Agreed with the dissenting justice at Court of Appeal

Applies any time an Aboriginal person is being sentenced or seeking bail



Remedial Purpose

Fear that s. 718.2(e)
will have no real impact:

*In our view, s. 718.2(e)
creates a judicial duty
to give its*

remedial purpose real force.



Background factors

**Sentencing
Options**

Restorative justice

Judicial Notice



Gladue Report:

What circumstances brought this person before the court?

The Checklist:

- Personal History
- Family History
- Community History



Painting a picture of the defendant

Gladue is a right

- ▣ Applies to every Aboriginal person being sentenced or making a bail application
- ▣ Applies if you live on or off reserve
- ▣ Applies to all Aboriginal people (self identify)
- ▣ Means more than a Gladue Report
- ▣ Judge must take judicial notice
- ▣ How events that happened to you, your family and community brought you before court

GLADUE REPORTS

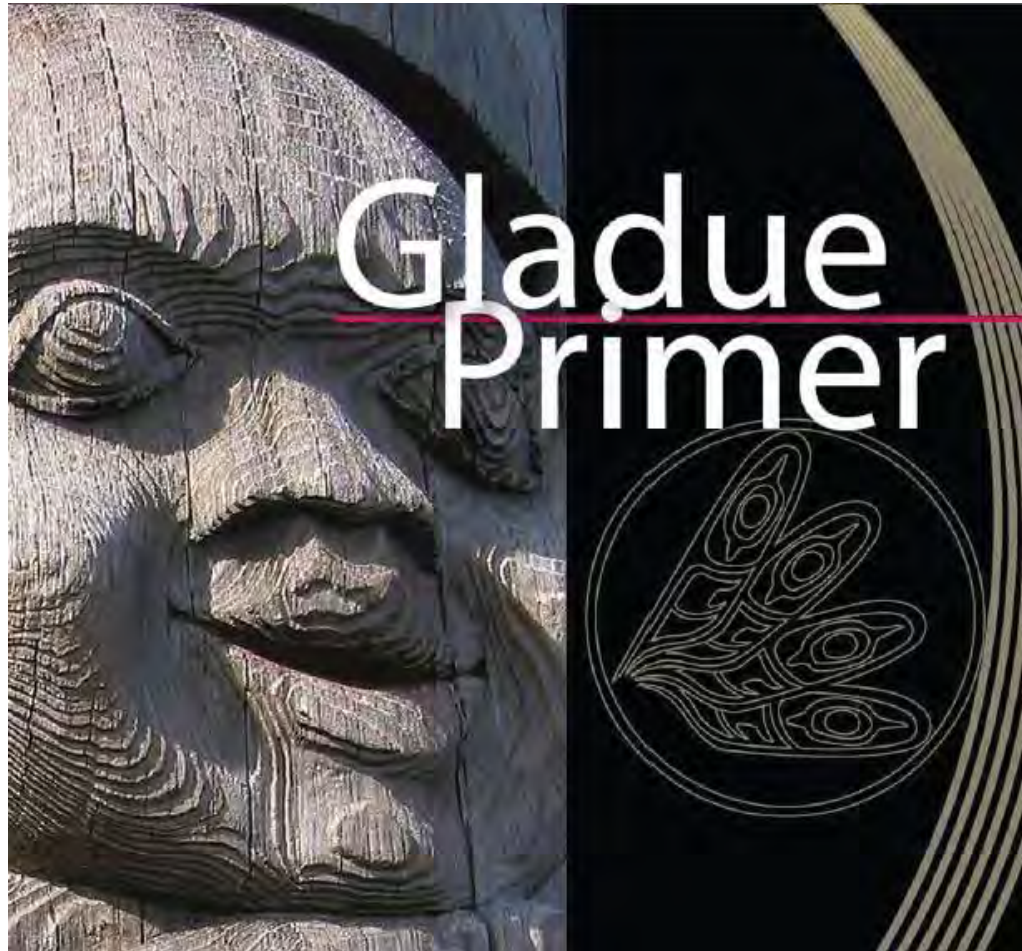
- Pilot
- Future
- Other means to assert
- Oral submissions
- Other information



- Report contains
- Past
- Present
- Future



R. v. Gladue



Sample Gladue Submission



Sentencing of Ed Sorry

- Background factors under Gladue
 - Past- Background factors
 - Foster care, abuse, parents IRS, impacts on him have resulted in alcoholism. Mom attended IRS, lost her status etc , criminal record for impaired, assault and theft under... been 10 years
 - Present
 - In treatment
 - Parenting focus-
 - Connections
 - Assaulted 2 men after a night of drinking...
- Future – Restorative Justice

Other sources of information

- Developing tools for a range of option
- On web
- Submissions, short reports, outlines for self-represented
- Be creative
- Use IRS decisions/judgements
- Tell the story

RECONCILIATION



Question





Working with LSS Intake



April 2015

Baljinder Gill
Community Training and Outreach Coordinator
Tel: 604-601-6015

How to apply for legal representation

Call LSS Provincial Call Centre at 604-408-2172
in Greater Vancouver or 1-866-577-2525 (call
no charge)



Come into one of our Legal Aid offices
(contact info available on our website
www.legalaid.bc.ca)

Our clients



LOCAL LEGAL AID OFFICES

Campbell River Local Agent

1261 Ironwood Street

Campbell River, BC V9W 5T4

Wednesday & Friday 9 – 11am & 1 – 3pm

Phone: (250) 287-9521

Fax: 250-287-9629

Courtenay Local Agent

1625 B McPhee Avenue

Courtenay, BC V9N 3A6

Tuesday 9 – 11 am & 1 – 3 pm

Thursday 1 – 3 pm

Phone: 250-897-1400

Fax: 250-897-3261



Who qualifies?

A client qualifies for legal aid when:

1. The legal problem is covered by LSS; and
2. The client meets LSS financial guidelines



What legal problems are eligible for coverage?

Criminal – Where charges are serious and there is a likelihood of jail



Family Law – Serious family situations regarding parenting (guardianship, parenting arrangements or custody/access), protection orders, child support and more depending on the issues. These situations need to be addressed immediately to ensure the safety of the client and or the children.



Child Removal – Where the Ministry of Children and Family Development or a Designated Agency has removed a child or where there is a **threat** of a child being removed. These matters also include any custody or access issues arising from a child in care.



Immigration – Where the client may wish to claim refugee status or where the client faces an immigration proceeding that may result in their removal from Canada.



Reciprocals – Where the client's legal matter may be in another province. This generally encompasses family legal aid problems where the other party resides in another province or the client resides in another province. However, on occasion criminal and immigration cases have gone through the reciprocals process as well.



Financial Eligibility

Income chart(All case types)



Household Size

1

2

3

4

5

6

7 or more

Monthly Net Income

\$1,480

\$2,070

\$2,670

\$3,260

\$3,850

\$4,405

\$5,040

Financial Eligibility

Personal Property (All case types)



Household Size

1

2

3

4

5

6 or more

Exemption

\$2,000

\$4,000

\$4,500

\$5,000

\$5,500

\$6,000

Requesting a review of a refusal

A client can request a review of a refusal

- This must be in writing
- The client should state why they disagree with the refusal and explain why they believe they should get legal aid
- The client should include any supporting documents

Coverage and financial eligibility reviews must be submitted within 30 days of being refused legal aid to:

Provincial Supervisor
Vancouver Regional Centre
400 – 510 Burrard Street
Vancouver, BC V6C 3A8
Fax: 604-682-0787



Working together

You can help your clients:

- ❖ Understand the intake process
- ❖ Prepare for the interview
- ❖ Organize documentation
- ❖ Make sure they follow up and provide intake with requested information



More information

Legal Services Society www.legalaid.bc.ca

Family Law in BC www.familylaw.lss.bc.ca



Presenter:
Sherilyn
Provincial Supervisor, Legal Aid Applications

Phone: 604-601-6093
Fax: 604-682-0787
Email: intake@lss.bc.ca





Legal
Services
Society

British Columbia
www.legalaid.bc.ca



Community

...Education

...Information

...Engagement



Publications and online resources to help you

- **Free print publications**
- **Online PDF publications**
- **Websites**
- **New! Videos**

Audience & accessibility

LSS Publication Readability

How much legal understanding is needed?

Level 1 — None needed.

No legal understanding required. Outline or “first step” information, written in clear language for those with no previous knowledge or experience with the law.

Level 2 — Some helpful.

Some understanding helpful but not essential. Offers all basic information on a topic, meant for those who are reasonably comfortable reading and who may have a general sense of some legal concepts.

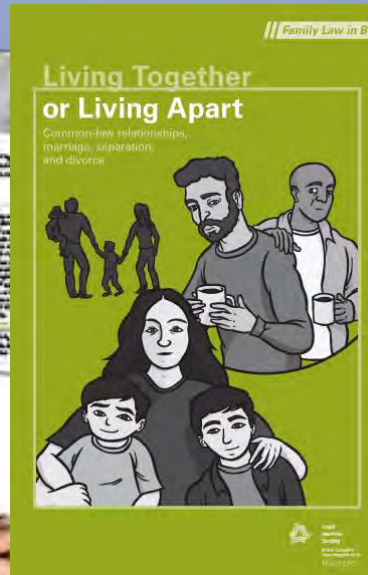
Level 3 — Some needed.

Basic familiarity assumed. Detailed material, written primarily as a reference for the advocate/intermediary audience, although accessible to members of the public with adequate literacy skills.

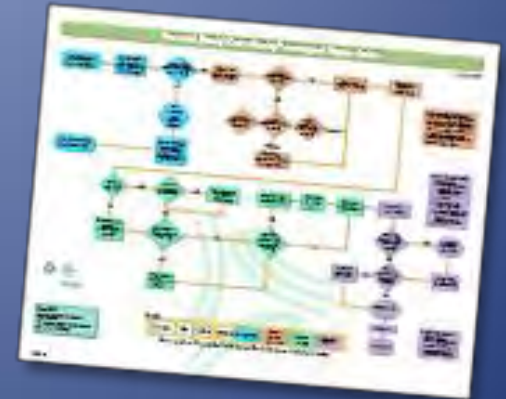
Family law publications

Level 2

Level 1



Level 3



Family violence

Level 1

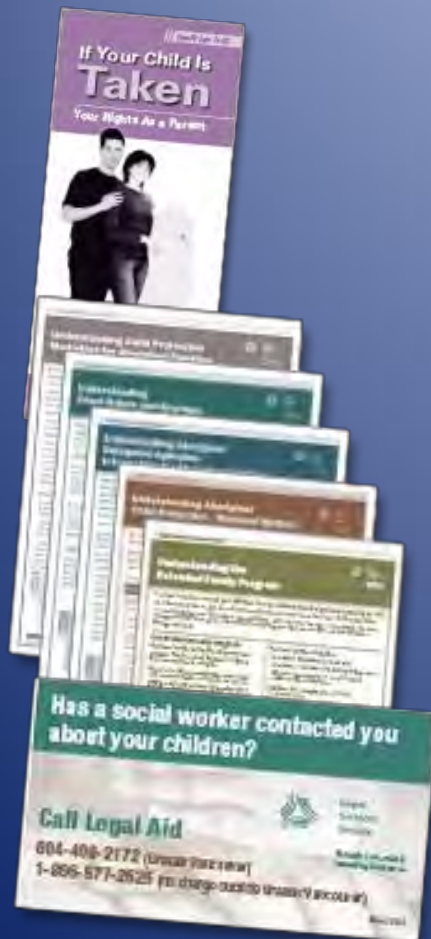


Level 2



Child protection

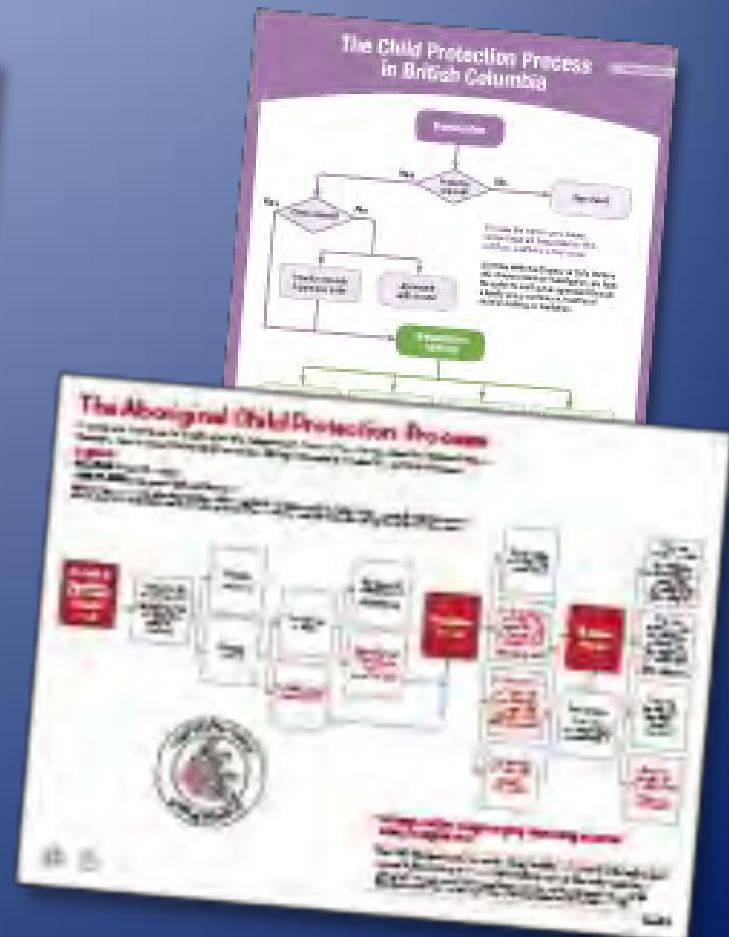
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Level 2



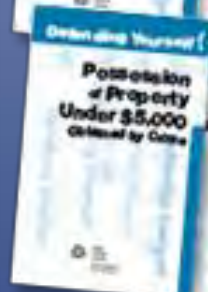
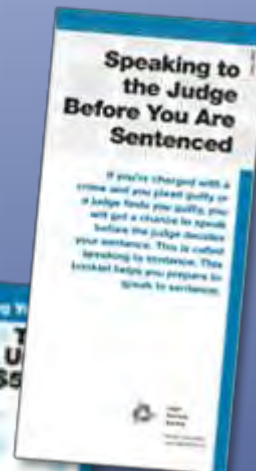
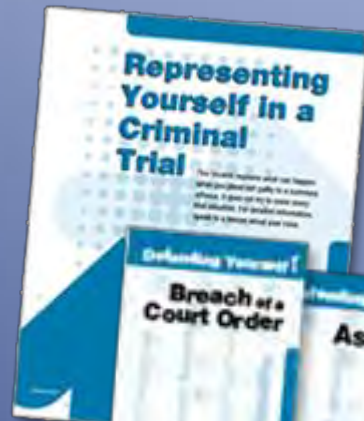
Level 3



Criminal

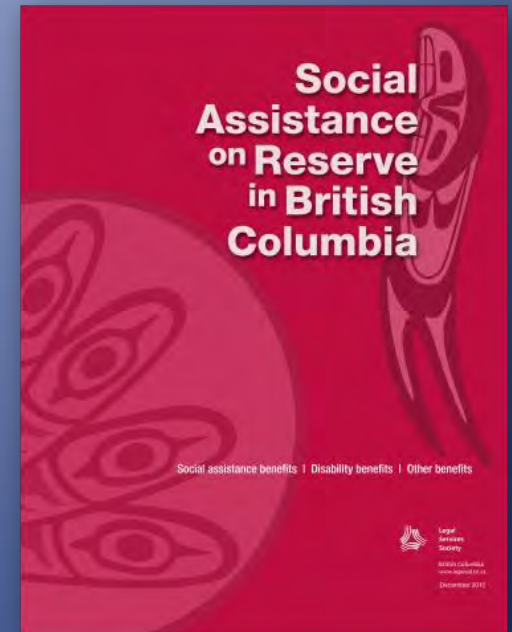
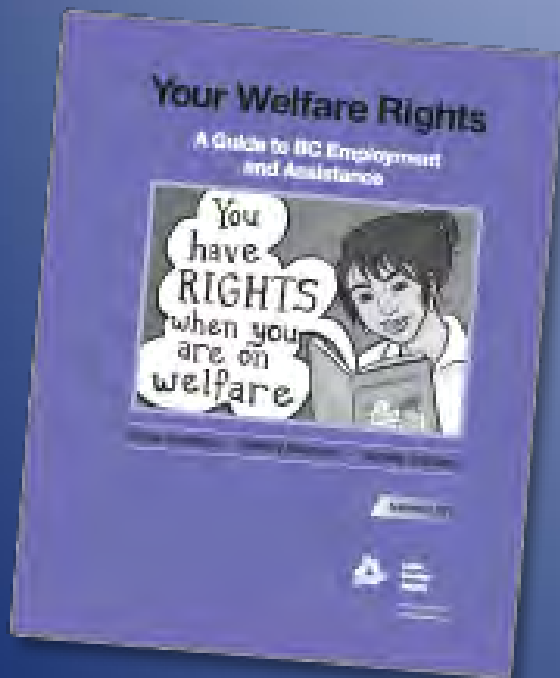
Level 1

Level 2



Civil publications

Level 2





Legal Services Society

Legal aid can help

British Columbia, Canada



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- A lawyer to take my case
- A legal aid office
- Publications
- News releases
- Career opportunities
- Lawyer e-services

Our locations



Our services



Our publications



We're here to help

Welcome to the Legal Services Society (LSS), the organization that provides  legal aid in BC.

If you have a legal problem and can't afford a lawyer, we can help. Join the thousands who use the self-help information on our [Family Law in BC](#) website or who read our free  legal information publications. You may also qualify for some  legal advice from a lawyer or even for a lawyer to take your case.

Find out more about [legal aid](#) and LSS.



Multilingual publications

I am a...

- Person who needs legal help
- Lawyer
- Community worker
- Aboriginal person
- Reporter

I want to...

- Apply for legal aid
- Contact LSS
- Get help with my family law problem
- Find family law court forms



Making justice work



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I want to find a publication by subject



Featured publications



Are You Aboriginal? (Gladue, First Nations Court)

Do You Have a Bail Hearing? Are You Being Sentenced for a Crime? Do You Know About First Nations Court? If you're Aboriginal, you have special rights...



How to Get A Court-Appointed Lawyer for Your Child Protection Case

For people facing a complicated child protection hearing who have been denied legal aid but can't afford a lawyer. Explains why you can't for a co...



Indian Residential Schools Settlement

The Common Experience Payment and the Independent Assessment Process This fact sheet is for Indian residential school survivors who want to know what...



Parents' Rights, Kids' Rights

A Parent's Guide to Child Protection Law in BC Explains what happens if the director of Child Welfare has concerns about a child's safety or plans to...



Understanding Child Protection Mediation for Aboriginal Families

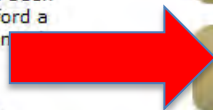
This fact sheet has information in plain language about child protection mediation, how it can help Aboriginal families, and how to find a mediator....



I want to find a publication by language



I want to find a publication by title



I want to get a publication



To get a copy of an LSS publication

- Go to your [local legal aid office](#), or
- Place an order with Crown Publications (see below).

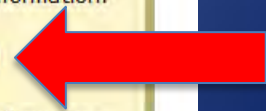
Online ordering with Crown Publications

Single copies

1. Go to the [Crown Publications](#) website.
2. Under Quick Links, click BC Public Legal Education & Information.
3. Search the list to find the publication.
4. Click the publication title to see the description and information.

Multiple copies or regular orders (quantities of 25 or 50)

1. Go to the [Crown Publications](#) website.
2. Under Quick Links, click BC Public Legal Education & Information.
3. At the top of the page, enter your *Customer ID* (see below) and your postal code, and click the arrow button.





Customer Account Application Form

To order:

- Fill in the form online, then e-mail it to Legal Services Society; or
- Print out and fill in the form, then fax it to Legal Services Society

If you plan to order multiple copies of a publication or place regular orders, then you can apply for a customer account. Please fill in the information below and return this form to Legal Services Society by email at distribution@lss.bc.ca or by fax at 604-682-0965. We will contact you after we have reviewed your application. You will receive your customer number and your pre-approved order quantity if your application is accepted.

Does your organization already have an approved Crown Publications customer number? Yes ☐ No ☐

Organization name:			
Contact person:	Title: _____		
Mailing address:			
Phone:	Fax: _____		
Email:	Website: _____		
Order requirements:	Maximum number of copies _____	Estimated frequency of orders _____	
Preferred languages:			
Area of law:	<input type="checkbox"/> Aboriginal <input type="checkbox"/> Civil <input type="checkbox"/> Criminal <input type="checkbox"/> Family <input type="checkbox"/> Immigration <input type="checkbox"/> Legal aid		
Type of organization:	<input type="checkbox"/> Aboriginal <input type="checkbox"/> Community group <input type="checkbox"/> Government <input type="checkbox"/> Library <input type="checkbox"/> Legal organization <input type="checkbox"/> Medical <input type="checkbox"/> Police/RCMP <input type="checkbox"/> School/College <input type="checkbox"/> Victim services <input type="checkbox"/> Other		
Demographics: (Groups/individuals you serve)	<input type="checkbox"/> Aboriginal <input type="checkbox"/> Children and youth <input type="checkbox"/> Community workers/Advocates <input type="checkbox"/> Gay/Lesbian/Bisexual/Transgender <input type="checkbox"/> Immigrants/Refugees <input type="checkbox"/> Police/RCMP <input type="checkbox"/> Seniors/Elders <input type="checkbox"/> Victims <input type="checkbox"/> Women <input type="checkbox"/> Other		
Services: (Type of service offered)	<input type="checkbox"/> Advocacy services <input type="checkbox"/> Counselling/Support Group <input type="checkbox"/> Crisis line <input type="checkbox"/> ESL/Literacy training <input type="checkbox"/> Legal advice <input type="checkbox"/> Legal representation <input type="checkbox"/> Mediation and conflict resolution <input type="checkbox"/> Pro bono legal services <input type="checkbox"/> Restorative justice <input type="checkbox"/> Other		

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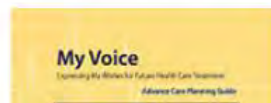



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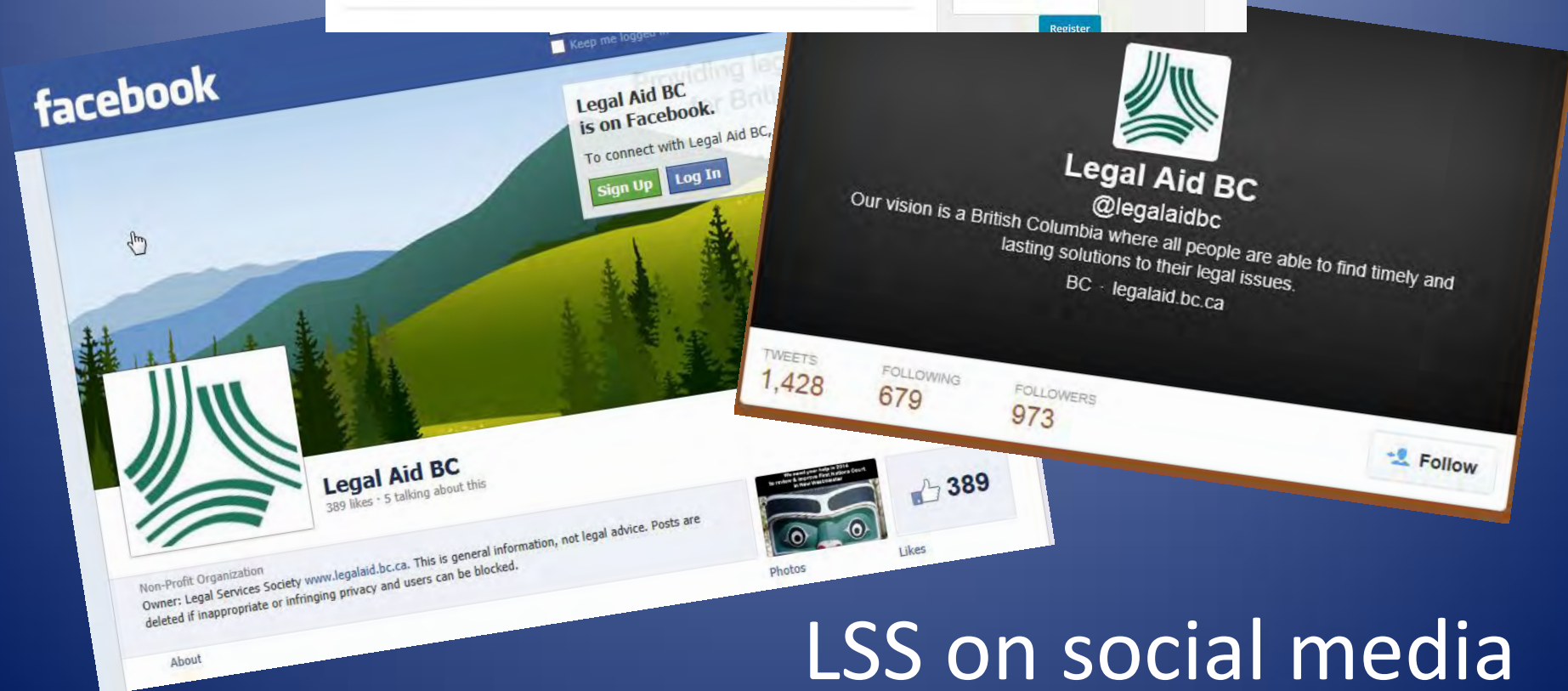
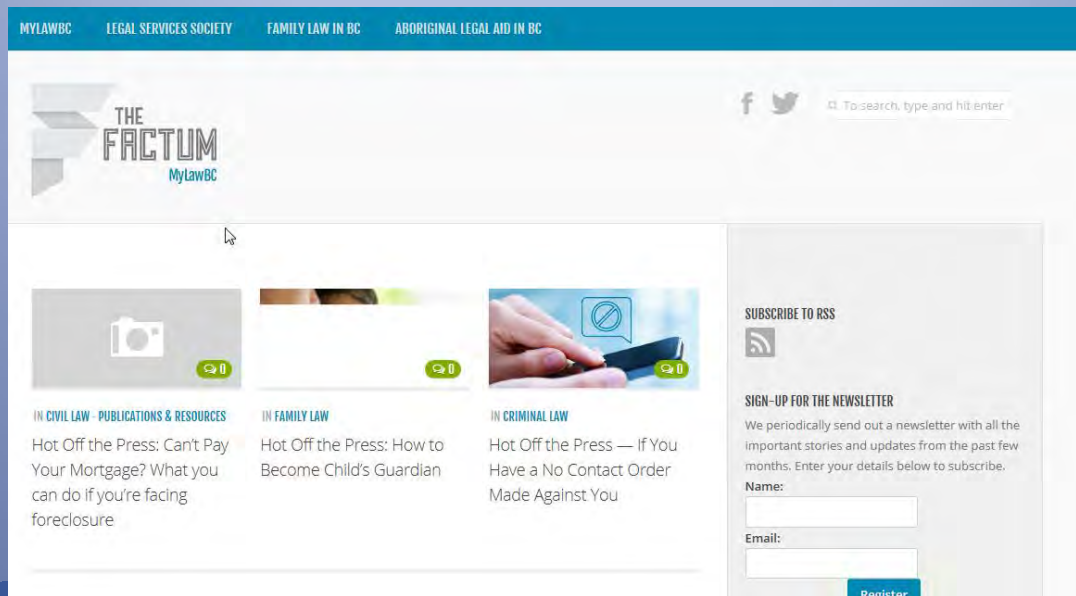




Providing legal information
for British Columbians

Online Outreach

Nate Prosser, Online Outreach Coordinator
nate.prosser@lss.bc.ca | 604.601.6058



LSS on social media

Aboriginal website



Aboriginal Legal Aid in BC



Your family ▾

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Your home on reserve Who can stay in the family home on reserve?

As of **December 16, 2014**, there are new laws about homes on reserves. These laws change who can stay in the family home on reserve if you and your **partner** break up or your partner dies. These laws may apply to you if:

- you live on a **First Nation** reserve,
- at least one of you is a member of the First Nation or a **status Indian**, and
- you've been living with your girlfriend or boyfriend for at least a



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Family Law

in British Columbia



Text Size:



Family Law Website

www.familylaw.lss.bc.ca

Family Law

in British Columbia



Text Size: [A](#) [A](#) [A](#)



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What's new in family law

[Frequently asked questions about the new BC Family Law Act](#)
Find out about the [latest changes](#) to family law

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Offline
Leave a message



Live Chat by [LivePerson](#)



British Columbia's [Legal Services Society](#) maintains this site. If you're having a family problem, you may qualify for a lawyer to advise you or take your case. Contact [legal aid](#) to find out.

[feedback](#)

Separation Agreement self-help guide

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in British Columbia

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Divorce & separation
[How to write your own separation agreement](#)

Section 5: Property (Optional)

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Your basic information

Short name: Party 1 Short name: Party 2

If one party doesn't disclose all of their assets

[Show instructions](#)

1

When this agreement is signed, if a party has failed to disclose family property that is worth more than \$amount, the party that did not know about the asset is entitled to:

2

a half interest in the undisclosed assets.

Pets

[Show instructions](#)

Name will keep the family pets as listed: list family pets. **Name** will be solely responsible for the costs of maintaining and caring for those pets. **Name** gives up forever any claim to the family pets.

Name will pay to **Name** the sum of \$amount as compensation for one-half of the value of list family pets.

Name will keep the family pets as listed: list family pets. **Name** will have access to the family pets specify access times; € as agreed upon by both parties.

Name will keep specify which family pe, and will be solely responsible for the costs of maintaining and caring for those family pets. **Name** gives up forever any claim to those family pets. **Name** will keep specify which family pe, and will be solely responsible for the costs of maintaining and caring for those family pets. **Name** gives up forever any claim to those family pets.

Microsoft Word Supreme Court family forms

Court forms

Here are links to the Provincial and Supreme Court forms used in the self-help guides on this site, as well as some links to sample completed forms. Choose your court below to see the links to the forms. To find out what to do with the forms after you've completed them, follow the step-by-step instructions in our [self-help guides](#).

[Problems?](#)

Important: Most of the PDF forms are stored on the Court Services Branch website: [Supreme Court](#) — [Provincial Court](#). Most of the sample forms are on JP Boyd on Family Law: [Supreme Court](#) — [Provincial Court](#). We just link to them here for your convenience.

> Supreme Court

> Provincial Court

> Other

Click on a table heading to sort the list.

Name	Form number	Description
Affidavit (guardianship, Supreme Court) PDF	F101	Use this special Affidavit to apply to become the guardian of a child if you are parent who doesn't have guardianship or a non-parent (relative or non-relative) who wants to become the child's guardian. An affidavit is a written statement that contains facts that you swear or affirm to be true to support your case. See How can you become a guardian? for more information about how to apply for guardianship.
Affidavit (Supreme Court) PDF Word Sample (PDF)	F30	A document that states facts that you swear under oath or affirm to be true in front of a commissioner for taking affidavits (could be a lawyer or notary public). Use this form to create an affidavit: <ul style="list-style-type: none">• About income if you and the other party agree about the child support payor's income, but the payor doesn't have a copy of a recent income tax return/assessment to attach to the Agreement as to Annual Income (to explain why not).• In response to an application for interim family orders (when the parties don't agree).• In response to an application to change family orders for child or spousal support and/or parenting (when the parties don't agree).• To apply for alternative (substituted) service if you're applying to a judge/master for permission to serve documents in a different way than what's set out in the court rules (for example, because the other party is avoiding service).

Word forms available
on Court forms page

Click on "Word"
to open

Microsoft Word Supreme Court family forms

This document must be filled out on screen (and not by hand). To make these red tips reappear after printing, click **Ctrl-z** (Macs: **command-z**).
[Tips for drafting an affidavit](#)

Form F30 (Rule 10-4(2)) and

Instructions in red disappear when you print the form

How many affidavits have you filled out in this family law case? Number this affidavit accordingly.

This top section (**court file no.**, **registry**, **roles**, and **names**) should be the same as what's on the original Notice of Family Claim (Form F1 or F3), or whichever form started your family law case.

of

and was made

This is the affidavit

« your name in this case »

Link to additional instructions at the top of selected forms

In the Supreme Court of British Columbia

Your full legal names, including also known as:

« role »
« role »

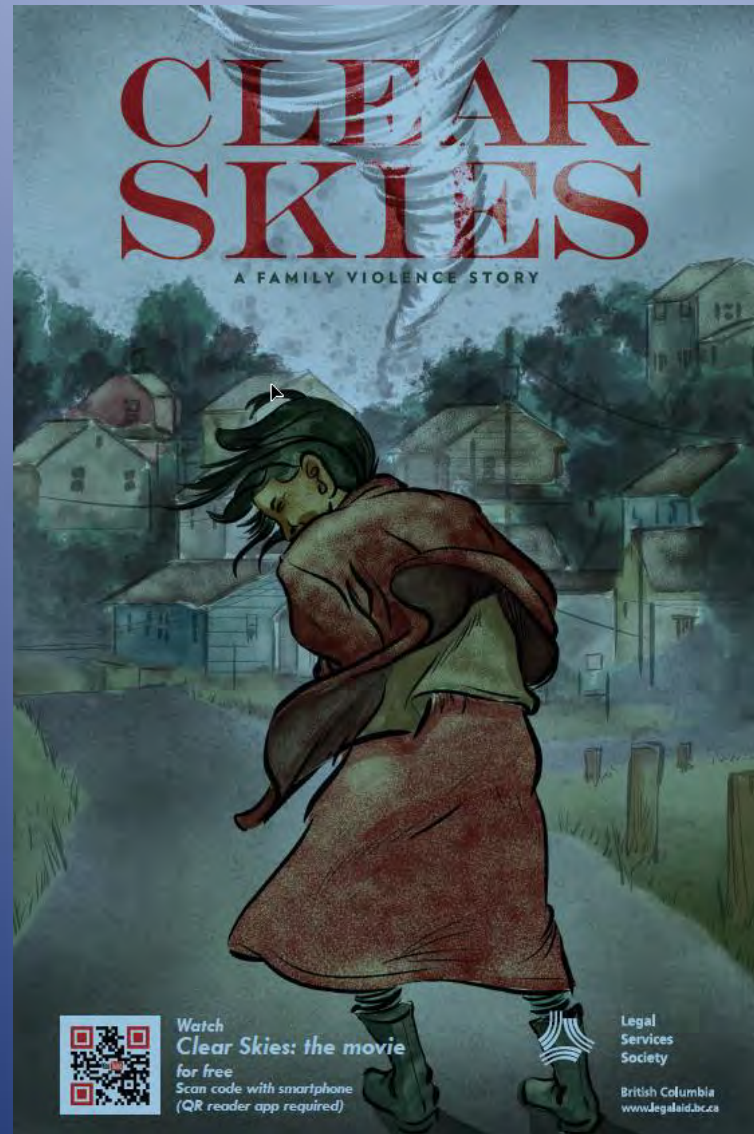
→

→



« role »
« role »

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This site provides legal information, education and help for British Columbians. What is here for you?

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Find someone in your community who can help with legal problems.



Learn & Teach

Access resources that build awareness of laws and how the legal system works.



Reform & Research

Access resources that feature analysis and reform of the law and the legal system.

What's new on Clicklaw

- [Tenant Resource & Advisory Centre \(TRAC\) launches Tenant Survival Guide as Clicklaw Wikibook](#)
Courthouse Libraries BC and Tenant Resource & Advisory Centre...
February 25, 2014
- [New Resource! Separation Agreements: Your Right to Fairness](#)
West Coast LEAF's Separation Agreements: Your Right to Fairness...
February 4, 2014
- [Court Forms - you have questions.](#)

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Clicklaw www.clicklaw.bc.ca

Clicklaw is a legal portal that provides links to legal information and helps you locate services in your community through its HelpMap

You can search Clicklaw by:

- ✓ Legal topic
- ✓ Audience
- ✓ Geographical area
- ✓ Language
- ✓ Type of resource

Welcome to MyLawBC

an interactive platform which is designed to help you find effective, sustainable solutions to your legal problems.

- Guided pathways
- Action plan to solve legal problems
- Family negotiation platform

What areas of law will it cover?

- Family law issues around divorce and separation
- Family violence
- Advanced life planning
- Wills and estates
- Foreclosure
- Dialogue tool

Who are the users?

People with...

- no legal knowledge
- low-literacy
- English as a second language
- lack of time/energy
- high stress or emotional levels
- multiple needs, varied goals, motivations, and information sources
- self-represented litigants

MyLawBC Blog

The screenshot shows the LSS website homepage. At the top, there's a banner with the text "Legal Services Society" and "Legal aid can help", along with "British Columbia, Canada". Below the banner is a navigation bar with links: Home, Legal aid, Lawyers, Community workers, Aboriginal, LSS News, and About us. On the left side, there's a search bar and a list of links under "I'm looking for...". The main content area has a section titled "We're here to help" with a welcome message and a list of services. At the bottom, there's a section titled "Aboriginal Legal Aid in BC" with a small image and a "my problem, my solution MyLawBC" logo, which is circled in red.

Legal Services Society
Legal aid can help
British Columbia, Canada

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I'm looking for...

- Legal help
- A lawyer to take my case
- A legal aid office
- Publications
- News releases
- Career opportunities
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Our locations
Our services
Our publications

We're here to help

Welcome to the Legal Services Society (LSS), the organization that provides legal aid in BC.

If you have a legal problem and can't afford a lawyer, we can help. Join the thousands who:

- use the self-help information on our Family Law in BC website,
- find information for the Aboriginal community on our Aboriginal Legal Aid in BC website, or
- who read our free legal information publications.

You may also qualify for some legal advice from a lawyer or even for a lawyer to take your case.

Find out more about legal aid and LSS.

LSS celebrates 35 years of delivering legal aid to British Columbians.

Aboriginal Legal Aid in BC

my problem, my solution
MyLawBC

The screenshot shows a banner for MyLawBC. It features the LSS logo and the text "my problem, my solution MyLawBC". Below this, there's a blue button with the text "Find out the latest on MyLawBC >". The button is circled in red.

my problem, my solution
MyLawBC

Legal Services Society
British Columbia
www.legalaid.bc.ca

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Click on ...

The image shows the LSS logo and contact information. It includes the text "Legal Services Society", "British Columbia", and "www.legalaid.bc.ca".

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MyLawBC Blog

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MyLawBC November Scrum Update

BY LEGAL AID IN UPDATE — 5 DEC, 2014







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Follow the development of **MyLawBC**, our innovative, interactive site that will help British Columbians solve their legal problems.

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Thank You

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April 2015



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Community Engagement Program: LSS Community Partners

Lynn McBride
Community Engagement Coordinator
lynn.mcbride@lss.bc.ca | 604.601.6021



April 2015

Where are...



Community Partners?

- Legal aid offices
- Aboriginal services
- Legal information outreach services
- Community partners

Community Partner Locations in B.C.



Community Partner Locations

100 Mile House

Abbotsford

Alert Bay

Bella Coola

Boston Bar

Campbell River

Canim Lake

Castlegar

Chilliwack

Cranbrook

Dawson Creek

Fort Nelson

Fort St. John

Gold River

Grand Forks

Hazelton

Hope

Keremeos

Lillooet

Lytton

Midway

Maple Ridge

Merritt

Nelson

North Vancouver

Old Massett

Penticton

Port Hardy

Powell River

Prince George

Seabird Island

Sechelt

Skidegate

Trail

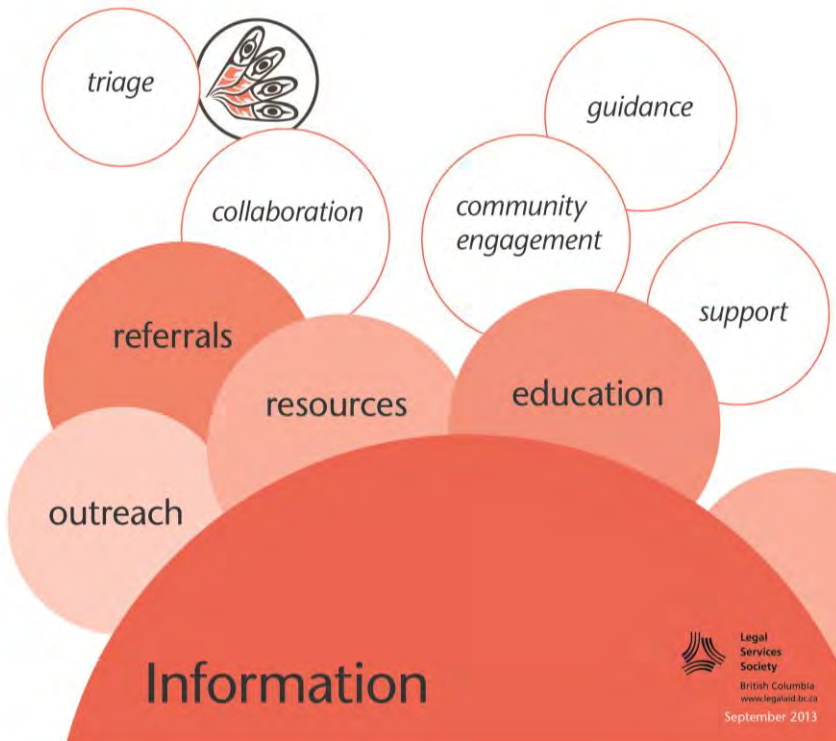
Vernon

What do community partners do?

- act as a link between LSS and people who need to apply for Legal Aid / LSS services
- raise awareness about LSS and other services in their communities
- provide access to PLEI materials – both print and online PLEI materials, published by LSS and other PLEI providers
- provide legal information, *not* legal advice
- refer clients to other places for help

Community Partners

ORIENTATION MANUAL



Community Partners Orientation Manual

A resource & reference tool for providing legal information & referrals

www.lss.bc.ca/assets/legalAid/CPOManualSept2013.pdf

Lynn McBride

Community Engagement Coordinator

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Legal
Services
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British Columbia
www.legalaid.bc.ca

April 2015





**HAIDA GWAI (PORT CLEMENTS) COMMUNITY WORKSHOP:
Family & Child Protection Law, Aboriginal Services & Civil Law Issues**

**Port Clements Community Hall
120 Bayview Drive, Port Clements, BC V0T 1R0
Wednesday, April 22nd and Thursday, April 23rd, 2015**

AGENDA – Thursday, April 23, 2015

Time	Session	Speaker	Facilitator
8:30–9:00	Breakfast		
9:00–10:30	Update on the New Matrimonial Property Act	<ul style="list-style-type: none">Amanda Rose – Family Lawyer	Lynn McBride
10:30–10:45	Break		
10:45–12:15	Overview and Changes to Wills and Estate Law Off and On Reserve	<ul style="list-style-type: none">Rosanna Slipperjack-Farrell – Staff Family and Child Protection Lawyer	Baljinder Gill
12:15–1:15	Lunch & Closing Remarks		Baljinder Gill

The Family Homes on Reserves and Matrimonial Interests or Rights Act

For Courthouse Libraries by Katrina Harry

What we will cover today

- New legislation called the *Family Homes on Reserves and Matrimonial Interests or Rights Act*
- Who, what, when, why?
- More resources:
 - Centre of Excellence for Matrimonial Real Property at www.coemrp.ca
 - Indigenous Bar Association website: <http://www.indigenousbar.ca>
- Definitions will be addressed as they arise

What is the Act

- Federal legislation
- Royal Assent June 19, 2013
- 2 parts to the Act
 - Part 1-How First Nations can enact own matrimonial property laws under the Act
 - Part 2-The provisional federal rules apply as of December 16, 2014

What is the *Indian Act*

- Federal legislation
- Formally consolidated 1876
- To oversee Indians and Indian lands
- Regulated Indians' lives:
 - Created a race-based identity (Status v. non-Status), residency on reserves, livelihoods, attendance at residential schools, creating political system of band councils, etc.
 - For a historical review of the Indian Act, see Battered Women's Support Services website,
<http://www.bwss.org/wp-content/uploads/2010/06/theindianactaboriginalwomens empowerment.pdf>

Why was this Act created

- Case law confirmed that provincial/territorial matrimonial property laws do not apply on reserve lands
- The Constitution Act, sections state that:
- The provinces have authority over
- The federal government has jurisdiction over Indians and lands reserved for Indians

What does the Act say about its purpose and application?

With regard to its creation,

- at Section 4:
 - “The purpose of this Act is to provide for
 - the enactment of First Nation laws and the establishment of provisional rules and procedures that apply
 - during a conjugal relationship,
 - when that relationship breaks down, or
 - on the death of a spouse or common-law partner,
 - » respecting the
 - use,
 - occupation, and
 - possession of
 - family homes on First Nation reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on those reserves.”

Some exemptions from the Act

- First Nations who enact their own laws under section 7-11 of this Act will not fall under the rest of the Act
- First Nations on the Schedule to the First Nations Land Management Act (section 12(2))
- Self-governing First Nations (section 12(3))
- Note that at least ONE of the spouses or common-law partners must be a First Nation member or an Indian in order for the Act to apply

How First Nations can enact own matrimonial property laws-ss. 7-11

Council must:

- notify the Attorney General (section 7(3));
- take reasonable steps in accordance with the First Nation's practices to locate voters, both on and off reserve, and inform them of their right to vote, the means of exercising that right to vote and the content of the proposed laws (section 8(3));
- publish a notice of the date, time and place of the vote (section 8(4));

How First Nations can enact own matrimonial property laws-ss. 7-11

- Once laws are approved, the council must:
 - notify the Minister in writing of the result of the vote (section 10); and
 - send a copy of the approved laws to the Minister, the organization designated by the Minister, if any, and the Attorney General of any province in which a reserve of the First Nation is situated.

Other information

- For templates, training, fact sheets, and more visit the website for the Centre of Excellence for Matrimonial Real Property at www.coemrp.ca
- No direct funding from Aboriginal Affairs and Northern Development Canada
- Dissatisfaction with First Nations Matrimonial Real Property Law

Provisional federal rules (apply December 16, 2014)—ss. 13-52

- Highlighted sections
- S. 13—each spouse or common-law partner has an equal right to live in the family home during the relationship. It does NOT matter whether they are a First Nation member or an Indian.
- S. 14—when a spouse or common-law partner dies, survivor has automatic right to stay in the family home for 180 days after the death

To dispose of or encumber the family home

S. 15-

- Spouse or common-law partner must obtain both the:
 - free
 - informed

consent of their spouse or common-law partner in writing to dispose or encumber the family home.

- A spouse that wishes to dispose of or encumber the family home has the burden of proving they obtained the required consent as set out above.

If consent not properly obtained

- Court may set aside the transaction
- May not be set aside if third party acquired it for value and acted in good faith.

Emergency protection order—s. 16-19

- On an ex parte application, a judge can make an emergency protection order for a period of **up to 90 days**. Orders can be varied, revoked, or extended beyond the 90 days.
- Judge must be satisfied that **family violence has occurred** and there is a **serious or urgent situation** that requires an immediate response to protect a person or property.
- The spouse or common-law partner may make the application even if that person has been forced to leave the family home as a result of violence.
- Judge's considerations are numerous.
- An emergency protection order can include a provision for exclusive occupation/reasonable access of the family home, among many other provisions.
- The application for an emergency protection order can be made by:
 - a spouse or common-law partner; or
 - by a peace officer with or without the consent of the spouse or common-law partner's consent.

Definition of family violence—s. 16(9)

- The Act includes a definition of family violence (s. 16(9)), which the court **must** consider) when determining whether to make an emergency protection order (ss.16(1) and 4).
- See s. 16(9) for definition of family violence
- Immediately, after an emergency protection order is made under section 16, the order and all supporting materials must be sent to a supreme court judge.
- The court must review the order within three working days, if a judge is available, and must either confirm the order or direct a rehearing of the matter (s. 17(3)).
- Designated judge/court may find that family violence has occurred for the purposes of this Act whether or not a criminal charge has been laid, dismissed or withdrawn, or a conviction has been or could be obtained (s. 22)

Emergency protection order continued

- Upon receiving notice of the order, person is bound by it
- A peace officer must serve a copy of the order on the persons referred to in the order, or by a substituted manner (as prescribed by the regulations), and must advise the applicant as soon as that has been done.

Emergency protection order-rehearing ss. 16-19

- If a rehearing is ordered:
 - evidence at rehearing must include the original evidence and can also include the collective interests of the First Nation members on whose reserve the family home is situated.
 - the order continues in effect and is not stayed unless the court orders otherwise.
- An order that is confirmed is deemed to be an order of the supreme court.
- Any person named in an emergency protection order can make an application to vary or revoke the order
- At a hearing or rehearing a judge can make an order:
 - to exclude members of the public, other than the parties from all or part of the hearings;
 - prohibiting the publication or broadcasting of any information from the hearing or rehearing, including the name of a party, witness or child; and
 - prohibiting disclosure to the public of any information in a court document or record related a proceeding under section 17 or 18.

Emergency protection order- application to vary or revoke-s. 18

- An application can be made to vary or revoke within 21 days after notice was received (though the court can allow further time), or at any time if there has been a material change in circumstances.
 - If the emergency order was granted by a justice of the peace or provincial or territorial judge, there is a time limit of 21 apply to revoke or vary the order.
 - After 21 days or after a rehearing, any person named in the order can apply to have the order revoke or varied if there has been a material change in circumstances.
- To read case law about material change in circumstance, try reading the Supreme Court of Canada case [Gordon v. Goertz, \[1996\] 2 S.C.R. 27.](#)
- The court must notify the parties or any persons specified in the order of the court's decision and any consequent procedures. This ensures the principles of fundamental justice and procedural fairness are met.

Exclusive occupation order-s. 20

- A court may grant an order for exclusive occupation of the family home and reasonable access to that home for a period that the court specifies.
- Violence does not necessarily have to be factor
- There are several factors a court must consider prior to granting an exclusive occupation order.

Exclusive occupation order contents—s. 20

An exclusive occupation order may require that:

- the spouse or common-law partner (whether a First Nation member or Indian or not) must leave the family home immediately or by a certain time, and prohibit them from re-entering the home;
- the spouse or common-law partner must preserve the condition of the home until they vacate it;

Exclusive occupation order contents—s. 20

An exclusive occupation order may also state that:

- An applicant make payment to the other spouse or common-law partner towards the cost of other accommodation; and
- A provision either spouse or common-law partner to pay for all or part of the repair and maintenance of the family home and other liabilities arising in respect of the home, or to make payments to the other spouse or common-law partner for those purposes.

Exclusive occupation order-vary or revoke-s. 20(6)

The exclusive occupation order can be varied or revoked by:

- anyone specified in the order, or
- by anyone who holds an interest in or a right to the family home if there has been a material change in circumstances

For an example of what may constitute a material change in circumstance, see the Supreme Court of Canada case [*Gordon v. Goertz*, \[1996\] 2 S.C.R. 27.](#)

Exclusive occupation order and death of a spouse or common-law partner—s. 21

- A surviving spouse or common-law partner may apply for an exclusive occupation order and reasonable access to the home for any period the court specifies.
- An interim order may be made before the application is determined.
- The court must consider many factors (see section 21(3) for full list)

Exclusive occupation order after death cont-s. 21

An exclusive occupation order after death may include provisions such as:

- A survivor must preserve the condition of the family home;
- A specified person must leave the home, and are prohibited from re-entering; and
- An executor of a will/administrator of the estate or the holder of an interest or right in or to the home pay for all or part of the repair of the home or other liabilities.

Division of the value of matrimonial interests or rights—s. 28

- Section 28 provides, where both spouses/common-law partners are First Nation members, upon breakdown of the relationship each is entitled, on application made under section 30, to ½ of the value of the family home.
- There is a difference between what can be granted to First Nations members versus non-First Nations members.

Valuation date

- Valuation date for married spouses will be the earliest of these days
 - the day on which the spouses separated with no reasonable prospect of reconciliation,
 - the day on which the divorce judgement was made,
 - the day on which the marriage was nullified,
 - the day on which one of the spouses made an application related to the consequences of breakdown of the relationship
- Valuation date for common-law couples will be the earliest of these days
 - The day on which one of the partners manifested the intention not to continue the relationship
 - The day on which one of the partners made an application related to the consequences of the breakdown of the relationship
 - The day on which one of the partners made an application to restrain improvident depletion of the interest or right in or to the family home and of the matrimonial interests or rights that is subsequently granted.

Division of matrimonial interests or rights upon relationship breakdown-s. 28

If spouse or common-law partner is **First Nations member**

- $\frac{1}{2}$ of the value of the structures or lands situated on the reserve that were acquired by the spouse or common-law partner either during the conjugal relationship or before the relationship but in specific contemplation of the relationship
- The greater of either $\frac{1}{2}$ of the appreciation in the value of certain other structures or lands held by the other spouse or common-law partner that are situated on the reserve or, the amount of any monetary contributions made by them to improvements to those structures or lands less any remaining outstanding debt incurred for those contributions and
- Where certain other structures or lands held by the other spouse or common-law partner that are situated on the reserve did not appreciate in value, the amount of any monetary contributions they may have made to them less any remaining outstanding debt incurred for those contributions.

Division of matrimonial interests or rights upon relationship breakdown-s. 28

If spouse or common-law partner is **NOT** a First Nations member, they are **entitled to:**

- $\frac{1}{2}$ of the value of the structures that are situated on reserve that were acquired by the other spouse or common-law partner either during the conjugal relationship, or before the conjugal relationship but in specific contemplation of the relationship.
- The greater of either $\frac{1}{2}$ or the appreciation in the value of certain other structures held by the other spouse or common-law partner that are situated on the reserve, or the amount of any monetary contributions made by them to improvements to those structures less any remaining outstanding debt incurred for those contributions; and
- the difference between the amount of any monetary contributions to certain lands or structures held by the other spouse or common-law partner and any remaining outstanding debt incurred for those contributions.

Variation of amounts payable-s. 29

Section 29

- a spouse or common-law partner can make an application to vary an amount ordered by a court pursuant to section 28 if the amount ordered would be unconscionable.

Variation of amounts payable—s. 29

In hearing an application to vary an amount payable a court may consider:

- The applicant's financial responsibility for care and upbringing of children in the applicant's charge;
- Debts or other liabilities incurred by each spouse or common-law partner;
- Significant change in the value of the interests or rights between the valuation date and the day on which the order was made;
- Whether exclusive occupation is given to one spouse or common-law partner;
- Availability of other on-reserve housing;
- The length of the relationship;
- Whether there was any agreement made;
- Any loss of value due to improvident depletion or disposition or encumbrance without the applicant's required consent; and
- Any other consequence resulting from the relationship breakdown.

Amounts payable—s. 29

- A spouse or common-law partner must apply **within 3 years after separation** to divide the value of the matrimonial rights or interests.
- Court may determine the amount payable by one spouse/common-law partner to the other by:
 - lump sum;
 - instalments; or
 - the transfer of an interest or right.
- The court can extend the period to bring an application beyond the 3 years.

Death of a Spouse or common-law partner

- There is a difference between what First Nation members and Non-members are entitled to.
- A survivor must apply within 10 months for any entitlement; however, the survivor can apply to extend the 10 months.
- The determination of value:
 - The difference between what a buyer would reasonably be expected to pay for interests or rights that are comparable to the interests or rights in question.
 - The amount of any outstanding debts or other liabilities assumed for acquiring the interests or rights or for improving or maintaining the structures and lands that are the object of the interests or rights.

Valuation date in death of a spouse or common-law partner

- The valuation date in the case of death is:
 - Spouses (married couples)
 - the day before the death occurred;
 - the day on which the spouses stopped living together; or
 - the date on which the survivor made an application to restrain improvident depletion (which was subsequently granted).
 - Common-law partners
 - The day before the death of the common-law partner; or
 - the date on which the survivor made an application to restrain improvident depletion (which was subsequently granted).

Entitlement after death-

First Nation members-s. 34(2)

A survivor who is a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights that were held by the deceased individual is also entitled to an amount equal to the total of

- (a) one half of the value, on the valuation date, of matrimonial interests or rights referred to in paragraphs (a) and (b) of the definition “matrimonial interests or rights” in subsection 2(1) that were held by the deceased individual in or to structures and lands situated on a reserve of that First Nation,
- (b) the greater of
 - (i) one half of the appreciation in value, between the day on which the conjugal relationship began and the valuation date inclusive, of matrimonial interests or rights referred to in paragraph (c) of that definition that were held by the deceased individual in or to structures and lands situated on a reserve of that First Nation, and
 - (ii) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures and lands situated on a reserve of that First Nation that are the object of matrimonial interests or rights referred to in that paragraph (c) that were held by the deceased individual, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments, and
- (c) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures and lands situated on a reserve of that First Nation that are the object of interests or rights that were held by the deceased individual that would have been matrimonial interests or rights referred to in that paragraph (c) if they had appreciated during the conjugal relationship, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments.

Entitlement after death- non members-s. 34(3)

A survivor who is not a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights that were held by the deceased individual is also entitled to an amount equal to the total of

- (a) 1/2 of the value, on the valuation date, of matrimonial interests or rights referred to in paragraphs (a) and (b) of the definition “matrimonial interests or rights” in subsection 2(1) that were held by the deceased individual in or to structures situated on a reserve of that First Nation,
- (b) the greater of
 - (i) 1/2 of the appreciation in value, between the day on which the conjugal relationship began and the valuation date inclusive, of matrimonial interests or rights referred to in paragraph (c) of that definition that were held by the deceased individual in or to structures situated on a reserve of that First Nation, and
 - (ii) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures situated on a reserve of that First Nation that are the object of matrimonial interests or rights referred to in that paragraph (c) that were held by the deceased individual, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments, and
- (c) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to the following lands and structures situated on a reserve of that First Nation, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments:
 - (i) lands that are the object of matrimonial interests or rights that were held by the deceased individual, and
 - (ii) structures that are the object of interests or rights that were held by the deceased individual that would have been matrimonial interests or rights referred to in that paragraph (c) if they had appreciated during the conjugal relationship.

Summary

- Spouses/common-law partners have equal entitlement to occupy the family home until they cease to be spouses or common-law partners.
- Spouses must give their consent before the disposition or encumbrance of the family home.
- An emergency protection order can exclude a spouse/common-law partner from the family home on an urgent basis (where there is family violence) for up to 90 days.

Summary cont...

- An exclusive occupation order provides short to long term occupancy of the family home (where one spouse is excluded).
- Each spouse is entitled to an equal division of the value of the matrimonial home and any other matrimonial rights or interests.
- In some circumstances, the courts may transfer matrimonial interests or rights between member spouses or common-law partners together with, or instead of, financial compensation.

Summary cont...

- When a spouse or common-law partner dies, the surviving spouse or common-law partner may remain in the home for up to 180 days after their spouse or common-law partner's death.
- The courts can enforce a free and informed written agreement between spouses or common-law partners.

Issues lawyers may face

In using the Act, the practical issues lawyers will face include:

- becoming familiar with all aspects of the new provisional rules,
- gaining knowledge about new laws individual First Nations communities develop under the Act, and
- learning about local court procedures and processes, especially given the access to justice issues many communities face.

Issues First Nations may face

- Deciding whether to develop their own community specific laws, or wait for the Act to apply on December 16, 2014,
- Educating First Nation members about the Act and its implications,
- Managing the capacity issues (for example, the legal costs of developing of their own laws, potentially revising existing policy to be in-line with the Act, determining who will represent the views of the council to the court), and
- Working with local peace officers to carry out the functions outlined within the Act

ALERT BAY COMMUNITY JUSTICE PROGRAM

Working Toward a Healthier
Community: A Restorative
Approach

By

Michael Jacobson-Weston
Coordinator

Wills, Estates and Succession Act

Presenter: **Karen Tse** – Rockies Law Corporation

These presentation materials are sourced and referenced from CLE and TLABC materials, online legal publications and Ministry publications. These materials are not meant to substitute legal advice. When in doubt, speak with a lawyer.

Wills, Estates and Succession Act

- * The new Wills, Estates and Succession Act (WESA) came into force on March 31, 2014
- * WESA streamlines administration of estates
- * Generally applies to a deceased's will or estate if they died on or after March 31, 2014.
 - * The *Estate Administration Act*, *Wills Act*, and other legislation replaced by WESA apply to the deceased's estates if they died before March 31.
- * For the probate rules it is the date of application (not date of death) that matters. If you apply after March 31, 2014, then, regardless of the date of death, you should use the new forms (and the new rules apply).

What will this presentation cover?

- * This presentation will provide a broad overview of WESA
 - * Highlights include:
 - * New Survivorship Rules
 - * Effect of Marriage and Separation
 - * Intestate Distribution
 - * Curing Deficiencies and Rectification
- * WESA is a piece of detailed and complex legislation
 - * What we will not have time to cover:
 - * How to draft a will
 - * How to probate a will under the New Probate Rules
 - * Estate Administration
 - * How to make various applications ... all of these topics will require a workshop in and of itself!

New Survivorship Rules

- * Prior to WESA

- * common accident - impossible to tell who died first:
 - * younger person is deemed to have died after the older person.

- * Under WESA

- * Each person is deemed to have survived the other.
- * In the case of joint tenancy, asset deemed to be held instead as tenants in common and will not pass to the survivor.
- * If a person fails to survive the deceased by 5 days, deemed to have died before the deceased.

WESA - Who are Spouses?

- * Spouses

- * Both alive immediately before deceased's death and
 - * (a) were married to each other, or
 - * (b) lived in marriage-like relationship for at least 2 years

- * More than one spouse

- * e.g. deceased living with wife, but had been having an affair and living common-law with another too for at least two years immediately prior to date of death.
 - * In this case, there are two spouses: can share the portions if they can agree, or if they cannot agree, then as determined by the Court on Application.

Intestacy: Spouse – Old Act

- * Under **previous** legislation:
- * Spouse **no Children**
 - * Receives the entire estate
- * Spouse **with Children**
 - * First \$65,000 of estate, plus
 - * 1/2 of remainder if one child, or
 - * 1/3 remainder if more than one child
 - * Plus life interest in matrimonial home
 - * Plus furniture and household effects

Spousal Share under WESA

- * The same provisions apply if there is no children under WESA (all to spouse)
- * The distribution is somewhat greater if there is children of the deceased. The only difference is the amounts involved and how the spousal home is dealt with.

Leaving Spouse + Children

- * If there are children of the deceased and they are also the children of the spouse
 - * spouse → first \$300,000.00 of the Estate as **preferential share**.
- * Spouse **not** the parent of the descendants (e.g. step mom/dad)
 - * Spouse → reduced to \$150,000.00.
 - * **The balance is divided ½ to the spouse and ½ to the intestates' descendants.**
- * If the net value of the estate is **less than** the preferential share than the entire estate is to go to the spouse

Pre-WESA Intestate Distribution

- * Prior to WESA, intestacy was governed by the provisions of the *Estate Administration Act*.
- * The intestate distribution was based on consanguinity
- * Consanguinity
 - * Closeness in blood relation

WESA – Parentelic Distribution

- * **WESA: parentelic distribution**
- * What this means: not based on consanguinity
 - * now based on closeness to a parent rather than just closeness in blood relations.

Distribution Scheme

1. If there is a spouse and no descendants all to the spouse (s.20);
2. If no spouse, all to descendants per stirpes but not to great-nieces or great nephews;
 - * **Per Stirpes:** an estate is distributed *per stirpes* if each branch of the family is to receive an equal share of an estate.
 - * a. Under s. 8.1 descendants can include assisted births conceived after death so long as the surviving parent, has given notice to the personal representatives within 180 days from the date of death of an intention to use human reproductive material. The birth must occur within two years of the death and the child must live for at least 5 days.
3. If there is no spouse or descendants then the estate would go to the parents;
4. If there are no parents then to the descendants of the parents per stirpes;
5. If no descendants of the parents then to the deceased's grandparents and if no grandparents to the descendants of the grandparents per stirpes;
6. If no grandparents or descendants of grandparents to the deceased's great grandparents or the descendants of the great – grandparents per stirpes;
7. If no great-grandparents or descendants of the great – grandparents, the Estate will escheat to the crown under the *Escheat Act*.

Example

- * Intestate leaves an uncle on one side of the family and a first cousin on the other
- * Old Act: uncle takes the whole estate since he is a relative of the 3rd degree and the cousin is of the 4th degree

Example

- * Under WESA – the parentelic system provides that the uncle and the 1st cousin take equally given they are both descendants of grandparents

Another Example

- * Uncle Bob survives on one side of the family and a niece, Nancy, survives on the other side of the family
 - * Table of Consanguinity provides that Bob and Nancy would take equally since they are both relatives of the 3rd degree
- * Under WESA
 - * Nancy would take ahead of Bob because the niece has a closer common ancestor (the intestate's parent) than the uncle and the intestate

Separation

- * Marriage and marriage-like relationships can terminate by either one or both parties
 - * Prior to WESA, the old act did not provide for termination of common-law relationship
- * Two persons cease being spouses of each other for the purposes of this Act if
 - * (a) in the case of a marriage, an event occurs that causes an interest in family property (see [Family Law Act](#)) to arise – e.g. separation, or
 - * (b) in the case of a marriage-like relationship, one or both persons terminate the relationship.
- * Spouses are not considered to have separated if, within one year after separation,
 - * (a) they begin to live together again and the primary purpose for doing so is to reconcile, and
 - * (b) they continue to live together for one or more periods, totalling at least 90 days.

What happens after Separation

- * A gift in a will to a person who has subsequently ceased to be a spouse, or an appointment of that person as a Personal Representative (executor or trustee) is **revoked** and any gift treated as though the spouse had predeceased the will-maker (s.56(2)).
 - * Subject to contrary intention appearing in a will
- * Revocation continues notwithstanding subsequent reconciliation if separation longer than one year.

The Elderly and Separation

- * Examples of interesting scenarios:
 - * Grandfather decides to terminate the relationship and there are questions as to capacity and or undue influence by the adult children.
 - * What if grandmother was placed in a care facility due to health reasons but the adult children take the position that it was a termination of the marriage-like relationship?
- * Cases will be dealt with on a case by case basis.

Spousal Home

- * The spousal life interest in the matrimonial home is abolished
- * Deceased spouse is the sole owner of the home or owns an interest in the family home:
 - * Spouse has right to purchase the matrimonial home or elect that it be considered part of share of the estate.
- * Spouse must elect this option within 180 days from the grant of administration.
 - * Personal representative cannot dispose of the spousal home within 180 days from the date of the grant without the consent of the spouse unless debts exceed assets and mortgage would not suffice to pay debts.

Spousal Home Valuation

- * New procedure to determine the home value:
 - * If personal representative dispute spouse's valuation, must provide alternate value.
 - * If they cannot agree, apply to court to have determination.
 - * If spouse is personal representative, she must apply to court unless all descendants agree.

Retention of the Spousal Home

- * Surviving spouse can seek an order from the court that the spousal home be retained for the surviving spouse without the surviving spouse purchasing
- * Under the New Probate Rules:
 - * surviving spouse may make an application to have the court exercise its discretion in determining if the spousal home should be retained.

Household Furnishings

- * Spouse entitled to the household furnishings, which have been defined as personal property “usually associated with the enjoyment by the spouses of the spousal home”.
- * Usually, unlikely to have issue with the household furnishings.
- * However, in the situation of a blended family, dispute may arise over items such as heirlooms, or rare coin, stamp or wine collections if items were only enjoyed by the deceased.

Occupancy Costs

- * Spouse who occupies the spousal home obliged to pay for the occupancy costs pending the purchase of the spousal home being dealt with. The surviving spouse **must pay** from the date of death:
 1. insurance against damage, destruction and public liability;
 2. taxes against the spousal home from the date of death of the deceased person to the date of the purchase of the spousal home;
 3. all reasonable and necessary expenses to maintain and repair the spousal home;
 4. rate and charges for electricity, gas, fuel, oil and water; and
 5. mortgage payments.

Wills

- * Do existing wills need to be rewritten?
 - * WESA does not invalidate any wills that were written before it came into effect.
 - * However, the Act affects all wills no matter when they were written.
- * Already have a will?
 - * May wish to discuss with lawyer to ensure wishes are upheld in light of changes to how wills are interpreted.

Deceased Person's Last Wishes

- * Courts have more latitude to ensure last wishes are respected.
- * Testamentary intent
 - * Possible for a document which is not duly signed and executed to supersede an older Will.
- * Courts have power to declare that a document which does not meet the formality requirements of a Will to be effective.

Curing Deficiencies

- * S. 58 of WESA
 - * Court empowered to order that a record, document, or writing be effective despite deficiencies in execution, attestation, or other aspects of compliance with the Act.

Record, document or writing that may be cured

- * “Record” includes data that:
 - * is recorded or stored electronically;
 - * can be read by a person; and
 - * is capable of reproduction in a visible form
- * Electronic data, provided it can be read by humans in visual form

Curing Requirements

- * Court may use curative power if the record, document or writing represents:
 - * testamentary intention
 - * intention to revoke, alter or revive a will
 - * testamentary disposition
 - * intention to revoke, alter or revive a testamentary disposition contained in a document other than a will.

Curing Requirements

- * No express witness or signature requirement
- * **Finality** – draft may not qualify
- * **Degree of connection**
- * Represents deceased's testamentary intentions
- * **Authenticity** – lawyer's notes did not qualify, but in notes on a will in deceased's handwriting did

What this means for Will-Makers

- * **Mark** as authentic and final the operative documents
- * Record and **preserve** all interim communications with will maker until final documents are executed, then **destroy** obsolete records
 - * E-mails
 - * Instructions, accountant's plans, memos
 - * Draft documents
- * Will-maker could **sign** instructions/letters/drafts to confirm intention that those are provisional will

What this means for Nominees and Personal Representatives

- * Will-maker's mental incapacity?
 - * "Nominee" (attorney/committee) should search for, review and preserve records
 - * Avoid loss of documents
- * Will-maker dies?
 - * Personal representative must urgently and diligently ascertain all records
 - * Preserve records to avoid unintentional destruction or failure to follow last wishes

Where to look for items?

- * Search will-maker's residence, office, safety deposit box, computers, cellular phone
- * Speak with family members, friends, lawyer, accountant, notary, accountant, financial advisor, insurance agent, charities
 - * May need a court application to gain access
- * Probate applicant must swear or affirm to **diligent search in each place** that could be reasonably considered to be a likely place

Rectification

- * Fixing Errors
- * There will be additional powers to “fix” a Will that has errors, including
 - * power to the court to rectify a Will after a grant of probate has been issued.
- * S. 59 expands court’s ability to rectify a will to coincide with will-maker’s intent

The Test

- * What did the will-maker intend regarding the terms in question?
 - * Is the will expressed in a way that fails to carry out that intention?
 - * Is the will so expressed because of an error of a kind that may be rectified under the statute?

What errors are rectifiable?

- * Accidental slip or omission: s. 59(1)(a)
- * Misunderstanding of the will-maker's instructions: s. 59(1)(b)
- * Failure to carry out the will-maker's instructions: s. 59(1)(c)

Accidental slip or omission: s. 59(1)(a)

- * Inadvertent inclusion or omission by anyone involved in generating will:
 - * will-maker
 - * drafter
 - * transcriber or assistant to drafter
 - * E.g. draft writes *per stirpes* but writes after that the names of every alive children. What happens to the kids of the one deceased child?

Misunderstanding of will instruction

- * Error of will drafter
 - * Not cases of misunderstanding by will-maker of effect of language used
- * Example
 - * Written as “vineyard”
 - * Vineyard includes fields, a bottling plant and a store
 - * Gift only meant to include only the fields

Extrinsic Evidence

- * WESA s.4 – Extrinsic Evidence
 - * Admissible if will provision is meaningless or ambiguous-for “construction”
- * Extrinsic evidence of intent is admissible to prove rectifiable error present
 - * Statements of the will-maker
 - * Will instructions and notes
 - * Draft wills and changes

Witnesses

- * Previously, if a witness as to the will is a beneficiary or the spouse of a beneficiary, the gift to that person is void.
- * WESA: gift to the witness is still considered void, but may be saved by the Court on application.

Marriage & Wills

- * Marriage will no longer revoke a prior Will.
- * Previously, a will was revoked if someone married:
 - * Many unaware that marriage revokes a will;
 - * Surprised – died without revision? Last wishes not necessarily carried out.
- * However, a will revoked by marriage under the old act is not revived by WESA, even if the person who made the will died after March 31, 2014.

Age

- * Anyone over the age of 16 shall be able to make a Will.
- * Previously, age requirement is 19, with an exception to those who are and have been married before age 19.

Undue Influence

- * Challenging a Will based upon Undue Influence
 - * Onus shifted from the opposing party having to prove undue influence directly, to the beneficiary (e.g. a caregiver) who is claiming the Will is valid, to prove that undue influence not exerted.

Gifts and Loans During Life Time

- * Gifts given during lifetime, are they deducted from gifts under will?
- * WESA: no more common-law presumption that a gift made during a will-maker's lifetime to a child is an advance of that child's inheritance.
 - * Gift in the will survives by Will's terms.
- * WESA: no more presumption that legacies in a will are revoked if the will-maker made a lifetime gift in the same amount as the legacy
- * Also, no more presumption that a debt owed by the will-maker is satisfied by an equal legacy to a creditor.
- * If these are to be otherwise accounted for, important to specifically provide for this in estate plan.

What are some indicators that I should review my will?

- * There are many reasons why you may wish to sit down with a lawyer to speak about your will. Some of these are:
 - * You got married after making a will
 - * You have made gifts similar to those mentioned in your will
 - * A gift in the will is subject to a security interest (such as a boat with loan payments)
 - * You have given your child some money that you think should now be deducted from child's share of estate
 - * You want to pay a debt by making a gift to the debtor in your will