

# family law intermediary training guide

law, the legal system and  
child-centered family justice



part of the  
public legal education association of saskatchewan's  
adult program



## credits

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This guide was produced by the Public Legal Education Association of Saskatchewan (PLEA) with funding from the Department of Justice Canada's Child-centered Family Justice Fund.

The purpose of PLEA is to assist in providing the public with an introduction to particular areas of the law. In this guide, that purpose is accomplished by educating intermediaries so that they may be able to provide legal information or sources of legal information to clients in need.

The contents of this publication are intended as general information only, and should not form the basis of legal advice of any kind. As well, the information presented in this guide is directed towards residents of Saskatchewan. Laws may be different in other provinces. Individuals seeking specific legal advice should consult a lawyer.

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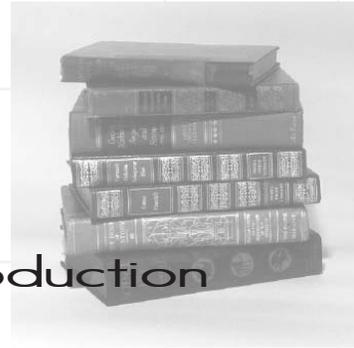
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## introduction

This guide has been developed by the Public Legal Education Association of Saskatchewan (PLEA), with funding from the Department of Justice Canada - Child-centered Family Justice Fund. This guide is intended to inform persons working with separating and divorcing parents of issues, information, and resources related to child support, support enforcement, custody and access, and related family law matters, as well as the legal system as a whole. It is hoped that this guide will give individuals in the helping professions the knowledge and skills they need to assist their clients in finding legal information to deal with the problems they are facing as a result of ending a spousal relationship. It is only when people know the law and are aware of their ability to get information about the law that they are able to protect themselves and their family and to gain full access to the mechanisms available to resolve the problems they face.

Individuals who are dealing with a separation or a divorce may have difficulty accessing traditional legal information services. Individuals may face a number of barriers that make accessing legal information difficult, including economic, geographical, and linguistic barriers. Individuals may not be aware that one of their problems is a legal one or that it has a legal component. Even those with this awareness may not know what to do or where to go for information. Although in many cases these individuals may not approach PLEA, or some other specific source of legal information, it is likely that they will relate their general difficulties to someone else. They might go to a community or family worker, for example, or to a counsellor, a social worker, an advocate or a volunteer at a self-help agency. We see these "helpers" as the link, or the intermediaries, between the law and those who need help with the law when facing the end of a spousal relationship. It is to them that this training guide is directed.

## training objectives

The purpose of this guide is to help intermediaries, who deal with separating or divorcing parents, and perhaps single parents, gain an understanding of the legal issues involved and provide sources for their clients to go to for assistance. This guide provides information on...

- identifying and classifying legal problems
- using the legal system
- gaining access to legal information and sources of information for assistance or advice
- making appropriate referrals

In addition, the guide provides intermediaries with the background knowledge and the resources they will need to assist separating and divorcing parents with problems requiring legal information. It is not the intent of this guide to prepare individuals to provide legal advice.

## information about PLEA

The Public Legal Education Association of Saskatchewan (PLEA) is a non-profit, non-governmental organization that exists to educate and inform the people of Saskatchewan about the law and the legal system. PLEA believes that public awareness of, and involvement in, legal issues can only increase the effectiveness of our legal system, which is designed to serve the needs of citizens.

PLEA receives funding from the Law Foundation of Saskatchewan and the Department of Justice Canada. PLEA also enjoys the support of the Law Society of Saskatchewan, Saskatchewan Department of Justice, Saskatchewan Branch of the Canadian Bar Association, College of Law at the University of Saskatchewan, Saskatchewan Legal Aid Commission, Saskatoon Public Library and libraries and regional colleges throughout the province.

The Family Law Intermediary Training Guide is funded by the Department of Justice Canada - Child-centered Family Justice Fund.

PLEA offers services that are designed to assist the public in becoming more informed about the law and the legal system. It differs from a lawyer's office or a legal aid clinic in that it provides general information on the law as opposed to giving legal advice for specific problems. The organization offers a number of services and materials (usually at no charge) which further its goals of heightening public awareness of the law.

- **Publications**

PLEA produces publications on many areas of the law and makes these available to the public. PLEA welcomes requests for general legal information on any topic. If we do not have the information that is needed, we will suggest the appropriate government agency or resource centre where the information may be found. PLEA publications can be found at [www.plea.org](http://www.plea.org).

- **Free Legal Information Sessions and Speakers Bureau**

Through its Speakers Bureau, PLEA is also pleased to arrange for speakers to address a group, club or association, or the public through a library session about a particular area of law. Volunteer lawyers and other knowledgeable professionals give lectures. These services are usually offered free of charge. To find out more about our Speakers Bureau, contact PLEA. To find out more about the Free Legal Information Sessions, contact your public library, regional college, or PLEA.

- **PLEA's Youth And Schools Program**

PLEA's Youth and Schools Program strives to promote the integration of law-related education into the schools through such means as the development of law-related resources for the classroom (e.g. teacher's manuals, *The PLEA* newsletter), workshops for educators on teaching law, and other publications and services to assist in planning a law-related education program.

- **Media**

PLEA occasionally works with Saskatchewan television stations to produce law-related media programs. In addition, many Saskatchewan newspapers carry PLEA's regular column *A Look at the Law*.

- **Projects**

During the course of any given year PLEA undertakes new programs and projects for which it receives special funding. The Family Law Intermediary Training Guide is one such project, and was funded by the Department of Justice Canada - Child-centered Family Justice Fund.





## the role of the intermediary

### what do legal intermediaries do?

Legal intermediaries are individuals who act as the "link" between their client and the legal resources existing in the community. Many individuals may not be aware that a problem they are experiencing is legal in nature or that it has a legal component. Some may know they have a legal problem but do not know where to go for assistance. These people often relate their general difficulties to an individual in a "helping field" with whom they have contact; i.e. "you". You can be the "link" those people need in order to have access to the legal assistance that is available.

### how does the intermediary process operate?

#### intermediaries give legal information not legal advice

We do not expect an intermediary to be an armchair lawyer. We do not want an intermediary to give legal advice. In fact, the law states that lawyers are the only ones entitled to give advice or perform any work pertaining to the law. We want the intermediary to perform the more limited function of providing legal information. That job is also one performed by PLEA.

Let us give an example. If a separated parent is having difficulties enforcing a maintenance order for support of his or her children and asks PLEA what to do about it, PLEA would provide him or her with general information about that area of the law and direct him or her to resources such as the Maintenance Enforcement Office, the Lawyer Referral Service, and Legal Aid, for further assistance. It is this kind of service that we hope intermediaries will provide as well.

#### the steps involved in providing information

The job of providing information can be broken down into six different stages. The intermediary must...

1. recognize that the client has a problem
2. know that the problem has a legal component
3. know into what broad area of the law the problem falls
4. know whether more information is required
5. find a source of information to help with the legal problem
6. make appropriate referrals

We do not anticipate that intermediaries will have difficulty recognizing whether their clients have a problem. That is what they are trained to do, and we believe they do it well. But PLEA can assist intermediaries to handle the last five stages, which are recognizing whether a problem is in whole or in part legal in nature; knowing into what broad legal category the problem falls; knowing whether more information is required; knowing where that information can be obtained; and knowing what resources may be available in the community to help the individual.

Once you realize your client has a problem, how do you know that this problem is legal in nature? It might help to keep in mind that much of what we do in our everyday lives has some connection to a law somewhere, whether it be federal, provincial, or municipal. The more you know and learn about the law, the easier it will be for you to answer the question of whether a problem is a legal one or has a legal component.

It might help to put the problem into some kind of category. You could ask yourself questions like these...

- are spouses separating?
- are questions regarding the custody and access of children involved?
- are support payments for a spouse or children a problem?
- will property division between spouses be an issue?
- has a crime related to abuse been committed?
- are there problems with rental accommodation or other living arrangements?

By answering "yes" to one of these questions, not only will you know that your client has a legal problem but you may also be able to classify that problem into a specific area of law. In this guide, the main focus is on family law or domestic relations problems. If you are able to categorize the problem into a specific area of law, it will be easier to locate the information you require (perhaps from a PLEA booklet) or to direct your client to the legal resources in the community that are available to assist him or her.

Knowing when there is a legal problem and how to access legal information and resources is not something that you will become an expert in after using this guide. The purpose of this guide is to get you started, to make you aware of the value of legal competency, and to emphasize that it is a skill that can be learned.

Most likely you will feel somewhat awkward during the period of time in which you are improving your legal competency skills. This is to be expected. But it will not be long before a new awareness and skill will help you deal with the legal needs of your clients.

Awareness involves a knowledge of the law and legal system. Skill is in knowing what should be done to deal effectively with a particular problem. Both your awareness and your skill will improve as you gain more experience. A component of awareness and skill is knowing where to go for help. Everyone involved with the law has to know how to use legal resources. The laws that govern our lives are so numerous and so complex that no one, not even lawyers (who have spent years studying the law), can keep it in their heads. You will always have to look something up or ask someone whose knowledge is greater than yours.

We do not expect intermediaries to be experts in the law. What we are hoping is that, with a bit of practice, intermediaries will be aware of when a problem might have legal ramifications, and will develop the skill to put that problem into a particular context (for example, family law or landlord/tenant law) which will help them to find the right resources for their clients to deal with a problem.

## **key considerations in acting as an intermediary**

### **legal information versus legal advice**

We wish to re-emphasize that intermediaries, because they are not lawyers, cannot be expected to give legal advice. Intermediaries, in acting as a link between the client and the legal resources, perform the more limited function of providing legal information. The difference between legal advice and legal information is illustrated by the following example.

*Your client comes to you and says that her husband has left the family home. They have one child, a daughter who is 13 years old. Your client has been employed full-time outside of the home for three years. Her husband is seasonally employed, and moves around a lot, as required by his job. He has refused to pay any support for your client or their child, but has said that he wants custody of their daughter. Your client is concerned, and wants to know if her husband can get custody of their daughter.*

### **legal information that may be given by an intermediary**

- It may be best if the couple can reach an agreement about custody, access and support arrangements for their child.
- There are individuals called "Mediators" who can assist a couple in reaching an agreement on parenting arrangements after they separate. Mediators can help decide childcare issues such as how much time a child spends with each parent, which parent has primary responsibility for important decisions in raising the child, as well as the financial contribution of each parent to the costs of raising the child. In addition, they can deal with issues such as division of family property and spousal support.
- Even if the couple agrees about the parenting arrangement, they may choose to have the court issue an order on the same terms. They do not have to argue in court to get a court order. They can apply for a consent order. This may make it easier for the terms of custody and access to be enforced. If the couple wishes to get a divorce, they must go to court anyway.
- If the couple cannot reach an agreement, they can start legal proceedings, and the court will decide on parenting arrangements. This may include an order for joint custody, although from a practical perspective, this is unlikely if the couple is not in agreement about custody.
- In making this decision the court must decide what would be in the best interests of the children. In determining what is in the best interests of the child, the court will look at several factors.

- If the client and her spouse cannot agree about custody, the client should contact a lawyer.
- You, as a legal intermediary, could inform her whether or not she might qualify for “legal aid” or how she could go about finding a lawyer in private practice.

### **legal advice that can only be given by a lawyer**

- A lawyer would take a very close look at the situation, in light of the applicable laws and legal concepts. The lawyer will be aware of the factors the court will consider in determining the best interests of the child. Then, the lawyer will apply what he or she has discovered about the couple and their child to determine how the law is likely to be applied. The lawyer will offer the parent advice on parental rights and responsibilities, as well as legal options and strategies.

The legal intermediary acts as the link between the client and the legal resources needed to help the client with his or her legal problem. An intermediary is not necessarily restricted to providing information. As an intermediary, you will also be capable of locating information and educating your clients to do the same.

### **confidentiality**

Any information a client gives to a lawyer is protected. A lawyer is required by the ethics of the profession to keep that information to herself or himself. The lawyer cannot be required by law to reveal that information. For example, a lawyer cannot be required to say anything in court about his or her client. But an intermediary is not a lawyer. The intermediary and client do not have the same protection that a lawyer and client have.

Most people know that there is a special relationship between a lawyer and client and that whatever passes between them is confidential. They may assume that because they are talking to an intermediary about legal matters, they will have the same protection. They should be warned that this is not the case. The intermediary could be required, by law, to reveal what he or she has been told.

Generally, individuals are not required to report anything about a crime that has been committed. One notable exception to that rule is dealing with abuse or neglect of children. Anyone who has reason to believe that a child is abused or neglected has a legal duty to report it. Failure to report such occurrences is an offence. But if an intermediary is told, for example, that a client has taken a vehicle, the intermediary is not obliged to report that fact. In certain circumstances you may decide to come forward with that information. That is your decision.

Please be aware that while it is generally not an offence to fail to report a crime, it is an offence to in any way assist the perpetrator to commit the offence or evade justice. Accessories to the crime are liable to exactly the same punishment as the main perpetrator.

## the changing state of the law

Because laws change overtime, PLEA regularly updates its publications. However, it may take some time before changes to the law can be incorporated into our materials, particularly our print materials. Intermediaries should be aware of that fact and should remind their clients that the information, to the best of their knowledge, is up-to-date but that there may be changes to the law.

Intermediaries should also be aware that even though the law can be an uncertain business, the agencies and sources of information which can help clarify any changes in the law or procedure generally remain the same. The client may think it is easy to know what the law is and may expect the intermediary to give a definitive answer. It may not be possible for the intermediary to do that, and he or she may have to explain that to the client. If the client wants an opinion on a legal matter, the intermediary should suggest that he or she go to a lawyer or legal aid for advice.

## let the client decide

When an intermediary starts listening to other people's problems, the first impulse may be to "take care of" that person. He or she may decide on a course of behavior that seems best for the client, without trying to find out what the client really wants to do. This is a natural reaction and often seems the easiest approach, but it is one fraught with danger.

Even though there may be an effective course of legal action open to the client, the client may not want to take that action and may understand, better than the intermediary does, the repercussions that may follow.

Let us consider the example of an immigrant woman who is being abused by her husband. The intermediary may believe the woman should leave her husband and therefore will give her information only about that option. This severely limits the woman's ability to make an informed decision. Possibly there are non-legal options that would serve her better. The intermediary should set out all the alternatives as clearly as possible and then go through the pros and cons of each option with the client.

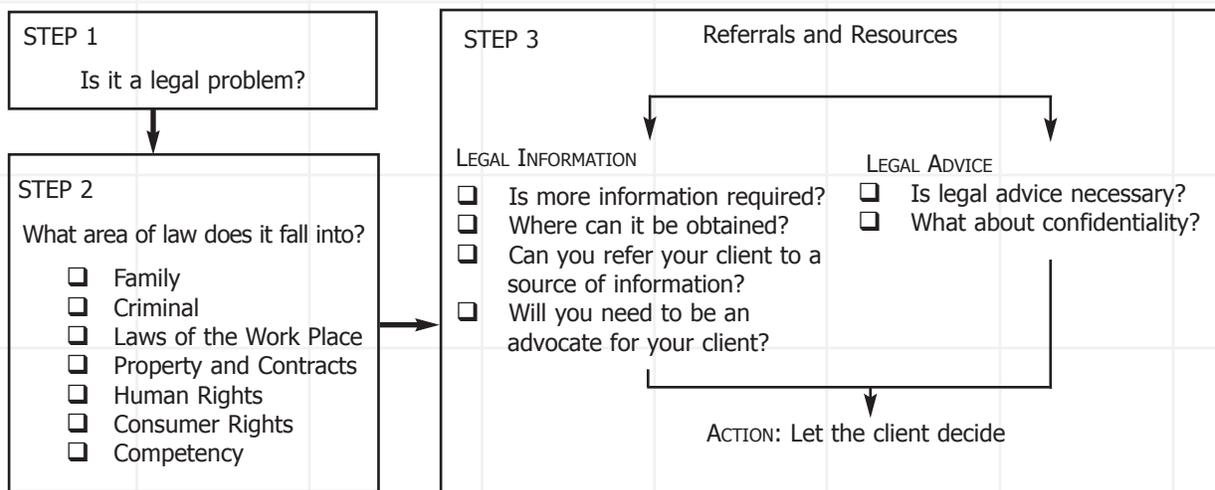
Alternative action that could have been suggested in our example would be contact with supportive members of a similar ethnic group, psychiatric counselling, assertiveness training, English language classes or, if required, referral to agencies that may provide economic support.

Only a person living in the client's situation can really understand the consequences of her decisions. If this woman does leave her husband, she may be cut off from her family and her community, isolated in a world that is difficult for her to understand. Since it may be difficult for others to know what it feels like to be in her situation, the intermediary should provide a full range of information and leave the decision-making to the person who must live with the results.

## summary

### how to recognize a legal problem

- are spouses separating?
- are questions regarding the custody and access of children involved?
- are support payments for a spouse or children a problem?
- will property division between spouses be an issue?
- has a crime related to abuse been committed?
- are there problems with rental accommodation or other living arrangements?





## legal and court system

### introduction to the legal system

The term “legal system” could be taken to include principles of democracy, our federal and provincial levels of government, their law-making powers, law enforcement, and court structure and functions. However, we are restricting our discussion of the legal system to the basic structure, function, and operation of our court system.

Laws are rules that citizens, through their elected representatives, have decided on to help individuals and societies function in an orderly manner. Courts are structures established to settle disputes. They operate by applying fixed rules to a problem. The steps in a court procedure are also fixed, but the rules vary depending upon what court you are in.

### federal laws and provincial laws

The *Constitution Act, 1867* sets out the distribution of powers between the federal and provincial governments. The federal laws that people in helping professions frequently work with are the *Divorce Act* and the *Criminal Code*. Examples of provincial laws are *The Legal Aid Act*, *The Saskatchewan Human Rights Code*, *The Children's Law Act* and *The Highway Traffic Act*.

Most statutes, whether provincial or federal, will have a set of regulations. Regulations set out in detail how the goals of the statute will be reached. Regulations are important because they have the force of the law. They can be passed by bodies other than government and, therefore, can be more responsive to change.

It is important to know the difference between statutes or acts and regulations because regulations may change quickly. It will also help you understand why, when you read a particular law, much of the information you expected to find there is not included.

For example, *The Saskatchewan Assistance Act* is a provincial law designed to provide assistance to eligible persons "in need". The Act states that the Lieutenant Governor in Council is to make regulations in order to carry out the provisions of the Act. These regulations deal with specific things, such as determining the amount of social assistance to be given and establishing criteria for eligibility.

## difference between civil and criminal law (types of disputes)

A civil dispute concerns the specific interests of individuals or entities (e.g. corporations). Thus, it is referred to as a private dispute. Civil law covers a range of issues such as negligence, wills and estates, debts, contracts, and family law issues such as divorce, child custody, family property division, and enforcement of maintenance payments.

In civil law cases, the party who starts the action seeking damages or some other remedy is usually called the *plaintiff*. The party against whom the remedy is sought is called the *defendant*. In family law matters, the person making an application to the court is called the *petitioner*. The person who must respond to the application is called the *respondent*. A civil law dispute might be resolved by applying common law, by interpreting a statute or by a combination.

Criminal law matters involve a public interest. Society as a whole says that certain conduct is not acceptable and imposes a penalty for individuals who engage in such behavior. Criminal law is broad in scope (from theft to treason; murder to air piracy). In general, criminal offences are set out in the *Criminal Code* and other federal statutes such as the *Controlled Drugs and Substances Act* and the *Food and Drugs Act*. Offences established by provincial statutes (e.g. *The Alcohol and Gaming Regulation Act*) or municipal by-laws (e.g. parking by-laws) are not, strictly speaking, criminal offences, though a penalty may be imposed for violating these laws.

The individual charged with committing a criminal offence is known as the *accused*. Criminal proceedings are conducted in the name of the Queen to represent the interest of the state. The lawyer representing the Queen is called the Crown Counsel or Prosecutor.

## precedent

In Canada, many of our legal decisions are made using the precedent system. This means that in our judicial system, lower courts generally follow higher court decisions. Similar legal problems are decided using similar principles. As a result, lawyers can advise their clients not only about what the law says, but also, in many cases, what a judge is likely to decide, if a similar issue or problem has come up before.

For example, if a spouse was being sued for maintenance payments by the other spouse, the judge would have to decide whether one spouse should make support payments to the other. The judge may look at other cases with similar facts. As much as possible, the judge would apply the principles in those other cases to the facts before the court, to decide whether one spouse should pay support to the other, in what amount and for how long. Factors such as how long the spouses lived together, what role each spouse had in running the household, or the ability of the spouses to support themselves within a reasonable period of time, would influence the judge's decision. Previous decisions can set a precedent for how important such facts are in making a decision.

However, this method is not always predictable, especially in an area like family law. Take the example of a court deciding what parenting arrangements are appropriate in a given situation. The general guideline for deciding this question is what is "in the best interests of the child". The things that determine what is in the best interests of the child will vary

from case to case, depending upon individual circumstances. Judges have a great deal of discretion to decide what is in the child's best interests. As a result, predicting the outcome is more difficult.

## summary - legal system

### sources of law

Laws originate from statutes (federal, provincial or municipal) and from the common law or case law. Judges use previous decisions or precedents to interpret the meaning of statutes. Our precedent system also allows judges to apply common standards where there is no statute to cover a particular situation.

### types of law

Broadly speaking, our laws can be divided into two general categories. Private law deals with individual concerns. In these matters, society does not have a direct interest, and is not directly affected, by how they are resolved.

Sometimes private law is called civil law. Some typical examples of private or civil law are family law, labour law, contract law, consumer law, property law and tort (personal injury) law.

Public law, on the other hand, has an element of collective public interest in it. Criminal law or human rights laws are examples of public law, where society as a whole has a more direct interest in how these laws are applied and the issues decided.

Criminal law is often contrasted with civil law, as if criminal law was synonymous with public law. In fact, criminal law is only one branch of public law. Areas like human rights law and constitutional law are examples of other important branches of public law.

Human rights legislation deals with matters such as discriminatory practices in employment, housing, public services and education. The actions of private individuals are regulated by human rights laws.

Constitutional law regulates the actions of governments. The *Charter of Rights and Freedoms* is an important part of our constitution. It is especially important to consider the *Charter* when dealing with laws like the *Criminal Code* or the *Youth Criminal Justice Act*. The *Charter* affects the kinds of laws the government makes to regulate individual conduct, and how it is able to enforce those laws.

*Remember that categories of law involved in a particular set of circumstances may overlap. The law may lead to multiple consequences and considerations for your clients. There may be a number of alternate options available to them. The fullest range of information possible should be presented to them. Some choices will be more suited to their needs than others.*

It is important to note that while we place laws in different categories, you will likely come across many situations where one set of facts crosses over into more than one category. For example, an assault or a car accident could give rise to criminal charges as well as a civil action for damages.

<b>Civil Action (Private Law)</b>	<b>Criminal Matter (Public Law)</b>
<ul style="list-style-type: none"><li>• object is to set right a wrong through compensation or restitution</li><li>• individual must bring action themselves (costs &amp; legal counsel their responsibility)</li><li>• individual does not have to proceed with action if they change their mind</li><li>• case against the defendant must be proven on a balance of probabilities ( a lower standard of proof)</li><li>• parties to the action have the most interest in the outcome</li></ul>	<ul style="list-style-type: none"><li>• object is to protect society, punish offenders and offer rehabilitation</li><li>• state brings the action on the information of the complainant</li><li>• in most instances the state does not allow the complainant to decide whether the matter will proceed</li><li>• case must be proven beyond a reasonable doubt ( a higher standard of proof)</li><li>• society has an interest in justice being done</li></ul>

## introduction to the court system

### courts in saskatchewan

There are basically three levels of courts, similar to those described below, in every Canadian province.

#### provincial court

The jurisdiction of the Provincial Court is determined by *The Provincial Court Act* and includes: small claims, youth and criminal. In addition, larger centres have Traffic Safety Courts presided over by Justices of the Peace. Provincial Court judges are appointed by the Province of Saskatchewan.

In some judicial centres, child protection matters and certain other family matters may go to Provincial Court or to the Family Law Division of the Court of Queen's Bench.

Saskatchewan has the capacity for some Cree language services in the Provincial Court. A Provincial Circuit Court, whose officials (Judge, Crown Prosecutor, Legal Aid Counsel, Court staff, and Probation Officers) all speak Cree, travels to points in the province with significant Cree-speaking populations (as of this writing, these are Sandy Bay, Pelican Narrows and the Whitefish First Nation; Montreal Lake is also available upon request). The Cree Court sits and presides over matters within its jurisdiction as would any other Provincial Court. Interpretation services are also provided.

#### court of queen's bench

This court can hear both civil and criminal trials. It is also an appeal court for some criminal cases and small claims cases. This is the court where most family law matters are heard. With some exceptions, noted above, all family matters now go to the Family Law Division of the Court of Queen's Bench. This is Saskatchewan's unified family court structure (i.e. bringing together into one court as many family law services as possible). Jury trials may take place in the Court of Queen's Bench. Queen's Bench judges are appointed by the Government of Canada.

### **court of appeal**

This court hears appeals from of the Court of Queen's Bench. It is also the appeal court for many of the criminal trials which take place in Provincial Court.

The reasons for an appeal from a lower court decision are limited to the judge making an error about the law. It is not enough that one or both parties disagree with the decision or that they disagree with the decision the judge made about who was telling the truth. An appeal judge can only overrule a lower court if an error in the application of the law was made.

### **supreme court of canada**

The Supreme Court of Canada consists of eight judges and a Chief Justice. It sits only in Ottawa. When a dispute involves Quebec civil law, at least two judges from Quebec must sit on the appeal.

This is the highest court in Canada. The decisions are final and conclusive. The Supreme Court has jurisdiction over civil and criminal matters throughout Canada. It also decides all matters referred to it by the federal government, such as constitutional questions. In order to be heard in the Supreme Court, it may be necessary to have a "leave of appeal" granted. Usually leave is granted when an important question of law is involved in civil cases and where a significant sum of money is involved. In criminal cases, the appeal usually involves a serious offence and an "important application of the law". In other criminal cases, the court decides whether or not to give its consent to hear the appeal. Under the *Canadian Charter of Rights and Freedoms*, the Supreme Court hears many constitutional cases.

All other courts must follow the decisions of this court unless the Supreme Court of Canada itself overrules a previous decision it made.

### **federal court of canada**

The Federal Court of Canada is divided into two divisions: one for trials and one for appeals.

The Federal Court, Trial Division hears, among other things, civil matters involving the federal government or its officers, or employees. As well, matters such as patent law (the registering of any invention or creation of science), maritime law (the rules of the sea and sea-going vessels), and copyright law (the creation of a work of art, literature, etc.) are all heard by the Federal Court of Canada, Trial Division.

In the Appeals Division, an appeal of a decision of the Trial Division can be heard. This division also hears applications for review from some federal tribunals or boards.

## summary - court system

- **Supreme Court of Canada** - All civil and criminal appeals - Constitutional matters
- **Federal Court** - Appeals Division
- **Federal Court** - Trial Division
- **Saskatchewan Court of Appeal** - Appeals from Queen's Bench Court, including Family Law Division - Some appeals from Provincial Court (only in certain cases)
- **Court of Queen's Bench** - Serious Criminal Cases - Larger Civil Cases - Appeals from Provincial Court - With some exceptions, all family matters go to Family Law Division of this court
- **Provincial Court** - Small Claims - Criminal - Youth - In some judicial centres, child protection matters and certain other family matters



## child-centered family justice

As intermediaries dealing with separating or divorcing parents, the area of the law that is most likely to be relevant is family law, particularly the areas of family law that deal with defining a spousal relationship, ending a spousal relationship, dividing family property, custody and access, and maintenance for spouses and children. The following information on these areas of the law is general legal information only and should not form the basis of legal advice of any kind. It is provided to assist intermediaries in their role of providing information and referrals for their clients.

### **spousal relationships**

In Saskatchewan, different forms of intimate relationships are legally recognized as "spousal relationships". In addition to formal marriages, Saskatchewan law recognizes some common law relationships and same-sex partnerships as spousal relationships. Changes to the law now ensure that the same legal rights and obligations apply to all persons in a recognized spousal relationship, whether that relationship is a legal marriage, an unmarried, opposite-sex relationship, or a same-sex relationship.

Persons in a spousal relationship do not give up any of their basic legal rights and freedoms upon entering a spousal relationship. Each spouse remains their own person in the spousal relationship and generally has the legal right to go about their life, independent of their spouse. For example, persons in spousal relationships have the same right to freedom of belief and expression as single individuals. Persons in spousal relationships can enter into contracts in their own right. The law does not assume that persons in spousal relationships will change their surname upon entering into a spousal relationship, although they may choose to do so. And, one spouse is not automatically responsible for the other spouse's debt simply by virtue of the spousal relationship.

Persons in a spousal relationship do, however, have certain rights and obligations in relation to the other spouse and any children of the relationship. In a spousal relationship, each spouse has an obligation to support the other spouse financially, if that support is needed. Each spouse has an equal right to live in the family home during the relationship, regardless of who "owns" the home, or pays the rent or mortgage. While each spouse has the right to own other property and earn money in their own right, the other spouse will have an interest in that property or money. In the absence of a custody order or agreement, parents are the joint guardians of their minor children and both parents have an obligation to support their children.

During the course of a spousal relationship, spouses may disagree about these notions, but generally not to the point that either spouse needs to rely on the law. As these notions often become legal issues only if the couple separates, they will be discussed more fully under the heading "Ending a Spousal Relationship". Before turning to that, however, we will examine a few aspects of spousal relationships in more detail.

***Legally Recognized Spousal Relationships***

- **Marriage:** A legal union of two people, solemnized before a civil or religious official, along with required formalities, such as a valid marriage licence. Traditionally, marriage has been limited to opposite-sex partners, but following several court challenges, the federal government has indicated that the legal definition will be changed to include unions between same-sex partners.
- **Common Law and Same-sex Relationships:** in Saskatchewan this is defined as two individuals, either of the opposite or same sex, who have lived together as spouses continuously for a period of at least two years. Other provinces have their own laws in this regard.
- **Parents of a child:** in some instances, parents of a child who have lived together as spouses in a relationship of less than two years, but of some permanence will be recognized as being in a "spousal relationship".

It is important to note that individuals in a relationship that is not a legally recognized spousal relationship may still have rights that stem from the relationship. The law that applies in these situations is far less clear. It varies, depending on the individual circumstances. Legal advice is recommended.

**legal marriages**

Although different forms of relationships are recognized as "spousal relationships", the requirements for a legal marriage are somewhat different. In order to create a valid marriage, partners must be...

- not within the prohibited degrees of consanguinity (blood relationship)
- unmarried at the time of the marriage ceremony
- over the age of 18 - persons aged 16 or 17 may marry provided that they have the consent of their parents or guardian; persons under 16 cannot marry without the consent of a judge

***Prohibited Degrees of Consanguinity***

An individual may not marry their...

- grandparent
- child
- sibling
- parent
- grandchild

As well, there are certain formalities that must be followed. Everyone who gets married in Saskatchewan needs a marriage licence. Licences are available at most jewelry stores and local town or city halls for a fee of \$50. Identification such as a valid driver's licence or birth certificate must be presented.

The licence issuer will read a statutory declaration that both marriage partners must complete and sign in the presence of the issuer. If either partner is unable to understand

English, they must arrange to have an interpreter present. The statutory declaration is a series of questions and information covering matters such as names, addresses, current marital status, and any blood relationship between the two partners that would prohibit the marriage. If either party is divorced, a final divorce document must be presented.

Marriages are solemnized or legalized through either a religious or civil ceremony. Clergy members and marriage commissioners must be registered in Saskatchewan in accordance with *The Marriage Act* in order to perform marriage ceremonies. In both religious and civil ceremonies, two witnesses are required.

Marriage licences usually become effective the day after the statutory declaration is signed and remain effective for a period of three months from the time of signing.

## **agreements**

### **agreements during the spousal relationship**

Spouses can draw up a legal contract that sets out the rights and responsibilities of each spouse during the spousal relationship. Sometimes this type of contract is called an *interspousal agreement*. When the contract is prepared after the relationship breaks down, it is commonly called a *separation agreement*. If an agreement covering similar matters is made in contemplation of a marriage, the term *pre-nuptial agreement* is sometimes used.

Although couples may orally agree to any number of matters, an agreement regarding the division of family property must be in writing to be legally enforceable. *The Family Property Act* also requires each spouse to get independent legal advice with regard to agreements dividing property. Sections of the agreement that seek to predetermine the custody of, or access to, any children of the relationship in the event that the relationship ends will not be enforceable.

Each spouse should consult their own lawyer before signing any agreement. A lawyer can ensure that the agreement says what the spouses want it to say and that the agreement is legally enforceable. It is important that each spouse fully understand their rights and obligations before entering into an agreement. Once made, a legally binding contract cannot be changed unless both parties agree, or a court orders a change. While a court can always override aspects of an agreement that deal with a child's well-being, it will only change other aspects of a domestic contract in extraordinary circumstances.

### **agreements to end a spousal relationship**

Reaching an agreement that settles issues related to the breakdown of a spousal relationship allows spouses to decide for themselves how to resolve disputes, rather than have a court decide for them. An agreement can include solutions that meet the needs of each spouse. Working out an agreement can also improve communication skills for spouses who must continue to deal with each other after separation or divorce.

Both spouses must agree on the terms of an agreement. This is not always possible when a couple is separating. It may not be possible for each spouse to feel confident that a fair and equitable settlement can be reached, perhaps because one spouse is more financially secure or there has been domestic abuse or violence.

### ***Resolving Family Law Disputes: Alternatives to Court***

- **By Agreement:** If a couple agrees on the terms of their separation, they can write the terms in an agreement. Each spouse should consult their own lawyer to ensure that they understand their rights, that the agreement accurately reflects their intentions, and that the agreement is enforceable.
- **Collaborative Approach:** Each spouse works with their own collaborative lawyer who has been trained to negotiate fair and reasonable settlements. Through four-way meetings, the spouses are able to cooperate with one another in a non-adversarial setting, while receiving legal advice and advocacy throughout the process. The parties must commit to reaching a settlement through a collaborative process outside of the courts and agree that the lawyers will not represent the clients in court if no agreement is reached.
- **Mediation:** With the assistance of a trained mediator, spouses are guided towards an agreement that can provide practical solutions to their problems. A mediator is an independent third party, who can facilitate communication and help spouses find solutions that they may not have considered before. Mediation is not "couples counselling" or therapy.
- **Negotiation:** Separating couples who cannot reach an agreement on matters related to the breakdown of their relationship may negotiate an agreement through their lawyers. Negotiation allows spouses who are unable to deal directly with each other to compare views with the other side in the context of their legal rights and obligations.

## **ending a spousal relationship**

When a couple decides to separate, a number of questions must be answered. Who will get what property? Will either of them continue to live in their home? Where will the children live? Who will make decisions about the children? Will one spouse pay support to the other spouse? How much will each spouse contribute financially to the support of the children?

A court order or other legal document is not required for spouses to live separate and apart. However, legally married spouses must obtain a divorce in the form of a court order before their marriage is legally at an end. Unmarried spouses do not need to go through any legal procedure to end their relationship - the relationship will generally cease to be recognized as a spousal relationship once the spouses have ceased to live together as spouses for a period of at least 24 months.

In the time between separation and the formal end of a spousal relationship, spouses' mutual obligations do not come to an automatic end. Spouses can, however, deal with many issues related to the breakdown of the relationship during this time. Practically speaking, there are a number of issues that must be dealt with once spouses separate. It may not be possible to leave matters such as child custody or maintenance until the relationship is formally ended. There are a number of ways to deal with such matters. One way, discussed above, is by agreement. If no agreement can be reached, a court can make orders about division of family property, custody, access, maintenance, and divorce. Courts

can make interim orders to cover the time between the time an application for a particular order is made and the time the parties or the court make a final decision.

## **separation**

When one spouse moves from the family home with the intention of ending the marriage, or even if the spouses both continue to live in the home but stop living together as a couple, they may be considered to be living separate and apart in the eyes of the law. People sometimes talk about a "legal separation" but there is no legal document or court order that is required for spouses to live separate and apart.

Parties may, however, wish to draft a written separation agreement to deal with matters such as child custody, child and spousal maintenance, and division of family property. Each spouse should consult his or her own lawyer before signing a separation agreement. There are several requirements that must be met in order for some types of agreements to be legally enforceable.

## **divorce**

Throughout the following section on divorce, the use of the term "spouse" refers only to a legally married spouse.

An application to the court is required to obtain a divorce. The procedure is fairly simple if both spouses agree. Usually, the most difficult questions concern child custody, family property division, and maintenance payments, not the divorce itself. When spouses seek a divorce, these related matters are generally dealt with at the same time. Even if the spouses have reached a final agreement on these matters, they are usually incorporated into the divorce order. If the court has issued any interim orders on these matters, a final order is usually issued at this time.

If the spouses can agree on these other issues, the court application to obtain a divorce is quicker, much simpler and less expensive. If the spouses are unable to agree, the court can make the decisions for them.

A court order for divorce ends the marriage and leaves the spouses free to remarry.

## **grounds**

A court will grant a divorce if there is a breakdown of the marriage. Marriage breakdown can be established by showing adultery, cruelty, or separation of one year or more.

Adultery occurs when one spouse has sexual intercourse with someone other than his or her spouse.

Cruelty occurs when one spouse treats the other in such a way that it would be unreasonable for the spouse to continue to live with him or her. Cruelty can be conduct that causes physical or emotional harm, but the spouse does not have to intend to hurt the other. The court will consider the effect of the conduct on the victim and will decide whether the conduct amounts to cruelty.

Separation of one year happens when the spouses do not live together for one year. This is the most common ground for divorce. A brief attempt at reconciliation during the year will not prevent the couple from divorcing, if the reconciliation is unsuccessful. They can still be considered to have been separated for one year if they lived together for no more than ninety days after the initial separation.

### **bars to a divorce**

Although they are rarely used, there are circumstances under which the court could refuse to grant a divorce. These are collusion (when two or more persons agree to commit a fraud), condonation (when one spouse voluntarily forgives a spouse for an act which might be a ground for divorce), connivance (when one spouse agrees to an act which one would normally resist, such as a spouse permitting the other to commit adultery), or a chance of reconciliation.

The court can also refuse to grant a divorce or can delay a divorce if reasonable arrangements have not been made for the maintenance of any children of the marriage.

### **procedure**

The spouse who is seeking the divorce must have a petition for divorce issued by the local registrar at the court house. Spouses may file a joint petition where they are in agreement about the divorce. A lawyer generally prepares the petition and has it issued for the spouse. A petition is a legal document that outlines the grounds for the divorce and other information. The spouses' marriage certificate must be filed at the court house when the petition is issued.

The spouse who files the petition is called the petitioner. The spouse who is being sued for a divorce is called the respondent. After the petition is issued, the petitioner serves a copy of it on the respondent. Generally, if the respondent does not want to contest or fight the divorce, the petitioner simply needs to satisfy the court that there are grounds for a divorce, wait a certain period of time, and file the appropriate documents. The court can then grant the divorce.

A respondent who wants to contest or fight the divorce must file an answer at the court office. He or she will probably get a lawyer to do this. A respondent may choose to contest some portions of the petition even if he or she agrees that there are grounds for a divorce. He or she may not agree with the proposed custody or maintenance arrangements, or other relief asked for in the petition. The respondent may then file a counter-petition. The counter-petition sets out the respondent's proposals regarding disputed matters.

#### **Forms Kits**

Forms kits are available for people who want to make application for an uncontested divorce without assistance from a lawyer. The kits contain forms and instructions and are available through Court of Queen's Bench locations across the province. The kits are \$25, plus tax. There is also a Variation of Maintenance kit, which may be obtained free of charge.

Divorce proceedings can be very complicated if the divorce is contested or if there are custody, maintenance, or property issues to be settled. Spouses may wish to attempt to mediate or negotiate the issues and consult with a lawyer.

If the court is satisfied that there are grounds for divorce and there are not any bars to the divorce, it will issue a judgment for divorce. A divorce may be granted together with an order dealing with custody, access, maintenance, and division of property, or by itself. The divorce is final thirty-one days after the judgment is issued. The purpose of the waiting period is to allow for an appeal. The court may shorten the waiting period under special circumstances.

After the thirty-one days have passed and an appeal has not been started, the divorce is final and the spouses are free to remarry. The court will issue a certificate that is proof of the divorce.

## **division of family property**

*The Family Property Act* establishes how family property is viewed in Saskatchewan. This law recognizes that both spouses contribute to childcare, household management and financial support. It states that each spouse is generally entitled to an equal share of their family property. It is important to note that family debt will also be considered in order to achieve a fair and equitable distribution. Property may be physically divided, leaving each spouse with possession of a variety of items making up their share of the family property. Because many assets, such as a car, cannot be cut in half, one spouse may get the whole item and the other spouse may get something else of equal value.

As a general rule, family property includes any real or personal property owned by one or both spouses, or by one or both spouses and a third person, at the time an application is made under the Act. Real property includes land and anything attached to the land, such as buildings. Personal property includes movable objects like household goods, jewelry, and cars. Family property also includes such things as businesses, pensions, and bank accounts.

Family property also includes the family home. A family home is the place where one or both spouses have lived or intended to live and consider their family home. It can be a house, a part of a house, a mobile home, or a condominium. The home can be owned or leased by one or both spouses. In the city, the family home includes the lot the house is on. In the case of farmland, it includes the home quarter.

For the purposes of dividing family property, the family home is treated somewhat differently than other family property. The family home will be divided equally unless it would be unfair and unjust to do so. The court will only consider it unfair if there are extraordinary circumstances or if it would be unfair to a spouse who has custody of the couple's children.

The court will also equally divide the rest of the family property, other than the family home, unless it would be unfair to do so. In deciding if it would be unfair to divide this property equally, the court considers different factors than when dividing the family home, such as...

- how long the separating couple lived together and how long they have lived apart
- any contribution one spouse made to the career of the other spouse
- the effect that domestic responsibilities have had on the earning capacity of each spouse

- when the property was acquired
- any contributions made by someone else to help buy the property
- tax liabilities if the property has to be sold
- the amount of child maintenance payments
- the value of any family property outside of Saskatchewan
- debts of the spouses
- any interest that another person has in the property

The value of property acquired before the spousal relationship began, except the family home, is exempt unless the court orders otherwise. This means that the value of that property at the time the spousal relationship began would not be divided according to the Act. The spouse who owned the property would receive the amount that it was worth at the start of the spousal relationship. Any increase in the value of the property since that time could be divided according to the Act.

### homestead rights

Homestead rights protect spouses who are not the registered owners of their homestead. A homestead is any property that a couple in a legally recognized spousal relationship has lived in, as their family home, during the relationship. *The Homesteads Act* sets out certain steps that must be followed before a homestead is sold, transferred, mortgaged, rented, or otherwise disposed of.

Originally, homestead protection was intended to protect married women from losing the family home. At the time the legislation was first introduced, it was very common for a husband to hold title to the couples' home in his name only. Before then, as sole legal owner, a husband could deal with the family home as he pleased, without the knowledge or consent of his wife.

In its current form, *The Homesteads Act* reflects modern circumstances and offers protection to a spouse in a legally recognized spousal relationship where the other spouse is the only registered owner of the property. The law protects the non-owning spouse, whether that spouse is a husband or wife in legal marriage, or a spouse in a common law or same-sex relationship.

When only one spouse is the registered owner of a homestead, he or she can only sell or otherwise dispose of an interest in the homestead if the non-owning spouse consents. If a non-owning spouse consents, they must sign an acknowledgement separate and apart from the owning spouse, indicating that they understand they are giving up their homestead rights voluntarily and without compulsion from the owning spouse.

An application to enforce homestead rights cannot be made after legally married spouses are divorced or after unmarried spouses have been separated for 24 months.

In dividing the property, the court will not consider improper or immoral conduct of the parties unless the conduct has financial consequences. For example, the court will always consider whether a spouse has been wasting family property, giving it away, or selling it to avoid having it divided.

### **property agreements**

Spouses can make an agreement to divide their property in whatever way they think is best. If the agreement is made in the manner specified in *The Family Property Act*, a court will not change the way the property is divided, unless the agreement was grossly unfair and one-sided at the time it was made. The Act specifies that an agreement must be in writing and must be signed by each spouse in front of a witness. Each spouse must also get advice from his or her own lawyer before signing the agreement. Each spouse then has to acknowledge in writing, apart from the other spouse, that he or she understands the agreement and its effect on his or her rights.

If the agreement is not made in the manner specified in the Act, the court can change the way the property is divided. However, the court would consider the agreement when dividing the property.

### **court orders dividing property**

If the spouses do not make an agreement in the manner specified in *The Family Property Act*, either spouse can ask the court to divide the property. This request can be made at any time during the spousal relationship, including at the time of separation or within six months after the date of probate or administration of a deceased spouse's estate. Legally married spouses must make the application before they are divorced. Unmarried spouses must make the application within 24 months following their separation, or within six months after the date of probate or administration of a deceased spouse's estate.

### **possession of the family home**

Under *The Family Property Act*, the court can also make an order allowing one spouse to have possession of the family home. Possession means who will live in the home, not who owns or rents it. It is possible for the court to award one spouse sole or partial ownership of the house and the other spouse the right to possession.

The court will decide the terms of the possession. The court can order a spouse to be given possession for his or her lifetime or any shorter period: for example, while any children are still living at home. The court can also order that a spouse be given exclusive use of any or all of the household goods. The court can decide who will be responsible for repairs and mortgage payments. The court may require the spouse who has possession to make a payment to the other spouse.

Where one spouse has possession and the other spouse owns part of the house, the court can make an order that prevents the sale of the house or places conditions on the sale of the property.

In deciding whether to give one spouse possession of the home and what conditions to include in the order, the court must consider...

- the needs of the children
- the conduct of the spouses towards each other and towards the children
- the availability of other accommodation within the financial means of either spouse
- each spouse's financial condition
- any binding agreement that was made between the spouses or, if the court sees fit, any other written agreement
- any orders that have been made regarding maintenance, custody of children, or division of property
- other relevant circumstances

Either spouse can apply to the court to change an order or to end the order for possession if circumstances changed after the original order was made.

## **custody and access**

Under Saskatchewan law, in the absence of a custody order or agreement, parents are the joint guardians of their minor children. Custody refers to the rights and responsibilities to care for the children. There are two aspects to custody. One is the right to have the child live with the parent. The other is the right to make the major decisions in a child's life, such as where the children go to school or what religious instruction they will receive. Access is the right of the child to spend time with the parent they do not live with. At law, children are not property, and custody does not imply ownership of them.

### **custody**

Sole custody exists when one parent has custody of a child. The child lives with that parent and the parent makes the decisions concerning the child's life. A parent who has sole custody is the only person who has the right to make decisions about the child. This right to custody does not depend on how old the parent is. A parent who can adequately care and provide for their child can have custody. If one parent has custody, the other parent will usually have access.

If one parent does not have sole custody the responsibilities for the children can be divided between the parents. A number of different terms may be used to describe custody arrangements where the parents share custody responsibilities. People may be familiar with terms like, "joint custody", "shared custody" or even "split custody". Because some of the terms used to describe these arrangements may be confusing it is very important for parents to clearly state, in any agreement, how or if decision-making responsibilities and time spent living with the child will be divided between parents.

Under these kind of arrangements parents may share decision-making responsibilities relating to the child, or parents may share time spent living with the child, or both. For example parents may share decision-making responsibilities even when the child resides with only one parent. Alternatively, parents may share decision-making responsibilities and time spent living with the child. The way in which these responsibilities are divided or shared can vary greatly and can be tailored to suit different families.

A custody agreement can be detailed or general. It can say that the parents will agree on how to divide childcare responsibilities or it can specify that the child will live with one parent on certain days and the other parent on other days. An agreement could provide that each parent have responsibility for the child for six months of the year. It could also provide that the child live with one parent but that both parents will agree on all major decisions.

## access

Access refers to the right of the child to spend time with a parent or another person who does not have custody. When one parent has sole custody, the other parent is usually allowed access. The purpose of access is to allow the child to continue to have a relationship with the other parent or other person. The only circumstance when access is not allowed is if it is not in the child's best interests to have contact with that parent. Access can be given to someone other than a parent, such as a grandparent, if it is in the child's best interests.

A parent with access to a child has the same right as the parent with custody to receive information about the child's health, education, and welfare. If an access parent has difficulty obtaining this information, they may try making their request in writing, possibly enclosing a copy of the custody agreement or court order. Alternatively, the parent could consult a lawyer, either to make a request on their behalf or to pursue legal proceedings to get the information

Access can be specific and state the exact days the non-custodial parent can see the child. It may also be very general and allow reasonable access. Reasonable access has the advantage of being flexible. If parents do not agree on what reasonable access is, they can mediate, negotiate, or apply to court.

## factors the court considers

If parents do not reach an agreement on custody and access arrangements, they can ask the court to decide the matter. In deciding custody and access, the court considers only the best interests of the child. To decide what is best for the child, the court will consider: the child's needs; the relationship the child has with each of his or her parents; and, depending on the child's maturity, the wishes of the child. The older and more mature the child, the greater weight his or her wishes will have.

The federal *Divorce Act* sets out a general standard of "the condition, means, needs and other circumstances of the child" for the court to determine parenting issues. *The Children's Law Act* sets out a few more detailed factors for the court to consider in this regard...

- the child's personality or character
- the willingness of the parent applying for custody to allow the child to have contact with the other parent
- where the child had been living before the custody application was made
- the child's relationship with others, such as brothers and sisters
- the ability of the parent to be a good parent
- the kind of living situation the child will have with the parent
- the plans the parent has for the child

The court will not assume that either parent should have custody of the child because of the child's age or sex. For example, the court will not presume that a very young child should live with his or her mother or that a son should be raised by his father. The court may not consider the conduct of a parent in determining custody, unless that behavior is likely to affect the ability to care for the child. For example, the fact that a parent is addicted to drugs or alcohol is important in deciding whether that parent has the ability to care for the child.

### **Enforcing Custody and Access Orders or Agreements**

A person who has custody as a result of a court order or agreement, but who is being denied custody may apply to the court for help in enforcing the court order or agreement. The court can order the police to locate and deliver the child to the person who is entitled to custody. If the person who has access to the child is not returning the child according to the order or agreement, the court may put other restrictions on the access. For example, the court may order that future access be supervised, that the person with custody and the person with access mediate their disagreement, or that the person with access provide his or her address and telephone number to the person with custody.

Unless the other parent consents or the child is removed to protect him or her from danger or harm, it is a criminal offence for a parent to take a child away from the parent who has a court order for custody. This applies no matter where in Canada the court order was made. If a parent takes a child, the other parent can call the police. The police can get the child back and arrest and charge the parent.

In certain circumstances, criminal charges may be laid against a parent who takes a child away from the other parent, even if there is not a Canadian court order for custody. If a child under the age of 14 years has been living with one parent and the other parent takes the child, the police can be called and charges may be laid.

If a parent takes a child out of Canada contrary to a custody order or brings a child into Canada contrary to a custody order made elsewhere, the order may be enforceable under international child abduction agreements. A person may be able to enforce the order directly or by contacting Saskatchewan Justice.

If a person who has access has difficulty getting to see the child, he or she may apply to the court for help. If the access order or agreement provides for reasonable access, the person may want to get a court order or agreement that provides for specific access. If the problem continues, the person may ask the court for a further order. For example, the court may order additional access times to make up for the times when the person was denied access; the court may appoint a mediator to help the people resolve the disagreement; or the court may order the person denying access to pay the expenses that the person with access paid as a result of being denied access. In extreme cases, a spouse could be found in contempt of court and jailed.

## **maintenance for spouses and children**

Maintenance is a payment made by one spouse to the other spouse for the support of that spouse or for the support of their children. Maintenance for the support of a spouse is called "spousal maintenance" or "spousal support". Spousal maintenance is generally paid by one spouse to the other spouse directly, although in some cases it may be paid to a third party, for example to a bank to cover mortgage payments. Child maintenance is paid to the spouse who has custody of the children. It is not paid directly to the children.

Maintenance can either be paid in accordance with an agreement made between the parties themselves or by court order if the spouses cannot agree on the amount.

### **spousal maintenance**

There is no automatic right to spousal maintenance. Spousal maintenance is intended to help a spouse overcome financial problems created by the spousal relationship or its breakdown. Both spouses are expected to become self-supporting as soon as possible, considering their individual circumstances. Persons in a spousal relationship other than a legal marriage may be eligible for maintenance if the spouses have lived in a spousal relationship for two years or if they have lived together in a relationship of some permanence and they have a child. Either spouse may be entitled to support from the other. Even where the mother of a child is not the spouse or the common law spouse of the father, there is an obligation for the father to provide certain kinds of maintenance. A mother may get maintenance for herself for three months before the birth and six months after the birth of the child. The father may also be responsible for medical and hospital expenses as a result of the pregnancy and for certain expenses after the birth.

Even if an award of spousal maintenance is appropriate, there is no set formula to determine the amount of spousal support. Divorcing and separating spouses can reach an agreement on spousal maintenance. Spousal maintenance is taxable income for the spouse receiving it and is a tax deduction for the spouse paying it. An agreement should distinguish between money to be paid as child support and money intended for spousal support. If no distinction exists, the global amount will be treated as child support for tax purposes.

If no agreement can be reached, a spouse can apply for a court order regarding spousal maintenance. A spouse can ask the court for a spousal support order on its own, or along with other matters such as custody, access, division of property, or divorce.

### **Factors the Court Considers**

When deciding whether a spousal maintenance order is appropriate, and, if so, determining the amount, the court will consider factors such as...

- the means, needs, and other circumstances of the spouse
- how long the spouses have lived together
- what role each spouse had in running the household
- any court order or agreement regarding maintenance of the spouse or children
- the effect the spousal relationship or its breakdown has had on each spouse's financial position
- the ability of each spouse to be able to support himself or herself within a reasonable period of time

In awarding spousal maintenance, the court does not consider any misconduct of the spouses in relation to the spousal relationship, such as cruelty or adultery, unless it has impacted the other spouse financially.

## child maintenance

Both parents have an obligation to support their children. The parent who has custody can apply for maintenance for the child. Child maintenance is payable while the child is under the age of majority (18) or over the age of majority but still dependent on the parent because of illness, disability, or other reason, such as full time attendance in school.

If a parent does not agree to pay maintenance or does not admit to being the parent, the other parent can ask the court for help. The court can make an order saying that a person is the legal parent of the child (see *Proof of Parentage*) and that they must pay child maintenance.

A step-parent may also have an obligation to pay child maintenance. Anyone who has demonstrated a settled intention to treat the child as a child of his or her family may have an obligation to pay maintenance for the child, even if their relationship with the other parent ends. This obligation exists even where the step-parent has not adopted the child. However, court decisions have said that a step-parent's obligation to pay maintenance is not as great as the natural parent's.

Maintenance payments for a child do not end because the person the child lives with marries or lives with someone else.

## Determining the Amount of Maintenance

There are guidelines in place that set out a fixed amount of support for each child, depending on the paying parent's income and the average cost of raising children. Payment schedules show the basic amount that the paying parent should pay. The basic amount may be increased from the amount set out in the guidelines if there are special expenses for a child, such as health care, childcare, education, or extracurricular activities. The basic amount may be reduced if paying that amount would cause undue hardship. The court may also depart from the guidelines if special provisions have been made for the benefit of the child.

Spouses may reach their own agreement about child support and when it can be varied. This agreement does not have to be based on the guidelines, but a court could refuse to approve an agreement that was totally inadequate to meet the child's needs.

The *Federal Child Support Guidelines* aim to make child support orders more consistent and predictable. For more information, contact the Family Law Information Line of the Department of Justice Canada at 1-888-373-2222 (toll-free) or visit the Department's website at <http://canada.justice.gc.ca/childsupport>. Additionally, Family Justice Services, Saskatchewan Justice may be able to provide useful information. They may be contacted at 1-888-218-2822.

A court may also order that a spouse or child be designated as a beneficiary under a life insurance policy, pension plan or other benefit plan, for example, a dental plan.

### **Payments**

Maintenance can be paid either periodically or in a lump sum. A lump sum means there will be only one payment. Although lump sum payments can be ordered for child or spousal maintenance, they are not usually ordered for child maintenance.

Periodic maintenance can be paid for an indefinite period, until a certain date, or until the happening of a certain event. There may also be other conditions. For example, in the case of spousal support, maintenance could be paid only while the paying spouse is working or until the other spouse gets a job or finishes a training course.

A court can order interim child or spousal maintenance to be paid during the time between an application to the court for maintenance and the point at which the court makes its final decision. When the court makes its final decision, it may make an order different from the interim order.

### **taxation of child maintenance**

The law regarding the taxation of child maintenance payments changed in May 1997. Child maintenance payments under court orders made on or after May 1, 1997 are taxable to the parent who makes the payments. This means that the parent who makes the payments cannot claim a deduction for income tax purposes and the parent who receives the payments does not include this amount as income for income tax purposes.

The reverse applies to people who obtained an order before May 1, 1997. However, a person who obtained an order before May 1, 1997 may apply to have the order varied to reflect the tax changes. If both parents agree, they may choose to file an election form with the Canada Revenue Agency to come under the new rules. Filing an election will only change the tax treatment of the order; it will not change the amount.

### **enforcing a maintenance order**

Simply because the court has ordered a person to pay maintenance, or they have agreed to pay maintenance, does not mean that they will do so. *The Enforcement of Maintenance Orders Act* is designed to make enforcing court orders and agreements for maintenance simple and effective. This law sets out the methods that can be used to collect on a court order or agreement for maintenance and sets up an office that collects payments for persons entitled to receive maintenance.

All child and spousal maintenance orders or agreements made in Saskatchewan can be registered in the Queen's Bench Court of Saskatchewan and enforced as orders of that court. If the person who is required to pay maintenance does not live in Saskatchewan, the order or agreement must be registered in a court in the province where they live. The order or agreement can then be enforced as a court order of that province.

The Maintenance Enforcement Office (MEO) has been set up by the Government of Saskatchewan to collect maintenance payments. This saves the person entitled to support the trouble and expense of enforcing the court order or agreement. The order or agreement must be registered with the Maintenance Enforcement Office if it is to be enforced by them.

To register an order or agreement, the parent must fill out a form and send it to the Maintenance Enforcement Office in Regina. A copy of their agreement or court order must also be sent to the Maintenance Enforcement Office. If the parent does not have a copy of the order, they can get one from the court house where it was made. Before sending an agreement for registration with the MEO, they must register it with the court or send an affidavit (a sworn statement) stating that the agreement is in effect and has not been set aside or changed.

The spouse or parent who is required to pay (the payor) is then notified that they must make payments to the Maintenance Enforcement Office. If the payments are not made, the MEO may send a default letter. If there is no reply, the MEO will determine what course of action to take, and may commence collection action. The time to process an application varies.

### **methods of enforcement**

*The Enforcement of Maintenance Orders Act* sets out the methods that can be used in Saskatchewan to collect money owing under a court order or agreement for maintenance. These methods include garnishment or writs of execution. These remedies are much the same as those used to collect other debts, but there are some differences.

The most common method used to collect debts is garnishment. A continuing garnishment requires the payor's employer to deduct maintenance payments from each pay-cheque. A continuing garnishment is put in place by serving copies of it on the employer. A garnishment order can be obtained from the court to get at other money that could be applied to the maintenance payments. For example, a bank account can be garnished.

A debt can also be collected with a writ of execution. A writ of execution is a formal order of the court directing the Sheriff to seize and sell goods or property to satisfy a judgment. This process is often time-consuming.

When debts other than maintenance payments are collected by garnishment, a portion of the salary of the person owing money is exempt. Similarly, certain property cannot usually be seized under a writ of execution. However, these exemptions of wages or property do not ordinarily apply when the debt is for maintenance payments.

Sometimes the payor wastes property, gives it away, or sells it to avoid having to pay the court order or agreement. If necessary, the recipient can apply to the court for an order that would prevent a payor from dealing with the property.

If the payor is leaving Saskatchewan to avoid enforcement of the court order or agreement, the police can make an arrest. The payor would then go to court for a hearing regarding their ability to pay the maintenance. If the payor moves to another province, the agreement must be registered and enforced in that province.

Another way to enforce a court order for maintenance is by taking the other spouse to court. The Maintenance Enforcement Office or the local registrar of the court can issue a summons requiring the payor to appear in court and explain why he or she is not paying. If they do not appear in court, they can be arrested and brought to court. The court may order payment of arrears, order security to be given for the payments, or even send the non-paying individual to jail for up to ninety days. In some circumstances, driver's licences may be suspended.

For more information about maintenance enforcement, write the Maintenance Enforcement Office at PO Box 2077, Regina, SK, S4P 4E8 or fax at (306) 787-1420. As well, the MEO has an automated Information Service that can be accessed by phoning (306) 787-9931. People who are registered with the MEO can gain access (with a password) to certain information on their files. As well, general information about the MEO is available on the same line to the general public (no password is required for this part of the service).

## **summary**

The following are case studies and questions that provide examples of problems that you might encounter while working on the job or as a volunteer.

What information would you give to the client? What additional information do you require?

In attempting to answer the questions, try to keep the following three steps in mind...

1. Identification: Is it a legal problem?
2. Classification: If yes, into what broad category of the law does it fall?
3. Referrals and Resources: Do you require additional information? Where could you find the legal information your client needs or to what resources in the community might you direct your clients?

### ***Case 1***

Your client, Mary, has been married for 35 years. She confides in you that she has been physically abused by her husband since they were married. The worst times are when he has been drinking. He has a substantial bank account, but he controls all of the money. She wants to leave, but feels she can't. She is afraid of not having any money and afraid that he will come after her. What can Mary do?

#### *Discussion*

Legal options for Mary include getting a lawyer and considering such issues as a restraining order, a separation agreement or order, a petition for divorce, a maintenance order for her, and division of family property, including who will remain in the family home.

Non-Legal avenues for Mary, in view of her fear of abuse, include contacting a transition house, interval house, or crisis line.

She may also seek help from Al-Anon, support groups, assertiveness training, family counselling or mediation, and Community Resources and Employment for initial or emergency financial assistance.

There are also possible criminal issues in this scenario. She may contact police or Crown Prosecutors to look into criminal charges arising from the abuse, or obtaining a peace bond.

## **Case 2**

Bill has been married to Laura for six years. They have two children, a son, age 5, and a daughter, age 2 ½. Unfortunately, Laura is a problem gambler, which has led to stress in their marriage. Laura's gambling losses, which have been frequent lately, have made it difficult to pay for household expenses. As well, Laura has had mood swings, which often lead to her either arguing with Bill or ignoring him. Bill is feeling intense strain from the emotional and financial pressures.

Bill believes that he and the children need more stability in their lives, and that they should leave Laura. Eventually, he and the children move in with his mother. However, this is just a temporary measure, until Bill can make other arrangements. Laura's mother has offered to look after the children for him, but Bill is reluctant. What if he can't get the children back?

What information would you give Bill?

### *Discussion*

Both parents have a responsibility to raise and care for their children. When they are living together, they work together to share that responsibility. The problem arises when parents separate. Although each parent continues to have an equal responsibility under the law, they may have difficulties trying to divide the duties and responsibilities.

There does not appear to be any evidence to support Bill's fear that his children could be abducted or kept from him. However, it may be that the best way to work through that issue is to negotiate a separation agreement with Laura, which includes terms that divide childcare responsibilities. If they cannot come to an agreement, Bill may want to consider applying to the court for an interim order for custody and support. An interim order is a temporary order that sets out certain terms for handling an issue, until the court can settle it on a more permanent basis.

Once an agreement or order is in place, there should be less uncertainty regarding childcare issues. Whether Bill and Laura can agree, or must go to court, Bill may need to see either a private lawyer or Legal Aid, to better understand his rights and responsibilities.

If Bill does see a lawyer, and decides to apply for a divorce as well, the lawyer is bound by law to discuss with him the possibility of reconciliation with Laura. The lawyer must advise Bill of marriage counselling or guidance services, which can help them to reconcile their marriage.

Referral - Private Lawyer or Legal Aid

Further information - PLEA booklets/pamphlets

"Non-legal" options - Problem gambling support groups

- Counselling

Preventing a parent from exercising lawful custody of a child is a criminal offence, with a penalty of up to 10 years imprisonment. However, it is unlikely that the police will act to remove a child from one parent's care, simply on the request of the other parent, unless there is a court order that supports the requesting parent, or unless the child is in danger.

If there is any fear that one parent could keep the other parent from having lawful custody or access, it will be particularly important that a court order be in place.

### **Case 3**

Fred and Yvonne have been married for 25 years and raised three children. Their two sons are married and living away from home. Their daughter, Susan, is 10 and lives at home. For the last five years, Fred and Yvonne have not been getting along. They seldom talked to each other, but for Susan's sake, they had resolved to stay together as long as they could. Fred finally decided it was time to leave. He is a salesman for a sporting goods wholesaler. Fred and Yvonne talked about it and agreed that Yvonne would have custody of Susan, and that Fred would pay \$1000 per month for their support. Yvonne would pay all the expenses for herself and Susan, including the mortgage on the home, which is \$500 a month.

Yvonne took a part-time job at a department store so she and Susan could get by, but there is seldom enough money for extras. But now Fred is living with another woman and has stopped sending money. What information would you give Yvonne?

#### *Discussion*

Yvonne and Fred's situation includes a number of issues that can arise when a spousal relationship ends, particularly custody and maintenance. By law, both parties are financially responsible for their children. They have informally agreed on custody and maintenance. However, because they have no formal agreement or order, Yvonne is in a difficult position.

They have informally agreed to give Yvonne sole custody (see *Custody and Access* earlier in this chapter). Sole Custody exists when one person has the custody of the child. The child lives with this parent. This parent makes the decisions concerning the child's life. Since Yvonne has custody, Fred would have access - the right to visit the children.

Given Fred's agreement, Yvonne's problem is really not with custody, but with enforcing the maintenance (See *Maintenance for Spouses and Children* earlier in this chapter). Spouses have an obligation to support each other and their children with food and other necessities of life. These necessities of life include such things as a place to live, basic clothing and health care.

Maintenance for children is not paid directly to the children but to the parent. Fred has agreed to pay both spousal and child maintenance. This has been by agreement (informally, between the two spouses). If Yvonne wants to enforce her agreement she must file the agreement with Family Law Division of the Court of Queen's Bench. It may then be enforced in the same way as a court order for maintenance. The agreement must be in writing and signed by the parties.

In most situations maintenance will be awarded for a child under 18. The court recognizes both parents' obligation to support the children and divides the obligation between the spouses according to their abilities to contribute. The amount of support that is ordered will depend on the means of each parent with reference to the *Federal Child Support Guidelines*.

The Guidelines are a set of tables and supporting rules, to calculate the amount that a paying parent should contribute toward the support of his or her children. Although there may be some exceptions, which depend upon individual circumstances, the courts generally will follow the guidelines when determining the issue of child support.

As well, the guidelines may be useful for individuals who are trying to agree through negotiation or mediation as to the amount of child support. Information on the guidelines, including links to the tables themselves, can be found at the following site, maintained by the federal government: <http://canada.justice.gc.ca/en/ps/sup/>.

The amount of child support depends largely upon the paying parent's income. As well, different guidelines are established for the various provinces and territories, to reflect the differences in provincial income tax rates. It is important that people use the correct table when determining appropriate levels of child support.

Yvonne should also be notified about the Maintenance Enforcement Office. After Yvonne has filed the agreement, the Maintenance Enforcement Office will register the order. She will then have the benefit of automatic enforcement of her order, just as if it were a court order.

If Fred does not pay, the Maintenance Enforcement Office will take steps to collect the maintenance payment for Yvonne.

Yvonne will be required to fill out the required forms, and Fred will be notified by registered mail that he must make payments to the Office. If he fails to comply, the Office has the authority to garnishee his wages or bank account or seize his goods to enforce the order.

The rules of exemption for garnishment and seizing property do not ordinarily apply when a debt is for maintenance payments. Yvonne may also want to get an order for exclusive possession of the family home to ensure her position (see *Division of Family Property* earlier in this chapter). Then the laws of *The Family Property Act* would apply.

She should be made aware of mediation services, which may help the couple work out the property settlement if the couple decides to divorce.

#### **Case 4**

You are a volunteer at the local Friendship Centre. Recently, Andy has been hanging around during the day. He tells you he is not at school because the teachers have been hassling him about fighting and skipping classes. They say he is going to fail his grade so he figures why should he go? He tells you that his father is "abusive" and that his mother is always "drunk". What do you do?

You call Andy's mother, Kathy. She comes to see you and relates her story: she and Joe have two children, Andy and Tom. Kathy quit her job when they had children. Joe drives a truck and is gone a lot, including evenings and weekends.

In recent months they have been experiencing not only financial difficulties but also marriage problems. Kathy feels that Joe is never at home because he is having an affair. When he is home he is always yelling at her and the kids. On a couple of occasions his anger got the better of him and he hit Kathy. Sometimes after he's spanked the kids they've had bruises. As a result of all her problems Kathy says she's been drinking a little. She admits she once drank to the point where she overslept and didn't get the kids up for school on time. "Things would improve", she thought. How can you help Kathy?

#### *Discussion*

If anyone suspects that children (under the age of 16) are being abused, they have a "legal" duty to report this to the Department of Community Resources and Employment. You cannot be sued for making the report unless you do so maliciously or without

reasonable grounds. The Department will then investigate the situation and decide if the children are "in need of protection".

*The Child and Family Services Act* defines "in need of protection" as follows...

- (a) As a result of action or omission by the child's parent
  - (i) the child has suffered or is likely to suffer physical harm;
  - (ii) the child has suffered or is likely to suffer a serious impairment of mental or emotional functioning;
  - (iii) the child has been or is likely to be exposed to harmful interaction for a sexual purpose, including involvement in prostitution and including conduct that may amount to an offence within the meaning of the *Criminal Code*;
  - (iv) medical, surgical or other recognized remedial care or treatment that is considered essential by a duly qualified medical practitioner has not been or is not likely to be provided to the child;
  - (v) the child's development is likely to be seriously impaired by failure to remedy a mental, emotional or developmental condition; or
  - (vi) the child has been exposed to domestic violence or severe domestic disharmony that is likely to result in physical or emotional harm to the child;
- (b) there is no adult person who is able and willing to provide for the child's needs, and physical or emotional harm to the child has occurred or is likely to occur; or
- (c) the child is less than 12 years of age and:
  - (i) there are reasonable and probable grounds to believe that:
    - (A) the child has committed an act that, if the child were 12 years of age or more, would constitute an offence under the *Criminal Code*, the *Controlled Drugs and Substances Act* or Part III or Part IV of the *Food and Drugs Act* ; and
    - (B) family services are necessary to prevent a recurrence; and
  - (ii) the child's parent is unable or unwilling to provide for the child's needs.

If the Department of Community Resources and Employment decides that Andy and Tom are in need of protection, but at no risk of serious harm, it can offer to work out an agreement with Kathy and Joe to provide family services to them. If no agreement is reached, the Department can either recommend mediation or apply to the court for a protection hearing. If no agreement is reached through mediation, the Department can then apply for a protection hearing.

If the Department finds that the children are in need of protection and at risk of serious harm, it can take them from the home and put them in the care of Community Resources and Employment. This could occur, for example, in a situation where there is evidence of abuse. A criminal investigation may also take place. If the Department removes the children from the home and does not return them within 48 hours, it then has to ask the court for a protection hearing. In addition, the Department can ask a Family Review Panel to review the situation before the protection hearing goes ahead. The panel can recommend returning the children on the condition, for example, that an agreement be reached for family services. If the panel recommends that the Department continue to keep the children in its custody, the protection hearing will go ahead.

Whenever a protection hearing is requested, the court must fix the time and date of the hearing so that it is held within 30 days of the request. A decision must be provided by the court within 60 days after the beginning of the hearing. The court can make any of the orders set out in of the Act.

The making of an order by the court under *The Child and Family Services Act* is based on a finding that the child is in need of protection. The court must consider the best interests of the child. If applicable, Kathy should be aware that First Nations Child and Family Services Agencies may be of assistance in this case as well.

#### *Orders with Conditions*

The Act gives the court the power to put conditions on any of the orders the court is allowed to make. These conditions may include access by a parent or person of sufficient interest; supervision by the Minister (term of supervision shall not exceed one year); or special treatment services. The various orders the court can make are set out below...

1. Child remain with or return to parent or be placed in the custody of another parent.
2. Child be placed in custody of a person having a sufficient interest.
3. Child be placed in custody of Minister for a maximum of six months.
4. Child be placed in custody of Minister until s/he reaches 18th birthday.

#### *Order of Permanent Committal (Crown Wardship)*

If the court does not think that any of the conditional orders are appropriate, it can make a permanent order that the child be placed in the custody of the Department. The effects of such an order include...

1. An unconditional, permanent committal of the child to the Minister.
2. The child may be placed for adoption.
3. Where a status Indian child is permanently committed, the director shall give notice of the order to the Band.

*Please do not look upon these as "answers" because there are no "right and wrong" answers to these questions.*

*It becomes clear as one works through the cases that the more information you have in an area, the more options you will be able to present to your clients. You will probably be surprised to see that you have come up with additional suggestions. The goal is to help you to access a range of available resources.*



## other laws that relate to children and parents

As intermediaries dealing with separating or divorcing parents, and perhaps single parents, there are some other areas of the law that may be particularly relevant. In this section we review some of these areas.

### **wills**

Entering into a spousal relationship can affect the validity of a person's will. A will made before marriage is automatically cancelled when the person who made the will marries. A will made by an individual in a common law or same-sex relationship is also automatically cancelled after the couple has lived together for two years - the point in time when the relationship becomes legally recognized as a "spousal relationship".

This automatic cancellation can be avoided by preparing a will in contemplation of the eventual spousal relationship. A will prepared before entering a spousal relationship that expressly declares that it is made in contemplation of a planned relationship with a specific person will continue to be valid after the spousal relationship begins.

It is very important for people entering a spousal relationship to know whether their will is going to continue to be valid after the relationship begins. If a person dies without a valid will, their property is divided according to *The Intestate Succession Act*, regardless of their wishes regarding the distribution of their property. This Act is discussed in more detail in the PLEA booklet *Wills and Estates*. It is important that individuals understand the effect that entering a spousal relationship can have on their wills and make appropriate arrangements to ensure they have a valid will.

Wills made after a person marries or has been in a common law or same-sex relationship for two years are valid. Because this distinction is sometimes confusing, it may be helpful to look very briefly at the public policy or rationale behind this law.

When a will is automatically cancelled at the beginning of a legally recognized spousal relationship, a new spouse and any children are protected by *The Intestate Succession Act*, which provides for a spouse and any children before all others who could benefit from the estate of the deceased. This presumes that the deceased person would have wanted to provide for the surviving family. However in the absence of instructions in a will, the law makes an arbitrary distribution for that purpose.

If a will is prepared in contemplation of a future specific spousal relationship or after the spousal relationship has begun, it is clear that the testator made decisions regarding the distribution of their estate knowing that they had a spouse or a spouse and children. In this case, in the event that a spouse and children are not properly provided for under the will, they can apply under *The Dependents' Relief Act* or *The Family Property Act* to obtain a fair share of the deceased person's estate.

Parents can choose to name a guardian for their children in a will. If there is only one parent, that parent can name a guardian in a written signed document or a will. If there are two parents, the surviving parent gets custody after the other dies, unless both parents agreed in writing that the deceased parent could name a guardian. This is true even if one parent has sole custody of the child.

Naming a guardian in a will indicates whom a parent would choose as a substitute parent for their child. However, an appointment made in a will does not become effective until a judge confirms it.

Judges usually respect the wishes expressed in a will, but must consider what is best for the child. It is essential to make sure that the person named agrees to be the guardian.

Any mentally competent person who is 18 years of age or older can make a will. In a few instances, persons under the age of 18 can make a will, where, for example, they are married or have been living in a spousal relationship continuously for two years, or they are on active duty with the armed forces. A single parent who is under 18, can name a guardian in a signed, written document.

If no one is named, anyone who is close to the child may apply to the court for custody and a judge will decide who is most suitable.

## **debts and credit**

Taken alone, entering a spousal relationship does not affect an individual's ability to secure credit. Within a spousal relationship, each spouse can maintain their autonomy and independence. They can maintain separate bank and credit accounts for their own use and disposal. Either spouse can apply for credit without the other spouse's involvement.

Neither spouse is automatically responsible to a third party for their spouse's debts, although many spouses voluntarily take out a loan together or co-sign for one another. As between third parties (for example lending institutions, credit card companies), the only debts both spouses are responsible for are debts where...

- one spouse co-signs a loan for the other spouse
- both spouses agree with a creditor that they are both responsible for the debt
- one spouse guarantees to the creditor the debt of the other spouse by signing a guarantee document

The following is an example. During a spousal relationship one spouse may purchase a major appliance on a credit card that is in their name alone. The cardholding spouse is the only party responsible for the debt. The other spouse is not responsible to the credit card company for the debt and the credit card company cannot require the non-cardholding spouse to assume responsibility for the debt.

Between the spouses, however, one spouse may be able to claim that the other spouse should share the responsibility for a debt that relates to "family" property, such as a major appliance that is enjoyed by both spouses and not intended to be the property of one spouse alone. But, this claim is between the spouses and does not change the responsibility of the cardholder to the credit card company. During the course of a spousal relationship, this situation can usually be worked out between the spouses, but may become more problematic if the couple separates.

## change of names and naming a child

Individuals in a legally recognized spousal relationship have a choice about the surname they will be known by. Either spouse can choose to use...

- the surname they were given at birth - women may be familiar with the term "maiden name" in this context
- their spouse's surname
- the legal surname they were using immediately before their current spousal relationship
- a double surname made up of both spouses' surnames - the name can't contain more than two components and may be hyphenated or not (Wilson Greene; Greene Wilson; Wilson-Greene; or Greene-Wilson)

While it is not necessary to apply for this type of name change, persons who are in a spousal relationship that is not a legal marriage must file a declaration confirming the relationship. The declaration must be signed by both spouses. Forms and further information may be obtained from the Vital Statistics Branch of Saskatchewan Health.

Although simply choosing to change your surname in the course of a spousal relationship will not alter your birth records, you can arrange to change your name on all business documents, such as bank accounts, hospitalization cards, and driver's licences, by contacting the related agency directly. Individuals who change their surname as a result of a spousal relationship can change their name back to a previous surname at any time.

Concerning names for a child, the parent or parents of the child must register the baby's birth with Vital Statistics within fifteen days of the birth. Home births must be registered within 24 hours. By registering the child's birth, the parents comply with the law. The birth registration does not give either parent rights to the child. Those rights and responsibilities come from other laws, such as *The Children's Law Act* or *The Family Maintenance Act*. Signing the form is, however, evidence that you are a parent of the child.

The registering parent or parents can choose any name they like for their child's first, middle or last names. The names must be written in the Roman alphabet. The child may have a hyphenated or combined last name. The last name, or surname, cannot contain more than two names hyphenated or combined.

If only one parent registers the child's surname, the surname will be the one chosen by that parent. If both parents register the child's surname, the surname will be the one chosen by both of them. If the parents have the same surname and cannot agree on the child's surname, the surname must be theirs. If they have different surnames and cannot agree, the child's surname must consist of both parents' surnames hyphenated or combined in alphabetical order.

## proof of parentage

The law says that fathers and mothers must support their child, and that both have legal rights and obligations for the child. In cases where the identity of the father or the mother is unknown or denied, a person can apply for an order legally recognizing the man or woman as the parent of a child.

*The Children's Law Act* lists a number of circumstances in which a man will be presumed to be the father of a child. Several are listed in the Act but the two most common are...

- if he was living with the child's mother when she became pregnant or when the child was born
- if he signed the birth registration form

The man may provide proof in court that the presumption is not correct, but unless he does so, the judge will make an order recognizing him as the father.

If the man is not presumed, in law, to be the father, and he denies being the father, the judge will decide the issue. The judge will hear evidence in court to decide who is the father of the child. Friends or acquaintances may testify about the nature of the relationship between the man and the woman. The evidence must satisfy the judge that it is more likely than not, on the balance of probabilities, that the man is the father.

In addition to hearing evidence, the judge may make an order for blood or DNA testing, or the parties can agree to have these tests done. A person cannot be tested without his or her consent. If the person refuses to take a court-ordered test, the judge may draw whatever conclusion is reasonable, taking all the circumstances into account.

Both blood tests and DNA tests are available to prove paternity or maternity. Blood tests check for certain elements in blood that are compatible with paternity or maternity. Blood tests cannot prove that someone is the parent of a child; they can only show if a person is not the parent. DNA testing can be expensive, but is much more accurate and compelling than a blood test. DNA testing is done on blood cells or on a body tissue sample, such as hair or saliva. It examines the small percentage of DNA that is unique to each person. DNA testing permits a very accurate assessment of parentage.

## support and services for young parents

The Department of Community Resources and Employment may provide support and services to 16 and 17 year olds if...

- they appear to be in need of care and supervision
- no parent is willing or able to take responsibility for the young person
- they cannot live at home safely

The Department also offers the Teen and Young Parent Program. A Teen and Young Parent Worker can offer support and information about available options. The program is voluntary and confidential. For further information about Teen and Young Parent Services in your area, contact your local Community Resources and Employment offices.

## child protection services

In Saskatchewan, we have laws to protect children against abuse or neglect by a parent or guardian. These laws are designed to prevent child abuse and neglect, and to protect children in abusive situations. These laws are also designed to help families stay together, if possible, by providing counselling and support services to families in need.

Responsibility for the safety and well-being of children is shared by all professionals and the community when parents do not ensure the safety of their children. Anyone who has reason to believe that a child is abused or neglected has a legal duty to report it. Suspected child abuse or neglect can be reported to any Community Resources and Employment office, a community crisis centre, or police service.

Anyone who thinks they may be abusing or neglecting their own child, should talk to someone. Help is available. Community Resources and Employment can provide assistance through their family services programs. Help is also available in the community through family service bureaus, daycare centres, support or self-help groups and agencies offering family counselling and parenting classes.

### Child Abuse and Neglect

Child abuse can take on many forms including physical violence, sexual abuse, or emotional abuse, such as making unreasonable and repeated demands on a child.

Child neglect includes not providing enough food, clothing, shelter, or health care for a child. It may also include leaving young children alone without proper supervision or care.

Protection services may be provided to children who may suffer physical or emotional harm because of family violence and to children under 12 who have committed a criminal act.

In Saskatchewan, child protection services are provided by the Department of Community Resources and Employment. First Nations Child and Family Services Agencies (FNCFSAs) provide similar services to First Nations children living on reserve. The police have the same authority as Community Resources and Employment and FNCFSAs to apprehend children.

When a child protection agency gets a report involving child abuse or neglect, they must investigate the matter to determine whether the child is abused or neglected, and whether the child is in danger. The agency may question the child, the parents, and other care providers to get all the facts. Other professionals such as teachers, medical professionals, and counsellors may assist in the process. The police and Crown prosecutors may also investigate.

There are many cases where a child needs some form of help from outside the family, but is not at risk of serious harm. In such situations, some form of family services may be offered. Services may be counselling about nutrition or anger management. In many communities, parent aides are available to help parents. There may be a family support centre or a parent support group that can help the parent.

If the child protection agency decides that a child needs to be protected, the parents of the child must be advised. The agency must offer services to the parent, such as counselling and support services. If the child is in danger, the agency will take the necessary steps to protect the child. This may include offering family services or, as a last resort, removing the child from the home to safety, if no other arrangements can be made. The child must be returned when the child is no longer in danger. This may not happen until after a child protection hearing is held.

### **Signs of Abuse or Neglect**

Some common signs of abuse or neglect include...

- unexplained injuries or repeated injuries of the same type
- running away from home
- being frequently away from school or sick
- inadequately fed or clothed
- exposure to violence at home
- unusual interest or familiarity with sexual acts

If a child is apprehended, the parents must be told...

- the reasons for the child's apprehension
- the contact information for the child protection worker in charge of the file
- that the parents have a right to contact a lawyer

### ***Child Protection Hearings***

If the child is not returned within 48 hours, the child protection agency must ask the court for a protection hearing. This request must be made within seven days and the hearing itself must be scheduled at the earliest possible date within 37 days after the child is taken away. The parents will be given written notice of the date, time, and place of the hearing, as well as an indication of the evidence of abuse or neglect that will be brought forward at the hearing.

During this time, the child will stay in a safe place, such as a foster home, medical facility, or with relatives. Parents may be allowed to visit, depending on the circumstances.

At the hearing the judge listens to all the evidence, including the reasons the agency removed the child, anything that the child or the parents have to say, and any evidence that came out at other civil or criminal trials. The hearing may be held in private so that the evidence does not become public knowledge.

The parents may bring a friend, family member or lawyer for support and advice.

The judge must think of what is best for the child. If the judge decides that the child is abused or neglected, the judge may still return the child to their home. The judge may place certain conditions or restrictions on the child's return. The judge may decide that the child should be placed with another person who has an interest in the child, such as a family member. In some cases, the judge may decide that it is necessary to place the child in the care of the agency. If the child is not returned home, parents may still be allowed to visit their child.

If the agency is looking into a report about the child, parents may want to contact a lawyer right away. They may also want to contact a lawyer if they believe that the agency is not

respecting their rights. A lawyer can advise parents of their rights and help them through the process. A lawyer can also attend meetings with the agency and help them prepare for a protection hearing. A lawyer may also be able to refer parents to other professionals that can help work through the problem.

If parents don't know who to call they can look through the yellow pages and call a lawyer who practices family law. They can also call the Lawyer Referral Service, operated by the Law Society of Saskatchewan, toll-free at 1-800-667-9886. If parents don't think they can afford a lawyer, they can contact their nearest Legal Aid Office to find out if they qualify for assistance.

## **adoption**

Adoption law allows an adopting parent or parents to become the parents of a child born to someone else. The adopted child becomes for all purposes the child of the adoptive parents, as if the child had been born to those parents. At the same time, the adopted child ceases to be the child of his or her birth parents.

Parents can place a child for adoption through an agency adoption or through a private adoption, called an "independent" adoption. If a child is made a permanent Crown ward after a child protection hearing, that child may be placed for adoption. A third adoption situation is when a person who becomes a step-parent of a child applies to adopt the child in a step-parent adoption.

*The Adoption Act* and its regulations set out adoption procedures. The procedures vary depending on which type of adoption is being carried out.

A child who is 12 or older must consent to any adoption order.

### **independent or agency adoptions**

In an independent adoption or an agency adoption, the birth parents must consent to the adoption. If one birth parent refuses to agree, the court may dispense with that consent if it is in the best interests of the child. Dispensing with consent means that the judge allows the adoption to go ahead without the consent. A parent who consents to adoption must have independent legal advice. For example, the birth mother must have her own lawyer. The adoptive parents' lawyer cannot advise a birth mother consenting to the adoption of her child.

Birth parents who place a child for adoption cannot give a consent until the child is 72 hours old. A birth parent may revoke consent within 14 days. To revoke a consent, the birth parent must give written notice to the Director of Community Resources and Employment within the 14 day time limit.

### **Homestudy Report**

The homestudy report is an important step in the adoption process. It contains information gathered from a number of sources on the ability of potential adoptive parents to parent an adopted child, and usually includes information about the applicant's social, family and financial history, personal references, medical reports and a criminal record check. The report must be prepared by a trained individual approved by the Director of Community Resources and Employment.

Once completed, the homestudy is registered at the Central Adoption Registry. Birth parents considering placing a child for adoption can then consider a number of homestudies that may meet their expectations for potential adoptive parents of their child.

### **step-parent adoptions**

A step-parent may adopt the child of his or her spouse. This may happen, for example, when an unmarried parent later gets married. The child's step-parent, then becomes entitled to adopt. The parent does not need independent legal advice in this situation.

The consent of the other birth parent is required for the adoption, unless a judge dispenses with the requirement for consent. Whether or not the other birth parent consents to the adoption, they are entitled to apply for access.

#### **Post-Adoption Services**

By law, records of all adoptions finalized in Saskatchewan must be maintained. Birth parents, birth family members, adoptive parents, and adults who were adopted as a child may access post adoption services, such as search and information services. Information that could be used to identify an adoptee or birth parent will not be released without written permission of the party in question, but non-identifying background information may be obtained upon request. Birth parents can register their willingness to exchange information or have contact. Reunion services can be accessed if both parties are registered and both request a reunion. There is a fee for services, except requests for non-identifying background information. You may contact Saskatchewan Community Resources and Employment for more information.

### **victims of domestic violence**

*The Victims of Domestic Violence Act* provides for some assistance to victims of domestic violence through three types of specialized orders - emergency intervention orders, victim's assistance orders and warrants of entry. The law applies to women and men who suffer violence from their live-in partners, whether they are married, living common-law, or in a gay or lesbian relationship. It applies to parents of children, whether they have ever lived together or not. The law also protects children and older adults living in a family environment.

#### **emergency intervention order**

Emergency intervention orders can give relief to a victim in an emergency. Police officers, mobile crisis workers and victims services coordinators can help victims apply for an order requesting...

- exclusive occupation of the family home
- a police officer to remove the abuser from the family home
- a police officer to be present and supervise while the abuser or the victim takes personal belongings from the family home
- a restraining order prohibiting the abuser from contacting the victim

Special Justices of the Peace are available at any hour of the day or night to hear applications. Before making an order, the Justice of the Peace must determine that "domestic violence" has occurred and be satisfied that the matter is serious or urgent enough that it should not wait until it can come before a judge.

An emergency order of this type can be granted without the abuser being present. Once granted, however, it will not become effective until the abuser is given notice of it. Also, because these orders are designed to deal with emergency situations, they must be confirmed afterwards by a judge. The judge must review the order and supporting papers within three working days of getting the documents from the Justice of the Peace. If the judge is not satisfied that there was evidence to support the order, a rehearing of the matter may be scheduled.

### **victim's assistance order**

These orders are similar to an emergency intervention order, but are designed to be used in non-emergency situations. Application is made to a judge, who may make any of the orders available as emergency intervention orders. Other orders are available too. For example, a judge may order the abuser to pay compensation because the victim has suffered a loss of money as a result of the abuse. Compensation may be for things such as loss of earnings, medical and dental expenses, moving expenses, out-of-pocket losses, or legal expenses.

### **warrant of entry**

Warrants of entry are designed to be used where there is concern about domestic violence in connection with a person who cannot act on their own. A Justice of the Peace may order that a police officer be allowed to enter and search a place. The order may only be made after a potential abuser has refused to give a police officer access to a person who may be the victim of domestic violence. The warrant allows the police to enter and search the place. They may examine or assist a victim and, if necessary, remove the victim.

### **peace bonds**

Another option for people who fear for their safety is a peace bond. A peace bond is a court order that requires another person to "keep the peace" for a certain amount of time and obey any other conditions ordered. A peace bond is not a criminal conviction. As long as the conditions of the peace bond are met, the individual will not be charged with a criminal offence with regard to the peace bond. If, however, the conditions of the peace bond are broken, the individual can be charged with a criminal offence. If convicted, the person can be fined and/or jailed and will then have a criminal record.

If a person has a real fear that someone is going to harm them, or their children or their property, they can go to the police station and ask for a peace bond by giving a formal statement explaining exactly why they are afraid. The person named in the peace bond may be required to go to court. At the court hearing a Crown Prosecutor will explain the situation to a judge. The person requesting the peace bond does not have to be present, but may choose to attend.

If the court is satisfied that there are reasonable grounds for the person to fear for their safety or the safety of their children or property, the judge will ask the individual responsible to enter into a peace bond. If the individual agrees to the peace bond the

judge will grant the order right away. The individual must read and sign the peace bond, indicating that they understand the bond and agree to follow conditions, such as...

- keep the peace and be of good behaviour
- not harm or harass the person who requested the peace bond
- not see, phone, write, or otherwise contact the person who requested the peace bond

If the court is satisfied that there are reasonable grounds to fear an individual but that individual will not voluntarily agree to enter into a peace bond, the judge will order a hearing. A hearing is similar to a trial. If the judge orders a hearing the person asking for the peace bond must attend court on the hearing date. A Crown Prosecutor will conduct the case. The other individual may be represented by a lawyer or may speak for themselves at the hearing.

The judge hears both sides, including testimony from the person asking for a peace bond, the other individual and any other witnesses. After considering all of the evidence, the judge will decide whether or not to order the peace bond. The judge will also consider other conditions, such as ordering that the individual not contact the person requesting the bond or their family, be around their home or workplace, or possess any weapons.

The judge can order the peace bond for any set period of time, up to twelve months. If the individual will not agree to enter into the peace bond after a judge's order, the individual can be placed in jail for up to twelve months. After the peace bond expires, if the person still fears for their safety, or the safety of their family or property, as the result of a new incident, they can apply for a new peace bond. They cannot rely on the same incidents to extend the peace bond beyond the twelve month period.

By breaking any of the conditions of the peace bond the individual is committing a crime. The police can arrest the individual and may charge them with a criminal offence. If the police charge the individual and they deny the charge, there will be a trial. The person who requested the peace bond will then have to give evidence about how the individual broke the conditions of the peace bond.

If the person pleads guilty to the charge the person who requested the peace bond will not be required to attend court, but may choose to do so. After the individual pleads guilty or is found guilty, the judge will decide the sentence for the offence. The person who requested the peace bond may want to provide the court with a victim impact statement so that the judge can consider how the individual's actions affected them.

They may want to ask the police about the availability of Victims Services in their area. Victims Services can provide information and support to victims.



## seeking legal advice

### lawyers

#### when to go to a lawyer

Another aspect of providing legal information is knowing when to suggest that your client go to a lawyer. Often, people do not think of visiting a lawyer until after they get into trouble. But a lot of problems can be avoided if the individual goes to a lawyer before major decisions are made.

The following situations are some examples of when a lawyer should be consulted for advice...

- buying or selling a home or other real estate, organizing a business, or making a major purchase
- changing the status of members within the family (e.g. by divorce or adoption)
- making a will or planning an estate
- signing a large or important contract
- handling accidents involving personal injury or property damage
- defending a criminal charge
- bringing or defending a civil suit (other than in Small Claims Court)

But there are many situations involving the law where people other than lawyers are the best ones to go to for advice and information. In a business situation, often a business organization, agency, or accountant is the best source of information. For many other problems, government agencies are the places to go for some assistance. It all depends on the nature of the problem before you. Experience with legal problems and knowledge of the law will help you in deciding whether or not the advice of a lawyer is needed.

#### what to expect from a lawyer

##### code of professional conduct

The Law Society of Saskatchewan's Code of Professional Conduct demands that a lawyer behave with integrity and competence. The quality of service must be comparable to that which other lawyers in a similar situation would provide. In the course of providing this service, a lawyer should...

- keep the client reasonably informed
- respond to the client's telephone calls
- respond within a reasonable time to communications that require a reply

- inform the client of proposals of settlement and explain them properly
- not withhold information from the client or mislead the client in order to cover up negligence or mistakes
- make a prompt report when the work is finished

In addition, a lawyer has a duty to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of the client. As well, a lawyer owes a duty to the client not to withdraw services except for good cause and upon notice appropriate in the circumstances.

### **what is the difference between a barrister and a solicitor?**

In Canada, a lawyer is both a barrister and a solicitor. A "barrister" is a lawyer who conducts the trial and argues cases in court. The case may be a family dispute, a criminal charge, or a civil suit. Barristers develop skills in drafting court documents, arguing points of law, and questioning witnesses.

A "solicitor's" job is mostly office work and does not involve going to court. Solicitors are mainly responsible for drafting contracts, handling real estate transactions, drawing up wills, administering estates, or advising corporations.

Many law graduates join a general practice and become proficient in many areas. Other lawyers practice in a particular area of law, such as family law or criminal law.

### **how to find a lawyer**

Finding a lawyer knowledgeable in a particular area of law may require some research. Lawyers in Saskatchewan are allowed to advertise with regard to their preferred area of practice. Some methods of locating an appropriate lawyer are...

- Word of mouth: Ask a friend, an acquaintance, or a co-worker for a referral.
- Phone a lawyer: Ask if she or he has experience in that particular area. If not, ask whom they would recommend.
- Call the Lawyer Referral Service: The Lawyer Referral Service will give the caller the names of two lawyers who have indicated preference in that area of the law. A maximum of \$25 will be charged for the first half-hour consultation. The Referral Service is run by the Law Society of Saskatchewan. They are located in Regina and have a toll-free number: 1-800-667-9886.

### **how does a lawyer decide what fee to charge?**

Lawyers may charge an hourly rate, they may charge a fee for a particular service, or they may work on a contingency basis (all explained below). Which route they take will depend, to a large extent, on the circumstances and the type of service involved.

The Law Society has a schedule of fees (called a tariff of costs) which serves as a guideline for lawyers and the public. This schedule is not binding in any manner; rather it is intended to suggest those charges, which are thought to be appropriate for the particular service. It is subject to adjustment depending on the experience of the lawyer, the time the job takes, and the professional skill required.

In addition, there will be many services a lawyer is called upon to perform that are not specified in the tariff. A lawyer will, for example, frequently be asked to advise, negotiate, settle, or in other ways adjust and give opinions on important matters. In such cases, charges are usually made on an hourly rate. Hourly rates will most likely fall somewhere between \$60 and \$220, depending on the lawyer's expertise.

There are some transactions for which lawyers most often charge on a fee-for-service rather than an hourly basis. Some of these are land transactions, work related to estates, and debt collections. The fee may be a percentage of the value of the estate, the property, or the debt. The tariff might suggest what percentage would be appropriate to charge. The fees charged, for example, for the legal work required in real estate transactions generally vary between one and two percent of the value of the property. When handling a debt collection, most lawyers will take between 15 and 30 percent of the amount recovered.

Legal fees for administering an estate are also determined on a percentage basis. These are more than guidelines, however. They are Rules of Court and must be followed. The fee schedule is set out in PLEA's *Wills and Estates* booklet. The rules also state that if the executor or administrator does all of the work for which he or she is responsible in administering the estate, and the solicitor does only the legal work involved, the solicitor will be paid 60% of the fees.

There are times when a lawyer will agree to work on a contingency basis. This means that instead of charging on a hourly basis, the lawyer will take a percentage of the damages awarded. Usually, this type of agreement is made if the client cannot otherwise afford to pay a lawyer. Under this arrangement, the lawyer might agree to take anywhere from 20 to 50 percent, depending on the amount of the award. If the client loses the case, the lawyer will not receive any legal fees.

No matter what method is settled on by a lawyer to establish his or her fees, a client will always be charged for disbursements. These are expenses that must be paid in the course of dealing with the matter at hand. For example, any long distance phone calls that must be made are paid for by the client. Often documents must be registered or filed at the court house or other offices and a fee is charged for registering or filing. The client pays all of these charges, which are necessary to complete the case.

It is possible that a lawyer will ask for a retainer before doing any legal work. This is common practice in the legal profession. Any money the lawyer is given in advance may be put into a trust account and used for payment of fees or disbursements.

It may be worthwhile to note that now, in a time of keen competition in the legal profession, lawyers often charge less than tariff rates. It pays to shop around.

### **can a client fire his or her lawyer?**

A person who is not happy with the service he or she is receiving can certainly fire the lawyer. However, the client must pay what is owed for work already done. The client is entitled to receive whatever documents and materials are on file so that he or she may pass them on to the lawyer who takes over the case, or the new lawyer may ask to have the file transferred directly to her or him.

Anyone who has a serious complaint about a lawyer can report the circumstances of the situation to the Law Society. The matter will be investigated and possibly sent to the Society's Discipline Committee for further action.

Sometimes a client does not understand an item on the bill or feels he or she has been overcharged. In this case, the client should go back to the lawyer and ask for an explanation. Lawyers keep close track of the time spent on each matter and should be able to tell the client the precise reason for the cost. A client who still is not satisfied could refer the matter to the Law Society.

Another avenue of redress for a client who believes he or she has been overcharged is to have the bill "taxed". This means asking a court official to go over the bill to see if the charges are appropriate. To do this, the client would likely have to go to another lawyer to help him or her through the court process. There are deadlines that have to be met, as well. In Saskatchewan, *The Legal Profession Act, 1990* states that an application to have the bill taxed must be made to the court within 30 days after the person received the bill. Under special circumstances the court may waive the 30 day limitation.

## **alternatives to hiring a lawyer**

Often problems just appear to need a lawyer when all a client may need is legal information. Many people cannot afford to hire a lawyer. Lawyers might charge anywhere from \$60 to over \$220 an hour. To a family without much money, even \$60 an hour might be more than they can afford. If the problem is a serious one, the final fee for a lawyer might well be in the hundreds or even thousands of dollars.

Many people believe this is an inequity in the law. While it is true that the law applies equally to all, those who do not know about the law or those who cannot afford legal assistance if they have to appear in court will be at a disadvantage. Because of ignorance or default, they may well lose what should be theirs.

To help remedy this injustice, some alternatives have been developed. Three of the most important of these are Mediation, Legal Aid, and Small Claims Court. Mediation and Legal Aid are often applicable in family law matters.

The following information about Mediation, Legal Aid, and Small Claims Court is provided so that you will know when to guide your client to these avenues of assistance.

### **mediation**

An important option for separating or divorcing parents to consider is mediation. If parents can agree, particularly on issues concerning their children, everyone benefits. Parents have the knowledge to make choices that are in the best interests of their children. Parents are also more likely to honour an agreement that they entered into voluntarily. A voluntary agreement can also save parents the stress and expense of going to court. Mediation is one way of achieving a voluntary agreement when parents are unwilling or unable to do so on their own. Mediators are specially trained to assist individuals in reaching agreements that meet the needs of all parties involved. A mediator may be a social worker, lawyer, or counsellor. Mediators act as impartial third parties.

While a mediator can assist spouses in coming to agreements, it is important that each spouse have independent legal advice before signing any agreement. Agreements regarding family property are not legally enforceable unless they are in writing, and each spouse has had independent legal advice.

## legal aid

In Saskatchewan, lawyers at the Legal Aid Commission are available to act for people who cannot afford to hire a lawyer and who need assistance in the areas of criminal law and family law. Legal Aid is funded by the provincial and federal governments.

### who is eligible?

A person is eligible for Legal Aid if...

- they are supported by social assistance, under either a federal or provincial program
- their level of income is lower than the amount available to him or her under social assistance
- the cost of legal services is so high that their income would be reduced to the social assistance level. (Here they may be asked to share in the costs of providing services.)

Persons who are 12 years to 17 years old (inclusive), and are charged with an offence under the *Youth Criminal Justice Act* or are detained or questioned in connection with an offence under the Act, may be eligible for Legal Aid or be able to have a lawyer appointed by the court.

### what services are provided?

#### *Family Law*

A legal aid lawyer will be appointed to assist individuals who are having problems with...

- divorce
- custody matters
- access (the right of the child to spend time with the parent who does not have custody)
- maintenance
- child protection matters (e.g. the Department of Community Resources and Employment has found the client's child "in need of protection" and the client wishes to respond to that accusation)
- restraining orders (if either partner is being harassed, threatened, or abused by the other, he or she may apply to the court for an order requiring that person to stay away from him or her)

### *Criminal Law*

A legal aid lawyer will be appointed to assist individuals who...

- have been charged with an indictable (serious) offence under the *Criminal Code*, or with serious offences under other federal laws
- have been charged with summary conviction (less serious) offences where it is likely, because of that charge, they will be imprisoned or will lose their jobs
- have been charged with, or are suspected of committing, an offence under the *Youth Criminal Justice Act* and either their parents are eligible for Legal Aid, or the court requires a lawyer to represent them

A legal aid lawyer may also be appointed, under certain conditions, where it is necessary to make an appeal to a higher court.

### *Civil Matters*

Usually, civil law matters attended to by Legal Aid are restricted to family law. However, there are situations where Legal Aid may assist an individual whose livelihood is in danger or where extraordinary hardship may result.

In addition, there are some areas of the province (northern Saskatchewan, for example) where Legal Aid may provide service to meet special needs.

### *Advice and Information*

Legal Aid offices may provide advice and information to anyone, provided the matter is not a complex one. If it can be dealt with in a brief interview or telephone call, an attempt may be made to respond to the problem.

## **small claims court**

Small Claims Court is designed to resolve many civil disputes. Civil law is the law that governs relationships between individuals. If you want to sue someone, or if you are sued, that is a civil matter. Anything relating to consumer transactions, contracts, or landlord/tenant disputes, for example, is civil law and may be handled by Small Claims Court.

Small Claims Court provides an informal and inexpensive method by which civil disputes may be settled in a court of law. It is set up in a way that allows individuals to present their own legal problems without the aid of a lawyer. In most cases, people do represent themselves.

Claims of less than \$5,000 may be heard in Small Claims Court. If the amount involved is more than \$5,000, it will have to be heard in the Court of Queen's Bench. It is almost always necessary to rely on a lawyer if a matter is being dealt with in the Court of Queen's Bench.



## **making referrals**

When people approach you with what you have determined to be a "legal" problem and you have classified the problem into a broad category of law, often the next step is to provide them with information about where they might go to seek further assistance. However, it requires some skill to ensure that your referral will be effective.

The following is a checklist for making helpful referrals...

- What is the correct name, address, and telephone number of the agency? (If possible give as much information in writing as you can, including drawing small maps and explaining available public transportation.)
- Is the agency able to deal with all areas of the law or are they restricted to specific areas? (e.g. Legal Aid is restricted to Criminal Law and Family Law)
- What can the person expect when they telephone? (Will they keep getting a busy signal, be put on hold, transferred from person to person, and/or receive a series of recordings without assistance until they, in frustration and desperation, hang up?)
- What kind of information should they be giving to the agency when they telephone? (e.g. "This is an emergency!")
- Will the agency give out information/advice over the telephone?
- Is a personal interview required? Is it desirable?
- What are the agency's hours? (If the agency is only open during normal business hours, is there any provision made for emergencies for persons who are unable to come in or call during those hours because of employment, childcare, or other reasons?)
- Does the person need to have an appointment, or can someone walk in off the street and receive assistance?
- Is the agency able to assist persons who do not speak English or who have other communication barriers?
- Is there any charge for the service?
- Is there a "financial means" test for providing assistance free of charge?
- Is the agency likely to deal with the problem directly or will it likely give the person another referral?
- Are there any restrictions on who can use the agency's service? (e.g. religious affiliation, membership, or residence)
- From whom are they likely to receive information/advice? (e.g. lawyer, law student, secretary, government worker, volunteer)

- Is there a limit to the amount of information or advice the agency is prepared to give?
- Is the referral information accurate and up-to-date? (One way of ensuring this is to have the persons you send to a specific agency report back their experience.)

(Adapted from: *Selecting Legal Materials And What To Do With Them Once You've Got Them*, Canadian Law Information Council, 1985.)

## complaining and appealing

### complaining

Sometimes a legal problem can be solved by using non-legal methods. An effective non-legal way to deal with a problem may be to complain to the person or agency that your client thinks is at the root of the problem. For example, if your client's landlord is not keeping the building in good repair, your client may want to explain to the landlord specifically what the concerns are. The landlord may do what is necessary to solve your client's problem. If not, your client may need to take the more formal and legal route of going to the Rentalsman.

Complaints may be more effective, if your clients consider the following guidelines...

- Clearly identify the problem. What is the decision or course of action with which you do not agree or are not satisfied?
- Find out why that decision was made. Ask for an explanation of the decision and for a copy of any written policy or regulations on which the decision was based.
- Document your facts and include times, dates, and items, such as copies of bills, letters, and receipts.
- Determine to whom you should be making your complaint. In some cases it may be more effective to approach the supervisor of the person who made the decision.
- Make a written complaint. Specifically set out your complaint and how you expect the problem to be solved. You may also want to ask for a response within a certain period of time. Keep a copy of your letter of complaint.
- Be polite but do not be intimidated. Know what your rights are and what the decision-maker's responsibilities are. Do not be threatened or persuaded to accept a solution or settlement, but be prepared to negotiate if necessary.
- Have a plan. Think about the best way to make your complaint and how to follow it up with further action if you don't get immediate satisfaction. You may decide to complain to more senior people in the same agency or business. You may also decide to go to your MLA, another agency (for example, the Ombudsman), public groups, the media, or through a formal appeal procedure.

## appealing

If a government agency, program or board has made a decision that causes a problem for your client, it may be possible to appeal that decision. Most provincial and federal government agencies allow for appeals from their decisions.

For example, if your client has been cut off welfare benefits by the local Community Resources and Employment office, it is possible to appeal that decision to the local appeal committee. If your client is not satisfied with the decision of the local committee, he or she may make a further appeal to the provincial appeal board.

Your client can get specific information about how to appeal from the particular agency or board which made the original decision. Your client is entitled to this information, so make sure he or she goes back to whomever made the decision and asks for it.

Here are some general guidelines that your client should keep in mind when appealing these kinds of decisions...

- Have a decision. Make sure you have actually received a decision that can be appealed, not just someone's opinion or error. Ask for a copy of the written decision.
- Check for time limits. Formal appeal procedures usually have certain limits within which an appeal must be started. Find out what these limits are in your case. If you miss the time limit you may be prevented from appealing.
- Get the details. Find out to whom you appeal and whether the appeal is written or oral. If written, find out if specific forms are needed and where to get them. If the appeal is oral, make sure you will be told the time and place of the hearing.
- Prepare thoroughly. Gather together all copies of letters and papers and any other information you have on the decision. Ask the department or agency for the reasons for their decision and ask for copies of any policy or regulation involved. Think about what you want to say and how you can back it up with the information you have. Write notes to help you if you are appealing in person and set out exactly what you expect from the appeal.
- Know your rights. You have a right to know the reasons for the decision you are appealing. You have a right to a private, unbiased hearing and a chance to tell your side of the story. The appeal board has a duty to make its decision only on information related to your situation and you have a right to know the reasons for the board's decision. You may have a right to bring someone (not necessarily a lawyer) to speak for you at your appeal. You may also be able to bring witnesses to support your story, and friends for moral support.

## **related plea resources**

PLEA produces several resources related to topics covered in this guide. These resources can be viewed online at [www.plea.org](http://www.plea.org). Extra copies may be ordered from PLEA. The following is a list of some related resources published by PLEA...

### **pamphlets**

- Child Abuse and Neglect
- Child and Spousal Maintenance
- Child Custody and Access
- Child Protection Services
- Harassment, Intimidation and Threats
- Names and Changes of Names
- Peace Bonds
- Unmarried Parents

### **booklets**

- Abusive Relationships
- Domestic Relations
- Single Parents
- Small Claims Court
- Wills and Estates

### **training guides**

- Family Violence Intermediary Training Guide

**notes**

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for an online, interactive family law training module go to  
[www.plea.org/famlaw](http://www.plea.org/famlaw)