

## **SUPPORT, CUSTODY AND ACCESS**

### **INTRODUCTION**

This checklist has been prepared to provide an overview of the law in Saskatchewan respecting the issues of custody, access, child support and/or spousal support. Each section commences with practical advice regarding the information you should request from your client during your initial interview and subsequent interviews. It is critical that you obtain all relevant information in order to assess your client's case and to make decisions as to how to proceed with your client's claim for custody, access, child and/or spousal support.

This checklist guides you through a Court application for custody and/or access, child support or spousal support with reference to the *Divorce Act*, *The Children's Law Act, 1997*, *The Family Maintenance Act, 1997*, and Queen's Bench Rules.

Included in this checklist are sections on jurisdiction, enforcement, income tax considerations and other considerations such as the death of one of the spouses. This checklist does not provide, and is not intended to provide, a full analysis of each issue. However, a lawyer retained to assist a client, regarding a custody or support case, should find within the checklist the necessary information to assess a client's position respecting custody and support and the information required to proceed with a Court application for custody or support. It is recommended that this checklist be used as a starting point only and that a greater analysis of the legislation and, of equal importance, the case law, should be undertaken, particularly in light of the fact-specific nature of these issues.

### **LIST OF AUTHORITIES**

#### **Legislation**

*The Children's Law Act, 1997*, S.S. 1997, c. C-8.2.

*The Dependants' Relief Act, 1996*, S.S. 1996, c. D-25.01.

*The Divorce Act, 1985*, S.C. 1986, s. 4.

*The Enforcement of Maintenance Orders Act, 1997*, S.S. 1997, c. E-9.21.

*The Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2.

*Federal Child Support Guidelines*, SOR/96-166-02.

*The Inter-jurisdictional Support Orders Act*, S.S. 2002, c. I-10.03.

*The Queen's Bench Act, 1998*, R.S.S. c. Q-1.

The Queen's Bench (Civil Mediation) Regulations, Q-1 reg. 6.

**Rules**

Queen’s Bench Rules.

**Other Sources**

*Changing Family Law Practice* (September 1994), Saskatchewan Legal Education Society Inc.

*Child Support Guidelines Update* (May 1998), Saskatchewan Legal Education Society Inc.

*Family Law Conference*, Saskatchewan (March/April 2000), Legal Education Society Inc. and University of Saskatchewan College of Law.

*Family Law Update – Child Support and Related Issues* (November 1996), Saskatchewan Legal Education Society.

Holland and Stalbecker-Pountney, *Co-Habitation: The Law in Canada*, (North York, ON: Carswell, 1990).

MacDonald and Ferrier, *Canadian Divorce Law and Practice* (vols. I and II), (North York, ON: Carswell, 1986, with updates).

*National Family Law Program* (vols. I and II), (Woodville, ON: Federation of Law Societies of Canada, 1996).

*New Family Law Rules* (November 2000), Saskatchewan Legal Education Society Inc.

*Pre-Trial Conferences* (November 1991), Bar Admission Course – Family Law Binder, Continuing Legal Education.

Wilson, *Wilson on Children and the Law*, 3rd ed. (Toronto: Butterworths, 1994 [looseleaf]).

**CONTENTS**

A.	The Client Interview .....	F-2-5
B.	Custody And Access .....	F-2-8
C.	Child Support .....	F-2-16
D.	Spousal Support .....	F-2-26

## CHECKLIST

### A. THE CLIENT INTERVIEW

1. Preliminary matters when arranging the interview.
  - 1.1 Request the name of your client's spouse or common-law spouse and, prior to booking an initial interview, ensure that there is no conflict of interest.
  - 1.2 Determine, through brief questioning, whether there is need for urgent action. For example, is there an immediate Court date? Is it necessary to proceed immediately to protect the physical safety of the client/children? Is an Application required to preserve assets? Is your client in immediate need of spousal and/or child support?
  - 1.3 Ask whether legal proceedings have commenced against your client:
    - 1.3.1 If yes, ask when the client was served, and whether a Court date has been set for the determination of interim issues.
    - 1.3.2 Obtain the name of your client's spouse's lawyer and request that your client bring copies of all pleadings to the initial interview.
    - 1.3.3 If the client has received a letter from a lawyer, request a copy be brought to the initial interview.
  - 1.4 Request the client to bring relevant documentation to the interview (e.g., income tax returns for the most recent three years, current pay slips, etc.). Advise the client that you may require further documentation after the initial interview. If possible, forward (by fax or mail) a blank Q.B. Form 609A Financial Statement to the client prior to the initial interview.
  - 1.5 Advise the client of your hourly rate and/or fee policy and advise as to the approximate cost of the initial interview. Consider having the client execute a retainer agreement.

Notes:

2. Initial Interview – General Information.
  - 2.1 Client information:
    - 2.1.1 Legal name.
    - 2.1.2 Address (residential and mailing).
    - 2.1.3 Telephone numbers (home and work).
    - 2.1.4 Birth date and place of birth.
    - 2.1.5 Maiden name.
    - 2.1.6 Marital status prior to marriage.
    - 2.1.7 Name of employer, employer’s address, client’s position and/or job title.
    - 2.1.8 How long the client has resided in Saskatchewan.
  - 2.2 The client’s spouse or common-law spouse:
    - 2.2.1 Legal name.
    - 2.2.2 Address (residential and mailing).
    - 2.2.3 Telephone numbers (home and work).
    - 2.2.4 Birth date and place of birth.
    - 2.2.5 Maiden name.
    - 2.2.6 Marital status prior to marriage.
    - 2.2.7 Name of employer, employer’s address, spouse’s position and/or job title.
    - 2.2.8 How long your client’s spouse has resided in Saskatchewan.
  - 2.3 Marriage:
    - 2.3.1 Date of marriage.
    - 2.3.2 Place of marriage.
    - 2.3.3 If a common-law relationship, date the parties commenced living common-law.
    - 2.3.4 Ask if the client has a non-ceremonial Marriage Certificate.
  - 2.4 Separation:
    - 2.4.1 Date.
    - 2.4.2 Place.

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- 2.4.3 Reasons for separation and, in particular, ascertain:
  - a. When your client believes the problems first started.
  - b. Whether there are third parties involved (new relationships of either party).
  - c. Whether there are alcohol or drug problems.
  - d. Whether there was physical and/or mental abuse.
  - e. If there are current safety concerns.
- 2.4.4 Ascertain whether there have been attempts to reconcile and your client's feelings about reconciliation.
- 2.4.5 Ask whether the client or spouse has received counselling in the past, is currently in counselling or desires counselling information.
- 2.4.6 Ascertain whether the spouses have lived together since separation and, if so, the dates and details of previous separations.
- 2.5 Children:
  - 2.5.1 Obtain general information as to all children that are involved (e.g., birth children of the client and spouse, adopted children, step-children, etc.).
  - 2.5.2 Legal names and gender.
  - 2.5.3 Birth dates and birth places.
  - 2.5.4 School or employment details respecting each child.
  - 2.5.5 Determine if there are any physical, emotional or educational needs for each child.
- 2.6 General Income Information:
  - 2.6.1 The client:
    - a. Present amount of monthly/annual income.
    - b. Any foreseeable change in job or income.
  - 2.6.2 The client's spouse or common-law:
    - a. Present amount of monthly/annual income.
    - b. Any foreseeable change in job or income.

Notes:

- 2.7 Agreements:
  - 2.7.1 Any written Agreements and type (e.g., pre-nuptial, co-habitation, separation agreement, prepared by the clients or by lawyers, etc.). If yes, request a copy or information as to whether they can be obtained.
  - 2.7.2 Any verbal agreements between the parties respecting separation (e.g., parenting arrangements, payment of support or payment of liabilities such as monthly mortgage, loans, etc.).
- 2.8 Information respecting prior proceedings, including details of when, where and results in proceedings such as:
  - 2.8.1 Divorce proceedings (ask for a copy of the Divorce Judgment).
  - 2.8.2 Any custody orders, either as part of the Divorce Judgment or otherwise.
  - 2.8.3 Any maintenance orders, child and/or spousal, as part of a Divorce Judgment or otherwise.
  - 2.8.4 Any orders granted as a result of variation proceedings to ensure you have the most recent Court Order respecting custody, access, child and spousal support.

**B. CUSTODY AND ACCESS**

- 1. Relevant Information:
  - 1.1 Obtain particulars of present and proposed future arrangements for custody and access.
  - 1.2 Discuss with the client the meaning of custody, joint custody, primary care, reasonable access, specified access, supervised access and the list of factors in Section 16 of the *Divorce Act* or Section 8 of *The Children's Law Act, 1997* the Court will consider in making custody orders.
  - 1.3 If custody is likely to be an issue, obtain the following information:
    - 1.3.1 Full particulars as to children's schooling, including grades, location of school, names of teachers.

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- 1.3.2 Full particulars as to the parenting roles played by each party since the birth of the children to the present date, including:
    - a. Each parent's involvement with school.
    - b. Each parent's involvement with medical, dental, health issues, etc.
    - c. Each parent's involvement in extra-curricular activities.
    - d. Each parent's involvement in daily tasks such as feeding, clothing, bathing, etc.
    - e. Theory of, and each parent's role in, the discipline of children.
  - 1.3.3 Information regarding hours of work of each spouse and past and proposed daycare arrangements, if necessary.
  - 1.3.4 The relationship of each child to each other child and to the spouse.
  - 1.3.5 Any unusual behaviour of either spouse towards children (e.g., physical abuse, sexual concerns, substance abuse issues, etc.).
  - 1.3.6 If unusual spouse behaviour, information as to the effect on children (e.g., school work, sleep, relationships with other children, etc.).
  - 1.3.7 Information as to the involvement with extended family for each parent.
  - 1.3.8 Review religious issues.
  - 1.3.9 Information as to possible witnesses who may supply affidavit evidence on an interim application or who would testify at trial, such as teachers, psychologists, daycare workers, family members, neighbours, physicians, etc.
2. Jurisdiction.
- 2.1 Decide whether application can be brought in Saskatchewan or must be brought in another jurisdiction by reviewing:
    - 2.1.1 Section 3(1) of the *Divorce Act*, requiring ordinary residence in a province of one year preceding the commencement of the proceeding.

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- 2.1.2 Section 6(1) of the *Divorce Act* to determine if the child is substantially connected with another province.
- 2.1.3 Section 15 of *The Children's Law Act, 1997* to determine if the child is habitually resident in Saskatchewan or, if not, the conditions in Section 15(1)(b) can be met.
- 2.2 Determine whether to proceed under the *Divorce Act* or *The Children's Law Act, 1997* by reviewing the following:
  - 2.2.1 If the parents are married either the *Divorce Act* or *The Children's Law Act, 1997* may be used to commence an application for custody. Usually proceed under the *Divorce Act* unless:
    - a. You wish to proceed in Saskatchewan and neither spouse has been an ordinarily resident in Saskatchewan for at least one year.
    - b. Your client does not wish to make an application for divorce concurrent with the application for custody.
    - c. It is an urgent situation and you do not have immediate access to the Marriage Certificate or there are difficulties in obtaining a Marriage Certificate; consider an ex parte application, dispensing with the immediate need for the filing of a Marriage Certificate under Queen's Bench (Q.B.) Rule 590(2) or 590(3).
  - 2.2.2 For unmarried parents, only *The Children's Law Act, 1997* can be utilized.
  - 2.2.3 If the client seeking custody or access is not a birth parent of the child (e.g., grandparent, aunt, uncle, past caregiver, etc.), either the *Divorce Act* or *The Children's Law Act, 1997* may be used. However, consider Section 16(3) of the *Divorce Act* that requires a non-spouse to obtain leave of the court before applying for custody under the *Divorce Act*. If the application is made pursuant to *The Children's Law Act, 1997*, you must apply to have the non-birth parent seeking custody or access declared to be a person of "sufficient interest."

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- 2.3 Determine whether to proceed in the Court of Queen's Bench (General) or the Family Law Division (Regina, Saskatoon or Prince Albert).
- 2.4 Determine which Judicial Centre is appropriate for the commencement of the custody or access application.
  - 2.4.1 Review Court of Queen's Bench Rule 593, allowing commencement at any Judicial Centre but consider the possibility of transfer to other Judicial Centres for reason of balance of convenience. Consider where the child or children are habitually resident and note that critical witnesses will be found where the child is resident.
3. Interim Custody and Access Proceedings (No Existing Order).
  - 3.1 To initiate custody and/or access proceedings, where there are no custody orders, the Petitioner must sign and then issue a Petition (Rule and Form 589). The application for custody or access is made pursuant to Section 16 of the *Divorce Act* and/or Section 6 of *The Children's Law Act, 1997*. A Petition for Divorce must be issued, then served personally (see Rule 594(2)). The interim custody or access proceedings are brought before the Court of Queen's Bench Chambers by service of a Notice of Motion (Family Law Proceeding) in Form 602 as you are claiming substantive and interim relief. You must file the Notice of Motion and supporting Affidavits with proof of service 14 days before the date set for hearing the motion (Rule 602(2)(b)). Note, however, that where the motion also claims child support or a variation of spousal support, there shall be at least 37 days between the date of service of the document commencing the Family Law Proceeding and the date set for the hearing of the motion (see Rule 602(3)(a)).
    - 3.1.1 The Petitioner is not required to serve and file a Financial Statement in Form 609A provided that the Petition is restricted to custody of and/or access to a child. Where the Petition also claims child support, you may or may not be required to file a Financial Statement in Form 609A, depending upon the nature of your claim.
  - 3.2 If the Respondent wishes to contest the custody or access application, the Respondent must serve and file an Answer in Form 597A or an Answer and Counter-Petition in Form 598. The Answer and Counter-Petition must be filed within 30 days after the service of the Petition, if the Petition was served in Canada or in the United States of America (see Rule 597(1)).

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4. Custody and Access By Way of Corollary Relief Proceeding.
  - 4.1 A Corollary Relief Proceeding is one where divorced parties (former spouses) seek a custody or access order. See Sections 15(1) and 16 of the *Divorce Act*. It is only applicable where the original Judgment of Divorce does not contain a custody or access order made pursuant to the *Divorce Act*. If the custody or access order was made pursuant to provincial legislation, consider whether you should apply for a variation order pursuant to Section 8 of *The Children's Law Act, 1997*.
  - 4.2 A Corollary Relief Proceeding is commenced by serving a Notice of Motion (Family Law Proceeding) in accordance with Form 602. The party bringing the motion, whether it be the Petitioner or Respondent, must serve the Notice of Motion with a copy of each Affidavit that the party intends to rely upon at the hearing and file the Notice of Motion and supporting Affidavits with proof of service 14 days before the date set for hearing the motion (see Rule 602(2)). Note that the party commencing a Corollary Relief Proceeding must do so at the Judicial Centre where the divorce or the order sought to be varied was granted or at any Judicial Centre when the divorce or the order sought to be varied was not granted in Saskatchewan (see Rule 593). The rules for service of a Corollary Relief Proceeding are set out in Rule 594 and, accordingly, the Notice of Motion must be served by personal service or, where the document is not a Petition for divorce, must be served by personal service or by leaving a copy with the lawyer of the person required to be served but only if the lawyer accepts service in writing on a copy of the document.
  - 4.3 The rules regarding filing Financial Statements with respect to a Corollary Relief Proceeding are set out in Rules 610, 611, 612 and 613. If the Corollary Relief Proceeding is restricted to custody and access and no claim is made for support, neither party needs to serve and file a Financial Statement; however, a court may order the parties to serve and file Financial Statements in certain circumstances.
5. Variation of Custody and Access Orders.
  - 5.1 Where there is an existing custody or access order, proceedings are commenced by service of an Application for Variation in Form 632, entitled Application for Variation (see Rule 602). The party bringing the motion must file the Notice of Motion and supporting Affidavits with proof of service 14 days

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- before the date set for hearing the motion (see Rule 602). Service of the Application for Variation must be effectuated either by personal service or by leaving a copy with the lawyer of the person required to be served, but only if the lawyer accepts service in writing on a copy of the document.
- 5.2 The variation application is made pursuant to either Section 17 of the *Divorce Act* and/or Section 8 of *The Children's Law Act, 1997*.
- 5.3 Rules 633 and 634 set out what information must be contained in the Applicant's affidavit in support of a variation application and the necessary documents that must be filed as well. Note that a document that has been previously filed with the court need not be filed or exhibited to the affidavit in support of the application if the affidavit identifies the document, states that the document is in the court file, and states the date the order was made or the documents were filed (see Rule 634(3)).
- 5.4 The onus is on the Applicant to prove a change in the conditions, means, needs and/or circumstances so as to justify the variation order.
- 5.5 If either party seeks to vary an interim order, the application is an Interim Relief Application in accordance with Rule 602 and is made pursuant to Section 15 of the *Divorce Act* or Section 8 of *The Children's Law Act* and not by Application for Variation.
- 5.6 If proceeding under the *Divorce Act*, note that Section 5(1) allows a court in a province to hear and determine a variation proceeding only if either former spouse is ordinarily resident in the province or both former spouses accept the jurisdiction of the court. Also, note Section 6(3) of the *Divorce Act* that allows the court either on application, or on its own motion, to transfer the variation proceeding to another province if the child is most substantially connected with the other province.
- 5.7 If applying for variation pursuant to *The Children's Law Act, 1997*, review Section 15 to determine if the child is habitually resident in Saskatchewan or, if not habitually resident, the conditions in Section 15 can be met.
6. Custody and Access trials.
- 6.1 The procedures outlined hereinafter apply equally to all custody and/or access trials.

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- 6.2 Consider whether you wish to examine for discovery on issues relating to custody or access. Remember Rule 638, which provides that a party may be examined for discovery touching on matters of custody of or access to a child only by leave of the Court.
- 6.3 If custody and/or access cannot be resolved by agreement prior to or after the issue is determined on an interim basis, the matter shall be set down for trial. However, a pre-trial conference is mandatory and the local registrar shall not assign a date for the trial of a Family Law Proceeding until a pre-trial conference has been held (see Rule 604).
- 6.4 In preparation for the pre-trial conference, consider the following:
- 6.4.1 Who should be present at the pre-trial conference. The client and the lawyer who will be handling the trial must be present at the pre-trial (see Rules 191(6) and (7)). Consider whether other individuals, who are actively involved in the child's caring (such as the client's new partner, grandparents, etc.), should also attend; but you should confirm in advance with the other counsel whether the other party will object to the presence of third parties at the pre-trial.
- 6.4.2 Discuss with the client the possibility of a focused access report or custody and access assessment. Determine whether a request will be made to the pre-trial Judge for such a report: Rule 191(1) and Section 97 of the *Queen's Bench Act, 1998*.
- 6.5 If proceeding to trial on the issue of custody, consider possible witnesses in addition to your client.
- 6.5.1 Consider using teachers, psychologists, daycare and/or babysitters, family members, neighbours, physicians, music and other instructors. If you intend to call an expert witness, remember Rule 284D requires you to serve an Expert Witness Notice 10 days prior to the pre-trial.
- 6.5.2 If a custody and/or access report has been prepared, decide whether the assessor should be a "witness of the Court" and make application pursuant to Section 97 of *The Queen's Bench Act, 1998* if required.

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7. Appeals.
  - 7.1 As regards interim custody orders, consider the following:
    - 7.1.1 The time for appeal is limited to 30 days from the date the interim order was made in Chambers (see Court of Appeal Rules and *The Court of Appeal Act, 2000*).
    - 7.1.2 Leave to Appeal from an order for interim custody is not required.
  - 7.2 If you intend to appeal an order for final custody or access, consider the following:
    - 7.2.1 The time for appeal is limited to 30 days after the day on which the order was made, unless extended on special grounds by an order of the Court of Appeal. Review Section 21 of the *Divorce Act*.
    - 7.2.2 A Notice of Appeal stays execution of an order for custody. You can apply to have the stay lifted to give effect to the order of the trial Judge pending appeal. Review Court of Appeal Rule 15.
8. Enforcement of Custody and Access Orders.
  - 8.1 With respect to the enforcement of custody and access orders, consider the following:
    - 8.1.1 Sections 282 and 283 of the *Criminal Code* make it an offence to breach a custody order. In the event this occurs, the police should be provided with a copy of the custody/access order or agreement.
    - 8.1.2 In the event the custodial parent refuses or denies the other parent access, the access parent should be advised of their rights under Part IV of *The Children's Law Act, 1997* with respect to enforcement of the access order and/or compensatory access.
    - 8.1.3 In the event the access parent takes the child out of the jurisdiction and refuses to return the child after the expiration of the access period, review Section 20 of the *Divorce Act* and Part IV of *The Children's Law Act, 1997*.

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**C. CHILD SUPPORT**

## 1. Relevant Information.

1.1 Obtain information as regards the children for whom your client is seeking support or for whom your client is being requested to provide support and in particular:

1.1.1 Status of your client to the child:

- a. Birth parent.
- b. Step parent.
- c. Person who has stood in the place of a parent.
- d. Possible birth father (in situations where paternity is in issue).

1.1.2 Determine the children's full legal names, gender, and birth dates.

1.1.3 Determine that each child is still a child of the marriage (the *Divorce Act*, s. 15.1); being a child of two (former) spouses who is:

- a. under the age of majority and who has not withdrawn from their charge; or
- b. over the age of majority but is unable to withdraw from their charge or obtain the necessities of life by reason of illness, disability or other cause (the *Divorce Act*, s. 2(1)(a) and (b), *The Family Maintenance Act*, 1997, s. 4(2)).

If the "other cause" is due to the child's full time attendance at a post-secondary educational institution, obtain further information as follows:

- a. Whether the child is working part-time while attending school and full-time during summer school breaks and if yes, where and what income the child receives.
- b. Information regarding any trust funds or education funds that may be available.
- c. Information respecting applications for and/or receipt of student loans.
- d. Information respecting cost of tuition and books.

Notes:

- e. Information regarding the educational plans for the child prior to the divorce or separation, including education pursued by older siblings.

Note that *The Family Maintenance Act, 1997* includes “pursuit of reasonable education” as a reason for failure to withdraw.

- 1.1.4 Determine if the child has any physical or other disabilities and obtain information with respect to the special expenses respecting the same.
- 1.2 Obtain information from the client respecting the current and/or proposed custody and access arrangements in order to assess whether child support should be adjusted as a result of an equal time sharing arrangement or an arrangement whereby the access parent has the child for more than 40% of the time over the course of a year.
- 1.3 When representing either a claimant or a respondent, full financial disclosure will be required whether you negotiate an agreement respecting child support or when applying or responding to a court application. Provide the client with a blank financial statement in Form 609A.
  - 1.3.1 As regards income, obtain information respecting both the client and the other party’s income including:
    - a. Current monthly/annual gross income from all sources.
    - b. If source of income is from an owner/operator business or farm operation, request income tax returns and year-end financial statements.
    - c. Any significant changes in income in the past few years or any anticipated changes in income in the near future.
  - 1.3.2 As regards expenses, if representing the claimant, have the client prepare a separate schedule of expenses allocated to children; expenses should be actual expenses, but discuss any proposed increase in specific expenses if child support is granted.
    - a. If representing the claimant, obtain details respecting childcare costs, including amounts paid, projected expenditures and reasons why the childcare was necessary.

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- b. If claiming extraordinary extra-curricular activities (see s. 7 of *Guidelines*), have the claimant prepare an affidavit attesting to the reasonableness and necessity of the expense, given the income of the parties. Obtain details on the spending habits for these activities prior to separation.
  - 1.3.3 If representing the respondent, obtain a complete expense statement and specifically request information respecting the expenditures made by the respondent on behalf of the children (access costs, specific medical or dental payments, etc.).
- 2. Obligation to Maintain Children.
  - 2.1 Discuss with the client the basic principle that parents have a joint financial obligation to maintain children of the marriage and that every parent has an obligation to provide maintenance. Review Section 15 of the *Divorce Act* and Section 3 of *The Family Maintenance Act, 1997*.
  - 2.2 If the claimant and respondent are married, determine which children are children of the marriage with reference to Section 2(2) of the *Divorce Act*. Consider the issue of any children for whom both spouses stand in the place of parents or any child of whom one spouse is the parent and for whom the other stands in the place of a parent.
  - 2.3 If the parents are not married, the parent has a support obligation if he is the father, she is the mother, or if it is a person who has demonstrated a settled intention to treat the child as a child of his or her family (Section 4 of *The Family Maintenance Act, 1997*).
    - 2.3.1 For unmarried parents, no obligation to provide support will arise unless there is a finding of paternity under *The Children's Law Act, 1997*. If paternity is questioned, discuss with the client the presumptions set out in Section 45(1) of *The Children's Law Act, 1997*.
    - 2.3.2 Consider discussing with the client life insurance obligations and the desirability of obtaining an order in accordance with Section 9(1)(d) and/or (e) of *The Family Maintenance Act, 1997*.

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3. Entitlement.
  - 3.1 Make a determination as to whether the child is still a dependent child with reference to the definitions in Section 2(2) of the *Divorce Act* or Section 2(b) and Section 4(2) of *The Family Maintenance Act, 1997*.
  - 3.2 If the child is over the age of majority (*Divorce Act*), or over 18 (*The Family Maintenance Act, 1997*), determine if the child is unable to withdraw from parental care because he or she is attending a post-secondary educational institute. Determine where the child is attending, how the expenses are being paid, and whether student loans, bursaries or education funds are available.
  - 3.3 Review the current parenting arrangement to determine if support should be paid by one parent to the other. Consider, specifically, joint time sharing arrangements and the income of the respective parents.
4. Amount of Child Support.
  - 4.1 Use the appropriate Federal Child support tables to determine the presumptive amount that the non-custodial parent should pay in accordance with his or her gross annual income and the number of children in issue.
    - 4.1.1 Consider only the payor's income if:
      - a. it is less than \$150,000 per year
      - b. the recipient has sole custody or custody more than 60% of the time
      - c. no special or extraordinary expenses are claimed (*Federal Child Support Guidelines*, s. 7).
      - d. no undue hardship is alleged.
    - 4.1.2 Consider the recipient's income if:
      - a. custody is split, or if shared custody, the payor has access more than 40% of the time over the course of a year (*Guidelines*, s. 9(a))
      - b. the child is over the age of majority and it would be inappropriate to apply the table amount
      - c. special or extraordinary expenses are claimed

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- d. childcare expenses are claimed
    - e. undue hardship is alleged
    - f. the payor's income is over \$150,000 per year, and it would be inappropriate to use the table amount.
- 4.2 If the spouses reside in different provinces, use the table for the province where the payor resides.
- 4.3 Consider whether there are any grounds to adjust child support level as set out in the provincial table. Consider if the amount should be increased by determining if there are:
  - 4.3.1 Any special expenses of the children for the childcare incurred because of education, employment or training of the custodial spouse.
  - 4.3.2 Special health care expenses.
  - 4.3.3 Any extraordinary education costs.
  - 4.3.4 Any extraordinary costs associated with extracurricular activities for children.
- 4.4 Consider whether the support award should be increased or decreased if there would otherwise be undue hardship to either parent or to the child. Consider factors such as:
  - 4.4.1 An unusually high level of debt reasonably incurred to support the family to earn a living.
  - 4.4.2 Significant access expenses, such as travel or accommodation costs.
  - 4.4.3 Obligations for the support of other children or previous support obligations.
- 4.5 Consider requesting specific termination dates for children who are close to the age of majority and who will likely withdraw from parental care to avoid future applications.
- 4.6 Where the payor spouse's income increases yearly, consider requesting that the child maintenance payments increase in accordance with the table amounts (to be reviewed on a yearly basis).
- 5. Income Tax Considerations.
  - 5.1 Child support payments are not included in the custodial parent's taxable income and are not deductible by payors of child support pursuant to agreements or court orders made on or after May 1, 1997.

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- 5.2 Unless child support paid pursuant to an existing agreement or order made before May 1, 1997, which has not been varied since April, 1997, it will continue to be deductible to the payor and included in the income of the recipient unless:
  - 5.2.1 The order or agreement specifically provides that the new tax rules will apply starting at a specific date, which cannot be earlier than May 1, 1997.
  - 5.2.2 The parties both sign and file a form with Revenue Canada agreeing that the new tax rules will apply after a specific date, which cannot be earlier than May 1, 1997.
  - 5.2.3 The agreement or order is varied after April 30, 1997 to change the amount of child support.
- 5.3 Consider the child tax benefit implications and the equivalent to spouse deduction.
- 6. Jurisdiction.
  - 6.1 Consider whether the application should be brought in Saskatchewan or other jurisdiction.
    - 6.1.1 If applying for an original order for child support that is not a variation, the application may be brought in Saskatchewan under the *Divorce Act*, if the parties are married, the parent seeking support resides with the child in Saskatchewan, and has so resided for one year. Alternatively, *The Family Maintenance Act, 1997* allows the application for child support unless the court orders a transfer of the proceedings to another court where the other court is deemed a more appropriate jurisdiction to determine the issue. Review Section 17 of *The Family Maintenance Act, 1997*.
    - 6.1.2 If seeking a variation of a support order under the *Divorce Act*, review Section 18(2) of the Act. If the respondent is ordinarily resident in another province, and has not accepted the jurisdiction of the Saskatchewan court, a variation order can be granted but it is provisional only until confirmed in the jurisdiction where the respondent resides.

Notes:

- 6.2 Consider whether to bring child support application under the *Divorce Act* or *The Family Maintenance Act, 1997*.

Note that *The Family Maintenance Act, 1997* has adopted the table amounts in the Federal Child support Guidelines (s. 2).

- 6.2.1 If the claimant and respondent are married, either the *Divorce Act* or *The Family Maintenance Act, 1997* can be used.
- 6.2.2 If the parents of the child have resided in a common-law relationship or have not resided in a common-law relationship but are the parents of a child, the provisions of *The Family Maintenance Act, 1997* must be utilized for child support applications.
- 6.2.3 If the claimant is not a birth parent of the child, the application for support is brought pursuant to *The Family Maintenance Act, 1997*, as it is only spouses, or former spouses, that may apply under the *Divorce Act* for child support.

Please Note:

- a. There are different age designations in the *Divorce Act*: s. 2 “the child of the marriage” and *The Family Maintenance Act, 1997* “the child.”
  - b. *The Family Maintenance Act, 1997* s. 9(c) specifies that retroactive maintenance can be ordered by the Court. Check the relevant case law if claiming retroactive support under s. 15 of the *Divorce Act*.
- 6.3 Consider whether the Court of Queen’s Bench or Provincial Court has jurisdiction to hear child support application.
- 6.3.1 Applications pursuant to *The Family Maintenance Act, 1997* may be brought in either the Court of Queen’s Bench or the Provincial Court.
- 6.3.2 Applications brought pursuant to the *Divorce Act* are brought in the Court of Queen’s Bench.

Notes:

7. Child Support Proceedings.
  - 7.1 In the Court of Queen’s Bench, commence by Petition: Rule 589.
    - 7.1.1 To initiate the child maintenance proceedings, where there are no existing orders, the Applicant must sign a Petition in Form 589. The application for the child maintenance is made pursuant to Section 15 of the *Divorce Act* and/or Section 3 of *The Family Maintenance Act, 1997*.
    - 7.1.2 The procedure involved in bringing child support applications is the same as that for the child custody and access applications. See section B above: “Custody and Access.” Review the Rules for the requirements of Financial Statements in Form 609A (see Rule 609–613).
  - 7.2 In Provincial Court:
    - 7.2.1 Commence by preparing Form A (Notice of Application), Form B (Notice to Appear) and Form D (Financial Statement). See *The Family Maintenance Act, 1997* (Provincial Court Applications), Regulations Chapter F-6.2, Regulation 1.
    - 7.2.2 A Notice to Appear must be served at least seven days prior to the hearing.
    - 7.2.3 The Respondent must file a Financial Statement and, if he or she wishes to dispute the claim; an Answer/Counterclaim in Form C must be filed.
    - 7.2.4 If access or custody of the children becomes an issue, either party should request that the file be transferred to the Court of Queen’s Bench.
  - 7.3 Consider whether an application for interim child support is required. Consider whether a voluntary payment in an appropriate amount is currently being paid.
  - 7.4 Consider whether you wish to examine for discovery on issues relating to child support.
  - 7.5 If the issue of child support cannot be resolved by agreement prior to or after the issue is determined on an interim basis, set the matter for trial, however, a pre-trial conference must be held prior to proceeding to trial.

Notes:

- 7.6 If proceeding to trial on the issue of child support, in addition to your client, consider possible witnesses, such as accountants if income is at issue for an owner/operator of a business or to put forward tax evidence.
8. Child Support By Way of Corollary Relief Proceeding.
- 8.1 This procedure is very unlikely to occur in that the Court of Queen's Bench will not grant a divorce unless the children of the marriage have been properly provided for.
9. Variation of Child Support Orders.
- 9.1 Jurisdiction.
- 9.1.1 If proceeding under the *Divorce Act*, review Section 18(2). Review your factual circumstances as to residence of the parties to determine whether the variation order will be provisional only until confirmed in the jurisdiction where the Respondent resides.
- 9.1.2 If applying for a variation pursuant to *The Family Maintenance Act, 1997*, review Section 10 of the *Act*.
- 9.2 Changes in circumstance.
- 9.2.1 When proceeding either under the *Divorce Act* or *The Family Maintenance Act, 1997*, consider Section 14 of *The Federal Child Support Guidelines*, which states that a change of circumstances is, in the case where the amount of child support includes a determination made in accordance with the applicable table, any change that would result in a different child support order or any provision thereon.
- 9.3 The procedure to be followed in varying an existing child support order is outlined in this checklist under heading 5: "Variation of Custody or Access Orders" in section B (Custody and Access) above. With the exception that the application is made pursuant to Section 17(1) of the *Divorce Act*, Section 14 of *The Federal Child Support Guidelines* and Section 10(1) of *The Family Maintenance Act, 1997*.

Notes:

10. Child Support Trials.
  - 10.1 In the Court of Queen’s Bench, the procedure involved in a child maintenance trial is effectively the same as in a custody trial (see heading 6: “Custody and Access Trials”).
  - 10.2 In Provincial Court, the date for trials on child maintenance issues are usually set on the return date for the Notice of Application. Trials are by way of viva voce evidence.
11. Appeals.
  - 11.1 As regards interim child support orders, consider the following:
    - 11.1.1 Time for appeal is limited to 30 days from the date the interim order was made in chambers. See Court of Appeal Rules and *The Court of Appeal Act, 2000*.
    - 11.1.2 Leave to appeal from an order for interim child support is not required.
  - 11.2 If you intend to appeal an order for final child support, consider the following:
    - 11.2.1 The time for appeal is limited to 30 days after the day on which the order was made, unless extended on special grounds by an order of the Court of Appeal.
    - 11.2.2 A notice of appeal does not stay execution of an order for child support. Review Court of Appeal Rule 15.
12. Enforcement of Child Support Orders.
  - 12.1 Consider provisions of *The Enforcement of Maintenance Orders Act, 1997*.
    - 12.1.1 Consider whether your client will execute an Opt-Out Form or register the maintenance order with the Maintenance Enforcement Office.
  - 12.2 Consider that Section 22 of *The Family Maintenance Act, 1997* allows maintenance agreements to be registered and enforced by the Court of Queen’s Bench.

Notes:

13. Other Considerations:
- 13.1 Death of payor.
- 13.1.1 Consider the possibility of securing the payment of child support by designating the child or other party as beneficiary of an insurance policy.
- 13.1.2 Consider the provisions of *The Dependents' Relief Act* in circumstances where no provision has been made for the child in the Will of the deceased payor.

**D. SPOUSAL SUPPORT**

1. Relevant Information.
- 1.1 Obtain information as regards the current income of both parties and assess the issues of need and ability to pay.
- 1.1.2 Obtain an employment history, for both parties, from the date of marriage to the date of separation. Make note of the following:
- a. Any time during the marriage that either party was out of the work force for any reason (e.g., for child rearing).
  - b. Any moves during the marriage, particularly if such moves were made to advance the career of one of the parties.
  - c. Any other interruption of work for any reason, including illness.
- 1.2 Obtain information as to the education level of each of the parties, including any courses taken. If your client is not currently working, obtain information as to any schooling that may be considered.
2. Entitlement.
- 2.1 Unmarried persons:
- 2.1.1 Consider the definition of "spouse" in Section 2(1) of *The Family Maintenance Act, 1997* to determine if the parties have lived together, continuously, for a period of no less than three years or could be considered to be in a relationship of some permanence (i.e., if they are the parents of a child).

Notes:

- 2.1.2 If the parties have not co-habitated for three years and have no children, there is no legal entitlement to spousal support. Consider, however, if there is a child but not a relationship of some permanence, whether spousal support should be requested for the three months prior to the birth of the child and the six months following the birth of the child. Review Section 9(f) of *The Family Maintenance Act, 1997*.
- 2.2 General entitlement.
  - 2.2.1 Review Sections 5, 6 and 7 of *The Family Maintenance Act, 1997* and Section 15(7) of the *Divorce Act*. Consider with the client the economic advantages or disadvantages to either spouse arising from the breakdown of marriage, economic hardship, issues of self-sufficiency.
  - 2.2.2 Consider prior standard of living of the parties.
  - 2.2.3 Consider applicant's ability to become self-supporting and the time and cost involved.
- 3. Amount of Spousal Support.
  - 3.1 Consider the ability to pay and the needs of the claimant. If child support is also being paid, consider the resources available after the appropriate child support level is determined. Note that child support will take priority to spousal support.
  - 3.2 Consider whether it is possible to negotiate a monthly spousal support payment with specific date of termination or whether a lump sum payment is an option.
  - 3.3 Consider whether the matrimonial property division can be intertwined with the issue of spousal support to provide, in essence, a lump sum spousal support payment through an unequal division of property.
  - 3.4 Decide whether you require expert evidence as regards to determining the economic loss as a result of work force interruption.
  - 3.5 Consider the impact of retirement and changes in income as a result, particularly with older clients.
  - 3.6 If the client receives the child tax benefit for children, consider the impact of spousal maintenance order on the child tax benefit.

Notes:

4. Income Tax Considerations.
  - 4.1 When determining the amount of spousal support, consider the deductibility of spousal support payments. The rules respecting spousal support were not changed in May of 1997 and thus, spousal support payments remain deductible and inclusive.
  - 4.2 Spousal support payments will only be deductible to the payor and included in the payor's income if:
    - 4.2.1 Payments are made pursuant to a written separation agreement or court order.
    - 4.2.2 Retroactive deductibility is only possible for the year during which the agreement is signed and the immediately preceding year. Review Revenue Canada Interpretation Bulletin IT-118R3 33,057-11, as very specific wording is required to ensure deductibility of previous payments.
    - 4.2.3 Only periodic payments, not lump sum payments, are deductible.
    - 4.2.4 Third party payments are deductible in very specific circumstances only.
5. Jurisdiction.
  - 5.1 Consider whether the application should be brought in Saskatchewan or another jurisdiction or whether an application should be made pursuant to *The Inter-jurisdictional Support Orders Act*.
    - 5.1.1 If applying for an original order for spousal support that is not a variation, the application may be brought under the *Divorce Act*, if the parties were married and one of the parties has resided in Saskatchewan for at least one year. Alternatively, *The Family Maintenance Act, 1997* allows the application for spousal support both for married persons and, in defined circumstances, unmarried persons.
    - 5.1.2 If your client is ordinarily resident in Saskatchewan, and the payor is located in another reciprocating jurisdiction, your client may start a proceeding in Saskatchewan that could result in a support order being made in that jurisdiction. (s. 5 of *The Inter-jurisdictional Support Orders Act*). If the parties are or were married, and you are seeking an order pursuant to the *Divorce Act*, you may be restricted to applying for a provisional order under Section 18 of the *Divorce Act*.

Notes:

- 5.2 If the parties have resided in a common-law relationship, or are the parents of a child, review the definition of “spouse” in *The Family Maintenance Act, 1997* to determine whether a claim for spousal support can be made.
- 5.3 Consider whether the Court of Queen’s Bench or the Provincial Court has jurisdiction to hear the spousal support application.
  - 5.3.1 Applications pursuant to *The Family Maintenance Act, 1997* may be brought in either the Court of Queen’s Bench or the Provincial Court (if outside of Saskatoon or Regina).
  - 5.3.2 Applications pursuant to the *Divorce Act* may be brought in the Court of Queen’s Bench.
- 6. Spousal Support Proceedings.
  - 6.1 Commence by Petition: Rule 589.
  - 6.2 If the Petition contains a claim for spousal support, the Petitioner is required to serve and file a Financial Statement in Form 609A and must do so with the Petition or within 10 days of issue of the Petition and prior to bringing any motion for interim relief (see Rule 610(2)).
  - 6.3 Consider whether an application for interim spousal support is required, which will be based on the need and/or ability to pay assessment.
  - 6.4 Consider whether you wish to examine for discovery on issues relating to spousal support.
  - 6.5 If spousal support cannot be resolved by agreement prior to or after the issue is determined on an interim basis, the matter will be set for trial. However, a pre-trial conference will be held prior to trial.
  - 6.6 If proceeding to trial on the issue of spousal support: in addition to your client, consider possible witnesses such as accountants or other professionals as regards the issues of income and experts on economic loss (if you wish to present such evidence).

Notes:

7. Appeals.
  - 7.1 As regards interim spousal support orders, consider the following:
    - 7.1.1 Time for an appeal is limited to 15 days from the date the interim order was made in chambers. See Court of Appeal Rules and *The Court of Appeal Act, 2000*.
    - 7.1.2 Leave to appeal from an order for interim spousal support is not required.
  - 7.2 If you intend to appeal an order for final spousal support, consider the following:
    - 7.2.1 The time for appeal is limited to 30 days after the day on which the order was made, unless extended on special grounds by an order of the Court of Appeal.
    - 7.2.2 A notice of appeal does not stay an execution of order for spousal support. Review Court of Appeal Rule 15.
8. Variation of Spousal Support.
  - 8.1 Jurisdiction.
    - 8.1.1 If proceeding under the *Divorce Act*, review Section 18(2). Review your factual circumstances as to residence of the parties to determine whether the variation order will be provisional only until confirmed in the jurisdiction where the Respondent resides.
    - 8.1.2 If applying for a variation pursuant to *The Family Maintenance Act, 1997*, review Section 10 and *The Inter-jurisdictional Support Orders Act*.
  - 8.2 Changes in circumstance.
    - 8.2.1 When proceeding either under the *Divorce Act* or *The Family Maintenance Act, 1997*, a material change in circumstance must be proved. Review with the client all circumstances existing at the date the original order for spousal support was granted and the current circumstances. If Financial Statements were filed during the original proceedings, the same should be reviewed.

Notes:

- 8.3 If there is a written interspousal contract that deals with the issue of spousal support, a determination must be made whether it is possible to overturn the provisions of the agreement.
- 9. Enforcement of Spousal Support Orders.
  - 9.1 Consider provisions of *The Enforcement of Maintenance Orders Act, 1997*.
    - 9.1.1 Consider whether your client will execute an Opt-Out Form or register the maintenance order with the Maintenance Enforcement Office.
  - 9.2 Consider that Section 11 of *The Family Maintenance Act, 1997* allows maintenance agreements to be registered and enforced as an Order of the Court of Queen's Bench.
- 10. Other Considerations.
  - 10.1 Death of payor.
    - 10.1.1 Consider the possibility of life insurance on payor as a method to secure spousal support.
    - 10.1.2 Consider including a provision in an agreement binding the estate of the payor for the spousal support payment.

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