



**Ministry of Attorney General
Justice Services Branch
Civil and Family Law Policy Office**

Family Relations Act Review

**Chapter 4
Judicial Separation**

Discussion Paper

Prepared by the Civil and Family Law Policy Office

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This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* should seek legal advice from a lawyer.

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DISCUSSION**Discussion Point (1) – Is Judicial Separation Still Needed in BC?**

Judicial separation has its roots in England in the days when getting a divorce required proof of cruelty or adultery and a private act of Parliament. People could not get a divorce from the courts, but they could get a release from the obligation to live together and an order for property division and spousal support.¹ Eventually, this process became called an action for judicial separation and became part of our law in Canada.²

A judicial separation is a court order confirming that a marriage has broken down. It doesn't change the spouses' marital status—they are still married and are not free to marry anyone else.³ In British Columbia, the BC Supreme Court can grant an application for judicial separation⁴ on grounds of adultery, cruelty, or desertion without reasonable cause for at least two years.⁵

These days, when divorces are much easier to obtain⁶, law reform bodies and provincial governments have looked at whether it makes sense to continue the concept of judicial separation.⁷ Some favour retaining it because there are people who, for religious, cultural, or other reasons, do not believe in or wish to divorce. For these people, judicial separation provides a way to rearrange their affairs, including property division and spousal support, without divorce.⁸ But these spouses have other options. They can either make an agreement,⁹ or one of them can apply to court for an order for property division or spousal support, for example, without the need for a divorce or a judicial separation.¹⁰

In British Columbia, judicial separation also carries other consequences, similar to a divorce. For example, under the *Family Relations Act* (FRA), judicial separation:

- starts the 2-year limitation period in which a spouse may apply for a court order (because one of the definitions of “spouse” under that Act is a person who applies for a FRA order within two years of a judicial separation);
- means that a person who is granted custody as part of a judicial separation also becomes the child's sole guardian (s.27(4));
- triggers an equal division of the family assets between the spouses (s.56);
- starts the 2-year limitation period in which a judge may interfere with an ante nuptial (before marriage) or post nuptial (after marriage) agreement (s.68); and
- means that each former spouse is to be considered an unmarried person in relation to property, the right to contract, and rights and obligations in civil proceedings, and is not responsible for any future debts that the other spouse incurs (s.127).¹¹

Judicial separation also triggers outcomes in other provincial acts¹² that refer to judicial separation.¹³

If judicial separation were no longer available in British Columbia, or no longer included in the FRA as an event with consequences similar to divorce, spouses who do not wish to divorce could decide to live separately and would be treated the same as all other

separated but still married spouses under the law. This is the case in other parts of Canada where judicial separation is not available as an alternative to divorce.¹⁴

Alberta recently replaced judicial separation with a declaration of irreconcilability – a court order that the spouses have no prospect of reconciling.¹⁵ Such a declaration triggers a spouse’s right to seek spousal support or an equal share of the family property.¹⁶ In British Columbia, the FRA already allows a judge to make an order that the spouses have no reasonable prospect of reconciling and this triggers a spouse’s right to an equal division of family property.¹⁷

In those parts of Canada where judicial separation is available as an alternative to divorce, it generally does not have the consequences that it does in British Columbia.¹⁸

Questions

1. Are there reasons why judicial separation should continue to be available as an alternative to divorce?
2. If judicial separation continues to be available in British Columbia, should it continue to carry rights and obligations and other consequences under the FRA? Or should married couples who wish to separate without divorcing be treated like other separated but still married spouses, under the FRA?
3. If all references to judicial separation are removed from the FRA, should they be replaced with references to a declaratory judgment– a court order that the spouses have no reasonable prospect of reconciling? This would expand the use of a declaratory judgment beyond its current use which is to trigger a spouse’s right to an equal division of family property.

Please provide your [feedback](#).

ENDNOTES

¹ See e.g., J.T. Irvine, “*The Queen’s Bench Act, 1998: Old Wine in New Bottles*” (2003), 66 Sask. L. Rev. 63 at paras.137-143.

² Before 1857, the power of the court to excuse spouses from living together was called divorce *a mensa et thoro*. The *Divorce and Matrimonial Causes Act, 1857* replaced this power with a similar action – judicial separation. In addition to releasing spouses from the duty of cohabiting with each other, judicial separation under the *Divorce and Matrimonial Causes Act, 1857* allowed wives to own their own property and to enter into contracts and be a party to a legal action, independently of their husbands. Married spouses in British Columbia can own property and enter into contracts independently of each other (see: *Law and Equity Act*, R.S.B.C. 1996, c.253 at s.60). See e.g., J.T. Irvine, “*The Queen’s Bench Act, 1998: Old Wine in New Bottles*” (2003), 66 Sask. L. Rev. 63 at paras.137-143.

³ See e.g., *Tatlock v. Tatlock*, 71 B.C.L.R. (2d) 194 (S.C.), affirmed [1994] B.C.J. No. 403 (C.A.); *Farwell v. Farwell* (1979), 17 B.C.L.R. 97 (S.C.); C. Davies, Family Law in Canada (Toronto: Carswell, 1984) at p.123; J.G. McLeod, The Conflict of Laws (Calgary: Carswell, 1983) at p.702.

⁴ British Columbia, *Rules of Court (Supreme Court)*, R.1; *Family Relations Act*, R.S.B.C. 1996, c.128 at ss.1 and 5; *Divorce Act*, R.S., 1985, c.3 (2nd Supp.) at ss.1 and 3.

⁵ *Divorce and Matrimonial Causes Act, 1857* (20 & 21 Vict., c.85) [England] and see e.g., *Tatlock v. Tatlock*, 71 B.C.L.R. (2d) 194 (S.C.), affirmed [1994] B.C.J. No. 403 (C.A.); C. Davies, Family Law in Canada (Toronto: Carswell, 1984) at 126.

⁶ For example, in Canada, a spouse can get a divorce if the other spouse committed adultery or treated him or her with cruelty during the marriage, but also simply if the spouses lived separate and apart for one year (*Divorce Act*, R.S., 1985, c.3 (2nd Supp.) at s.8).

⁷ Alberta Law Reform Institute, “Report No.65 – *Domestic Relations Act* – Family Relationships: Obsolete Actions” (March 1993); Scottish Law Reform Commission, “No.135 – Report on Family Law” (January 1992); Law Commission (England), “No. 192 – Family Law – The Ground for Divorce” (October 1990); J.T. Irvine, “*The Queen’s Bench Act, 1998: Old Wine in New Bottles*” (2003), 66 Sask. L. Rev. 63 at paras. 137-143.

⁸ See e.g., J.T. Irvine, “*The Queen’s Bench Act, 1998: Old Wine in New Bottles*” (2003), 66 Sask. L. Rev. 63 at fn 224.

⁹ *Family Relations Act*, R.S.B.C. 1996, c.128 at ss.28, 34, 61, 65, 68 and s. and see: Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia)

¹⁰ *Family Relations Act*, R.S.B.C. 1996, c.128 at s.1 (“spouse”), ss.56-57, s.89 and s.93.

¹¹ Other references to judicial separation in the *Family Relations Act*, R.S.B.C. 1996, c.128 include: s.5(1), s.61(2), s.93(1) and s.123(4).

¹² See e.g., *Land Titles Act*, R.S.B.C. 1996, c.250 at s.215(6); *Pension Benefits Standards Act*, R.S.B.C. 1996, c.352 at s.63(3); *Wills Act*, R.S.B.C. 1996, c.489 at s.16.

¹³ For example, under s.16 of the *Wills Act*, R.S.B.C. 1996, c.489, judicial separation (as well as divorce or annulment) has the effect of canceling any gifts to a spouse left by the other spouse in their will. The British Columbia Law Institute has recently suggested amending this section to say that a gift will be canceled when a triggering event under the FRA [s.56] occurs (in the case of spouses covered by Part 5 [family property] of the FRA) or when the relationship ends (in any other case). (British Columbia Law Institute, “Wills, Estates and Succession: A Modern Legal Framework” (Report No.45, June 2006) at p.148).

¹⁴ See e.g., Alberta (*Family Law Act*, S.A. 2003, c.F-4.5 at s.83 & s.108) and Ontario, Northwest Territories and Nunavut (see: J.D. Payne and M.A. Payne, Canadian Family Law (Toronto: Irwin Law, 2001) at c.7).

¹⁵ *Family Law Act*, S.A. 2003, c.F-4.5 at s.83 & s.108 – Alberta still lists judicial separation as a triggering event for family property division under its *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at ss.5-7, but judicial separation is no longer available in the Alberta.

¹⁶ *Family Law Act*, S.A. 2003, c.F-4.5 at s.57(2) and *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at ss.5-7.

¹⁷ *Family Relations Act*, R.S.B.C. 1996, c.128 at s.56 & s.57.

¹⁸ See e.g., Saskatchewan refers to judicial separation in defining what property is exempt from distribution when spouses break up – specifically, property that is acquired by one spouse after judicial separation (*The Family Property Act*, S.S. 1997, c.F-6.3 at s.23(3)).