



Family Law 101

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DISCLAIMER:

This presentation does not include legal advice.

If you, your client or someone you care about requires legal advice, please consult with a lawyer.

Outline

- Helping Our Clients Get Effective Legal Services and Outcomes
- The Sources and Structure of Family Law
- Resolving Family Law Matters
- Central Legal Issues and Concepts
- Resources

What is Family Law?



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- When relationships break down, family law governs how children will be cared for, child support, spousal support, and division of property and debts.
 - Family law also provides remedies intended to protect people from family violence.
 - Family law issues can be resolved with or without counsel, through negotiations, mediation, or litigation (court proceedings)

How to support our clients:

- Encourage them to seek legal advice
- Encourage and assist them to apply for legal aid
- Help them understand key family law concepts and terms
 - Direct them to helpful websites, like the Legal Aid website
 - Encourage them to take the Parenting After Separation course
- Help them consider what arrangements will work for them and be proactive in pursuing them
- Help them collect evidence (depends on the issues)
- Help them to communicate the factual details relevant to the legal issues

Which “family matters” can be resolved with “family law”?

Broadly speaking, there are three main categories:

- ❖ Support: Child & Spousal
- ❖ Property: division of family assets and debts
- ❖ Parenting Arrangements:
 - Parenting time
 - Parenting responsibilities
 - Guardianship
 - Relocation

How can Family Law Matters be Resolved?

Broadly speaking, two main paths to resolution:

Out of court > > > **Agreement**

Court > > > **Court Order**

- i. Parties often use both.
- ii. Engagement influenced by attitudes, fears, beliefs, values, circumstances, resources (especially \$\$), legal advice, etc.

Out of Court Settlement

- Lawyers and legal professionals have a duty to encourage parties to resolve issues, to the extent possible, out of court
- Trying out of court resolution is almost always advantageous, even if one of the parties has already started court proceedings.

Out of Court Settlement

→Negotiations (with or without lawyers)

→Mediation – includes Family Justice
Counsellor services

→Arbitration and med-arb.

→Collaborative process

In addition, the court process itself includes
ADR processes:

→BCPC: Family Management Conferences

→BCSC: Judicial Case Conferences and
settlement conferences.

Going to Court

- A judge decides on some or all of the issues
- Adversarial process and can erode relationship between the parties
- Procedurally and financially onerous
- Parties lose control over process and outcomes

BUT...

- Sometimes, the only way to get both parties to the table for out of court dispute resolution, or to provide disclosure, is to commence court proceedings.
- Court process includes ADR steps.

Family Law Legislation

→ *Divorce Act* (“DA”):

- Federal law - applies only to married spouses;
- Deals with divorce, parenting arrangements, child support, and spousal support;
- Does NOT deal with property/debt
- Orders under the *Divorce Act* can only be sought in Supreme Court.

→ *Family Law Act* (“FLA”):

- Provincial law - applies to both married and unmarried spouses;
- Deals with parenting arrangements, child support, spousal support, division of property and debts, conduct orders, and protection orders.
- Does NOT deal with divorce;
- Orders can be sought in either Provincial Court or Supreme Court (except for property and debt: Supreme Court only).

This presentation will focus on the *Family Law Act* but does address recent changes made to the *Divorce Act*

FLA or DA: Quick Guide

- Family law case in at the BC Provincial Court -> FLA only.
- Parties were never married -> FLA only.
- Parties are or were married AND the case is at the BC Supreme Court: either or both of the DA and the FLA (depending on the case and the issues).

Family Law Courts & Rules

Two courts that hear family law matters: Supreme Court and Provincial Court

“Jurisdiction”: what types of matters the court can deal with.

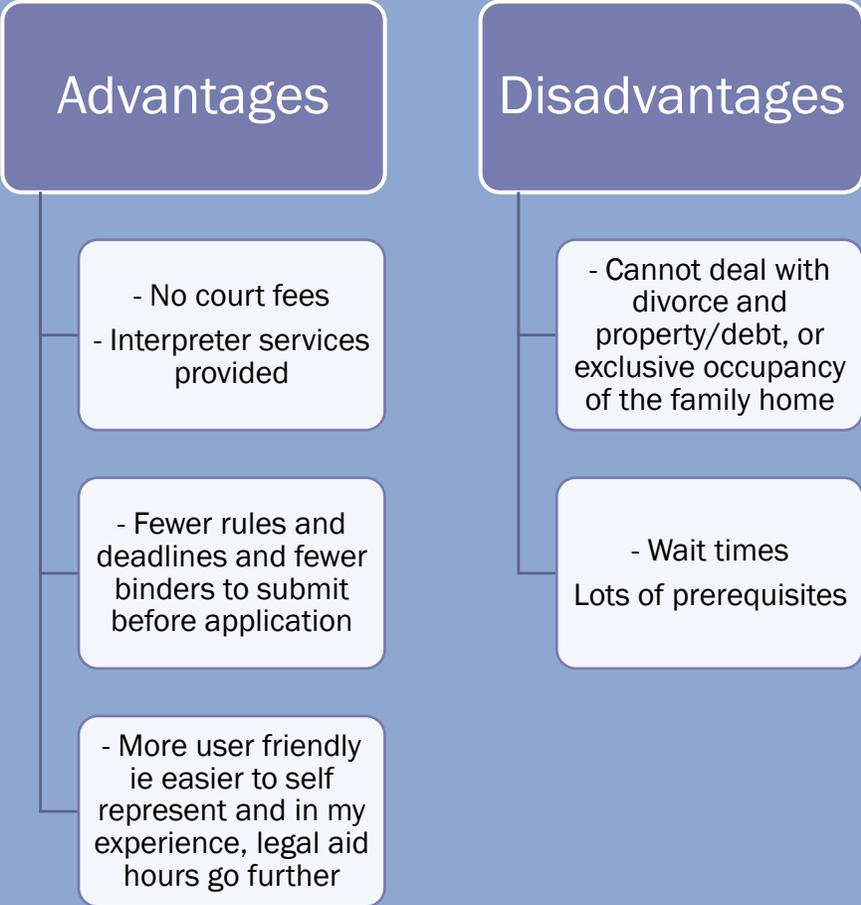
“Rules”: each Court has its own set of family law rules. The rules set out:

- i. The steps in the court process.
- ii. The forms that have to be used.
- iii. What each party has to do to move forward in the court process.
- iv. Basically, the “how to” of the court.

“Practice Directions”: supplement the rules.

Courts in BC – BC Provincial Court

BCPC can only consider FLA matters BUT cannot deal with property/debt and with exclusive occupancy of the family home.



BCSC can consider both FLA
and DA matters

Courts in BC – BC Supreme Court

Advantages

- Inherent jurisdiction
so you can ask for the
orders that you want

- Can deal with all
family matters:
property, divorce, all
child related issues,
support, protection

Disadvantages

-fees when you begin
an action and for each
step

-Rules can be difficult
for self-represented
litigants to follow.

-Costs can be ordered
against you

Terms and phrases to **AVOID**

Custody and access: old terms that no longer exists.

Visitation: not a term in BC.

Sole guardianship: old term that no longer exists

“Give” time with the child, “allow” time with the child, etc.

Diagnosing the other party with mental illness.

“Legalese” (just use plain language).

Myths and misconceptions

“legal separation:” not a recognized concept in BC.

Relevance of adultery (and other behaviours) to family law issues.

Parent who doesn't pay child support does not get to spend time with the child.

Parent who pays child support is automatically entitled to spend time with the child.

Automatic “50-50” in parenting arrangements.

Key FLA Term: “Guardianship”

- Parents are generally guardians (s.39);
 - i. Parents who have lived together with the child are guardians and remain guardians after separation.
 - i. A bio parent who has never lived with the child is not a guardian unless: order, agreement, or “regularly cares” for the child.
- Only guardians can have “Parental Responsibilities” and “Parenting Time” with respect to a child (FLA s.40(1));
- People who are not guardians may have “contact” with a child (ss. 58 and 59)

Divorce Act

- Guardianship is not a term used under the DA

Key Term: Parental Responsibilities (FLA)

- The ability to make decisions regarding the child's residence, education, health, etc.
- Section 41 of the Family Law Act lists parental responsibilities;
- Parental responsibilities can be allocated to one or more guardians only or to all guardians acting together.
 - Shared parental responsibilities = duty to consult the other guardian before a decision is made and attempt to reach agreement. If no agreement, may need to go to court. Sometimes, one party is given decision-making power, and the other can apply to the court to review the decision.
- Must be exercised in the best interests of the child

List of Parental Responsibilities

(Section 41 of the Family Law Act):

- (a) making **day-to-day decisions** affecting the child and having day-to-day care, control and supervision of the child;
- (b) making decisions respecting **where the child will reside**;
- (c) making decisions respecting **with whom the child will live and associate**;
- (d) making decisions respecting the child's **education and participation in extracurricular activities**, including the nature, extent and location;
- (e) making decisions respecting the child's **cultural, linguistic, religious and spiritual upbringing and heritage**, including, if the child is an Indigenous child, the **child's Indigenous identity**;
- (f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to **medical, dental and other health-related treatments** for the child;
- (g) applying for a **passport, licence, permit, benefit, privilege** or other thing for the child;
- (h) giving, **refusing or withdrawing consent for the child**, if consent is required;
- (i) **receiving and responding to any notice** that a parent or guardian is entitled or required by law to receive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
 - (i) starting, defending, compromising or settling any proceeding relating to the child, and
 - (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising **any other responsibilities** reasonably necessary to nurture the child's development.

Key Term: Decision- Making Responsibility (DA)

Decision-making responsibility:

Responsibility for making significant decisions about a child's well-being, including in respect of

- (a) health;
- (b) education;
- (c) culture, language, religion and spirituality; and
- (d) significant extra-curricular activities;

→ Decision-making responsibility may be allocated to either spouse, both spouses, a person who is a parent or stands in place of a parent, or any combination.

→ Unless otherwise ordered, a person with parenting time or decision-making responsibility is entitled to request from another person with PT or DMR or from others information about the child's well-being. (DA s.16.4)

Key Term: Parenting Time



FLA (s.42) – Parenting Time

The time that the child is in the care of a guardian (including school time, etc.)

- Subject to an order or agreement, a person who has parenting time may make day to day decisions during their time.

DA (s.16.2(1)) - Parenting Time

The time that the child is in the care of a spouse/former spouse, or other categories of persons listed in the DA (including school time, etc.)

- Parenting time may be subject to terms, such as supervision (entirely or for transitions), communications with the other parent, etc.

Key Term: Contact



FLA s.58-59

- Contact with a person who is not a guardian, by court order or by an agreement with all the guardians who have authority to decide who the child will associate with.

Examples: Biological parents who are not guardians, grandparents, other close family members.

DA s.16.5

- Court-ordered time with a person who is not a spouse.

Can be in person or by other types of communications.

The Test: Best interests of the Child

- “Best interests of the Child”
 - i. Only the best interests of the child must be considered when making agreements or orders regarding guardianship, parenting arrangements or contact with a child (FLA s.37(1). DA also says only BIC considered (DA 16(1))
 - ii. All of the child’s needs and circumstances must be considered to determine what is in the best interests of a child.
 - iii. FLA section 37(2) lists factors to consider when determining the best interests of a child under the FLA.
 - iv. DA sections 16(2) and (3) lists factors to consider under the DA.

FLA Best interests of the child factors

- a) the child's health and emotional well-being;
- b) the child's views, unless it would be inappropriate to consider them;
- c) the nature and strength of the relationships between the child and significant persons in the child's life;
- d) the history of the child's care;
- e) the child's need for stability, given the child's age and stage of development;
- f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

FLA Best interests of the child factors cont'd

- g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

FLA: Additional Best Interests Factors

- An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being (37(3)).
- Past conduct may only be considered if it substantially affects any of the best interests factors, and only to the extent that it affects that factor.

FLA Family Violence Factors (s. 38)

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

No Presumptions about Parenting Arrangements

FLA: no parenting arrangement is presumed to be in the child's best interests, such as equal parenting time, sharing parental responsibilities, or making decisions jointly or separately (s.40(4)).

DA: Parenting time - In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child (interpreted as no presumptions).

Decision-making responsibilities: no presumptions.

Examples of schedules:

- Equal time: Week on/Week off; 4-3-3-4/2-2-5-5
- Unequal parenting time: every other weekend plus some weekday time.

Key Terms: Child Support

Child Support is the right of the child (parents cannot contract out of child support).

Two components:

“Basic” child support

- *Federal Child Support Guidelines* – mandatory “table” amount (with exceptions).
- Monthly child support calculated based on where the payor lives, the number of children, and the payor’s gross annual income.
- Online calculators available (<https://www.justice.gc.ca/eng/fl-df/child-enfant/2017/look-rech.aspx>).

Special and extraordinary expenses (“section 7 expenses”)

- Examples: child care, health care expenses, some educational and extracurricular activities.
- Shared by the parties in proportion to their incomes.

What options are there for a person experiencing family violence?

- Family violence is relevant in the determination of the best interests of the child when making parenting arrangements (FLA) or parenting orders (DA).
 - i. Even if violence is directed at a spouse, the *FLA* and *DA* recognize that it can still be harmful to a child.
 - ii. Family violence may be relevant to financial issues in limited circumstances.
- Clients experiencing family violence can apply for a Family Law Protection Order under the FLA
 - i. An order made by a judge in either Provincial Court or Supreme Court;
 - ii. Lists conditions that the person against whom the protection order is made must follow (examples: restrictions on communications, attending at specific places, following the other person, possessing weapons)
 - iii. Can also apply for conduct orders and/or an interim order for exclusive use of the family home.
- Caution re denial of parenting time (FLA s. .

Denial of parenting time or contact under order or agreement (FLA ss. 61 and 62)

The consequences of denying parenting time or contact depend on whether the denial is “wrongful” or “not wrongful,” based on the test in the FLA. Denial is NOT wrongful in the following circumstances (s. 62):

- (a) the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised;
- (b) the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised;
- (c) the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written statement, by a medical practitioner or nurse practitioner, indicating that it was not appropriate that the parenting time or contact with the child be exercised;
- (d) in the 12-month period before the denial, the applicant failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact with the child;
- (e) the applicant
 - (i) informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, and
 - (ii) did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all;
- (f) other circumstances the court considers to be sufficient justification for the denial.

Consequences of denying parenting time or contact (s. 61 and 62)

- Compensatory (“make up”) parenting time, regardless whether denial was wrongful or not.
- If denial was wrongful – various potential consequences, including:
 - i. Fines or other payments.
 - ii. Reimburse other person for expenses “reasonably and necessarily” incurred as a result of the denial (travel, loss of wages, child care, etc.).
 - iii. Order to attend counseling or other programs.
 - iv. Order to attend family dispute resolution program.
 - v. Order that transition of the children will be supervised.
 - vi. Post security with the court or report to the court/other entity.

The court may make similar orders when a person repeatedly fails to exercise parenting time or contact under an order or agreement.

Applying for a
protection
order: what
will the court
want to know?

Is the protection order for an “at risk family member”? (s. 183)

Is family violence likely to occur?
(s. 183)

Do any of the listed risk factors,
or any other risk factors, apply?
(s. 184)

Family Violence: FLA Definition

“Family Violence” includes:

- a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- b) sexual abuse of a family member,
- c) attempts to physically or sexually abuse a family member,
- d) psychological or emotional abuse of a family member, including
 - a) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - b) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - c) stalking or following of the family member, and
 - d) intentional damage to property, and
- e) in the case of a child, direct or indirect exposure to family violence;

Family member
(s. 1) and at risk
family member
(s. 182) under
the *FLA*

- "family member", with respect to a person, means
 - the person's spouse or former spouse,
 - a person with whom the person is living, or has lived, in a marriage-like relationship,
 - a parent or guardian of the person's child,
 - a person who lives with, and is related to,
 - the person, or
 - a person referred to in any of paragraphs (a) to (c), or
 - the person's child,
- and includes a child who is living with, or whose parent or guardian is, a person referred to in any of paragraphs (a) to (e).
- "At risk family member:" a person whose safety and security is or is likely at risk from family violence carried out by a family member

Mandatory Risk Factors to Consider under the FLA (s. 184)

- (a) any history of family violence by the family member against whom the order is to be made;
- (b) whether any family violence is repetitive or escalating;
- (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
- (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
- (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
- (f) the at-risk family member's perception of risks to the at-risk family member's own safety and security;
- (g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

Additional
mandatory risk
factors if a child
is a family
member (s. 185)

(a) whether the child may be exposed to family violence if an order under this Part is not made, and

(b) whether an order under this Part should also be made respecting the child if an order under this Part is made respecting the child's parent or guardian.

What if each party is applying for protection order against the other?

s. 184(2)

The court must consider whether the order should be made against one person only, taking into account

- (a) the history of, and potential for, family violence,
- (b) the extent of any injuries or harm suffered, and
- (c) the respective vulnerability of the applicants.

s. 184(3)

For the purposes of subsection (2), the person who initiates a particular incident of family violence is not necessarily the person against whom an order should be made.

Protection
orders
“what ifs”
(s. 184(4))

The court may make a protection order regardless of whether:

- (a) an order for the protection of the at-risk family member has been made previously against the family member against whom an order is to be made, whether or not the family member complied with the order;
- (b) the family member against whom the order is to be made is temporarily absent from the residence;
- (c) the at-risk family member is temporarily residing in an emergency shelter or other safe place;

More
protection
orders
“what ifs”

The court may make a protection order regardless of whether:

(d) criminal charges have been or may be laid against the family member against whom the order is to be made;

(e) the at-risk family member has a history of returning to the residence and of living with the family member against whom the order is to be made after family violence has occurred;

(f) an order under section 225 [conduct orders restricting communications] has been made, respecting the at-risk family member, against the family member against whom the order is to be made.

Protection orders: additional points

- Can be made without notice; if so, the other party may apply to set aside (s. 186).
- Unless the order says otherwise, it expires after one year (s. 183(4)).
- The court may change, terminate, and extend protection orders (s. 187).
- Breaches of protection orders are addressed under the Criminal Code (as a criminal offence).
- If conflict or inconsistency between the protection order and another order (not a PO) under the FLA, the portions of the other order that are in conflict/inconsistency are suspended until either order is changed or the protection order is terminated (s. 189).
- Must be separate from any other orders and in a specific form (s. 183(5) and court rules).

Conduct orders

→ May be made for one or more of these purposes (s. 222):



(a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;



(b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;



(c) to prevent misuse of the court process;



(d) to facilitate arrangements pending final determination of a family law dispute.



Enforcement mechanisms include fines or other payments.

Examples of conduct orders (ss. 223-227)

- Case management (s. 223).
- Attend dispute resolution process, counselling, or other programs/services, including payment (s. 224).
- restrict communications, unless a protection order would be more appropriate (s. 225).
- Require payment of specified expenses for residence (s. 226(a)).
- Prohibit termination of specified utilities (s. 226(b)).
- Require a person to supervise removal of personal belongings from the residence (s. 226(c)).
- Various other conduct orders in relation to the purposes listed in s. 222 (previous slide).

Resources

- BC 211
- Rise Women's Legal Centre
- Legal Aid BC – website and client services
- Access Pro Bono
 - 30 minutes free summary legal advice
 - Virtual Family Mediation Program
 - Lawyer referral service
- Amici Curiae – volunteers help complete court forms
- Clicklaw Wikibooks -
https://wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law
- The pro bono project of the BC collaborative roster society (<https://www.bccollaborativerostersociety.com/pro-bono-collaborative-family-law-project/about/>)



Rise 
WOMEN'S LEGAL CENTRE

Questions?

NOT LEGAL ADVICE

THANK YOU!

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Best interests factors under the Divorce Act

Sections 16(1) and 16(2):

Best interests of child

16 (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.

Primary consideration

(2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Best interests factors under the DA (s. 16.3)

(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

- (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
- (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
- (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
- (d) the history of care of the child;
- (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

Best interests factors under the DA: Cont.

(g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

(j) any family violence and its impact on, among other things,

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Factors relating to family violence (s. 16(4))

(4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:

- (a) the nature, seriousness and frequency of the family violence and when it occurred;
- (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
- (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
- (d) the physical, emotional and psychological harm or risk of harm to the child;
- (e) any compromise to the safety of the child or other family member;
- (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
- (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
- (h) any other relevant factor.

Past Conduct (s. 16(5))

Past conduct

(5) In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.