

Stop Pulling Your Hair Out! A Guide to Legislation for Family Law Orders

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Notes:

Note #1: This Guide is prepared from the perspective of the East Region of the Ontario SCJ. All of the sites of the East Region have Unified Family Courts (CJA s. 21). For this reason, I do not address jurisdictional issues between OCJ and SCJ.

Note#2: This is simply a Guide, and a work in progress. It is probably not complete, and may contain errors. If you find errors, or places for improvement, please let me know and I will correct it.

1. What? A New Form for Family Orders

Effective March 1, 2021, Family Orders should stipulate the legislation under which the order is made. See: [Form 25 Family Law Orders \(General\)](#)

2. Why?

To clarify the applicable legislation on the face of the order.

To clarify appeal routes. In general, appeals of SCJ orders under provincial legislation lie to the Divisional Court, and appeals of SCJ orders under the *Divorce Act* lie to the Court of Appeal. See: CJA, s.6 and 19, and [Family Law Appeals Routes](#).

3. The Challenge:

Judges frequently receive draft orders that are improperly prepared. Parties, whether represented by counsel or not, often provide draft orders that simply list all of the orders under the generic section of the form, as a type of “catch-all” approach, or that list orders under the incorrect legislation. This leaves us with a bit of a mess that needs to be sorted out.

My experience is that parties and counsel are often not reliable when it comes to identifying the applicable legislation. The skill of identifying applicable jurisdiction seems to be as scarce as proper family law pleadings.

When dealing with motions to change, the court may have difficulty confirming the applicable legislation if the existing order does not stipulate the legislation on its face.

It is also not uncommon for previous consent orders to refer to the wrong legislation. For example, consent orders may refer to a definition under the *Divorce Act*, such as for “child of the marriage”, when the parties were not married. Consent orders may refer to the federal *Child Support Guidelines*, when the child support order is made under provincial legislation.

4. Some (Hopefully) Helpful Guidelines on Applicable Legislation:

a. General Jurisdictional Principles

The Constitution – Back to Basics

- The federal government has exclusive jurisdiction over marriage and divorce (*Divorce Act*).
- The provincial government has exclusive jurisdiction relating to the solemnization of marriage, property rights, and the administration of justice, including procedure in civil court.
- Support and parenting are provided for under both federal and provincial legislation. Claims for support and parenting arising in divorce proceedings are governed by the *Divorce Act*. Claims for support and parenting arising independently of a divorce are governed by the *Family Law Act* (support) and the *Children’s Law Reform Act* (parenting).

The Doctrine of Paramountcy

- Where federal and provincial legislation both apply, federal legislation is paramount and prevails to render the provincial legislation inoperative.
- Consistent with the doctrine of paramountcy, the *Family Law Act* (s.36) and *Children’s Law Reform Act* (s.27) provide that if an action for divorce is commenced under the *Divorce Act* (Canada), any application for support or parenting that has not yet been determined is stayed except by leave of the court.

b. Easy Cases – Orders in areas of exclusive provincial or federal legislation. For example:

<u>Area of Fed/Prov Exclusive Jurisdiction</u>	<u>Applicable Legislation</u>
Adoption and Openness Orders	Child, Youth and Family Services Act, Part VIII
Certificate of Pending Litigation	Courts of Justice Act, s.103
Child Protection Orders	Child, Youth and Family Services Act, Part V
Child Support orders and variations where parties were never married	Family Law Act Part III
Children’s Lawyer	Courts of Justice Act s.89, s.112
Contact orders where there is a Parenting Order under the Divorce Act	Divorce Act s.16
Contact orders where there is no parenting order under the Divorce Act	Children’s Law Reform Act Part III
Costs	Family Law Rules r.24, under CJA
Damages for tort claims such as assault, battery, negligence, breach of privacy, defamation, intentional infliction of mental suffering	common law
Damages for unjust enrichment	law of equity
Declaration of Parentage	Children’s Law Reform Act, Part I
Declarations of Constructive trusts	law of equity
Determination of questions of title between spouses	Family Law Act, s. 10
Dispensing with Consent to Change a Child’s Name	Change of Name Act s.5
Divorce	Divorce Act s.8
Equalization of net family property	Family Law Act, s. 9

Foreign Divorce Recognition	Divorce Act s.22
Guardianship and Disposition of Child's Property	Children's Law Reform Act ss.46-60
Hague Convention on the Civil Aspects of International Child Abduction	Children's Law Reform Act, s.46
Interest - Prejudgment and post-judgment	Courts of Justice Act, ss.128 and 129
Matrimonial home - sale	Family Law Act s. 24 and Partition Act
Matrimonial home orders	Family Law Act, Part II, ss.23, 24
Mental Examination	Courts of Justice Act, s.105
Parenting assessments	Children's Law Reform Act s.30
Parenting where parties were never married	Children's Law Reform Act Part III
Preservation and Security orders related to matrimonial property	Family Law Act, ss.12, 13
Procedural Orders under the Family Law Rules	Family Law Rules, under Courts of Justice
Publication Bans - Confidentiality/Sealing Orders in Applications under the CLRA	Children's Law Reform Act, s.70
Publication Bans generally	Courts of Justice Act, ss.135, 137
Publications Bans under child protection proceedings	Child, Youth and Family Services Act s.87
Restraining Orders	CLRA (s.35), FLA (s.46), CJA (s.101), or CYFSA (s.137)
Secure Treatment Orders	Child, Youth and Family Services Act, Part VII
Setting Aside a Domestic Contract	Family Law Act, s.56
Spousal Support orders and variations where parties were never married	Family Law Act Part III

Support Deduction Orders	Family Responsibility and Support Arrears Enforcement Act, 1996, S.O, s.10
Support Order Enforcement Clause required on all support orders	Family Responsibility and Support Arrears Enforcement Act, 1996, S.O, s.9
Variation of corollary relief terms of a Divorce Judgment	Divorce Act
Vexatious Litigant Order	Courts of Justice Act, s.140

c. More Challenging Cases – Orders in areas of Overlapping Jurisdiction – Parenting, Child Support and Spousal Support

Where parties were married, either federal or provincial legislation may apply to parenting, child support and spousal support.

If the *Divorce Act* applies, it is paramount to provincial legislation that is operationally incompatible with it.

But the court can apply provincial legislation even if there is federal legislation in the field as long as applying the provincial legislation is not operationally incompatible with the federal legislation.

Claims for corollary relief may be made at the same time as the divorce or after (*Divorce Act* ss. 3, 4). An uncontested divorce that is silent on corollary relief does not bar a subsequent application for corollary relief.

For married spouses, determining whether the *Divorce Act* or provincial legislation depends on how the matter is plead and, in cases of variation, under what legislation the previous order was made.

Keep in mind that there is no corollary relief jurisdiction under the *Divorce Act* where parties are divorced by a valid foreign divorce.[*DA* s.4, [Rothgiesser v. Rothgiesser 2000 CanLII 1153 \(ON CA\)](#), [Okmyansky v. Okmyansky 2007 ONCA 427 \(CanLII\)](#)]. Where there is a valid foreign divorce, a court will likely still have jurisdiction to deal with parenting and child support under provincial legislation, but not spousal support because “former spouses” do not qualify for support under the *Family Law Act*.

Circumstances	Applicable Legislation for Parenting, Child Support and Spousal Support Orders
If the parties were married and the proceeding includes a claim for a divorce	<i>Divorce Act</i> . But a final order for corollary relief must be part of the Divorce Order, or be made after the divorce is granted.
If the parties were married, are not divorced, and neither seeks a divorce	<i>Children's Law Reform Act</i> and <i>Family Law Act</i>
If the parties are divorced, and the divorce order includes terms for corollary relief	<i>Divorce Act</i> s.17 - corollary relief in a Divorce Order can only be varied under the <i>Divorce Act</i>
If the parties are divorced, and the divorce order is silent on corollary relief	Either the <i>Divorce Act</i> or the <i>Children's Law Reform Act/Family Law Act</i> , depending how it is plead. A party may

	<p>start an originating Application under either legislation. EXCEPT for spousal support, which must be claimed under the <i>Divorce Act</i> because “former spouses” do not qualify for support under the <i>Family Law Act</i>.</p>
<p>If the parties obtained an order for parenting, child support or spousal support under provincial legislation and subsequently divorced, and the divorce order is silent on corollary relief</p>	<p>Either the <i>Divorce Act</i> or the <i>Children's Law Reform Act/Family Law Act</i>, depending how it is plead.</p> <p>A party may bring a motion to change the existing order under provincial legislation, or start an originating Application for corollary relief under the <i>Divorce Act</i>. [see, for example, Houle v. Trottier 2012 ONSC 6661 (CanLII)]</p> <p>This applies to child and spousal support terms of a separation agreements filed under s.35 of the FLA that become enforceable and variable as an order under the FLA (FLA ss.35, 36). EXCEPT that spousal support agreements filed under s.35 <u>after</u> the divorce is granted are not variable under the FLA (or the DA), which means that an originating Application for spousal support must be made under the <i>Divorce Act</i>. [Stobo v Stobo 2016 ONSC 5805 (CanLII); Verhey v Verhey 2017 ONSC 837 (CanLII); Huazarik v. Fairfield 2004 CanLII 48161 (ON SC)].</p>

5. Practical Tips

- a. Attempt to identify the applicable legislation from the earliest stage, optimally the initial case conference.
- b. Deal with the applicable legislation in your endorsements - either by stating what the applicable legislation is, or identifying that the applicable legislation is an issue that needs to be determined and require the parties to file material on this issue.
- c. Review any previous orders to attempt to determine under what legislation the order was made. This may require reviewing pleadings. If necessary, require parties to file copies of previous orders and pleadings.

- d. If the parties are divorced, require parties to file a copy of the divorce order to confirm if it deals with any corollary relief items.
- e. If a divorced spouse is seeking to change spousal support in a separation agreement that was filed under s.35 of the FLA, check the date the agreement was filed. If the agreement was filed after the divorce was granted, spousal support must be claimed with under the *Divorce Act*.
- f. It is not uncommon to find a previous final order for corollary relief terms that was made, on consent, as a separate order from the divorce order, and that was made prior to the divorce being granted. This is a problem – because final orders for corollary relief should be made at the same time as the divorce, or after the divorce. You will need to consider how to deal with these, and you may need to review the pleadings to do so. If the order for parenting and support arose from the divorce proceeding, you may be prepared to consider it as an order made under the *Divorce Act*, but there is an issue as to whether such a final order for parenting or support order under the *Divorce Act* is validly made, if granted before the divorce.

g. Examples (uses the format of the new form 25)

PURSUANT TO THE *DIVORCE ACT (CANADA)*

- divorce
- corollary relief – parenting, child support, spousal support
- contact orders where there is a parenting order under the Divorce Act
- The court’s jurisdiction to make parenting and contact orders under s.16.1 and 16.5 of the *DA* is broad, including “to provide for any other matter that the court considers appropriate” (DA s.16.1(4), s. 16.5(5))
- To attend a family dispute resolution process (DA s.16.1(6))
- Relocation (DA s.16.1(7))
- Prohibition of removal of the child from a geographic area (DA s.16.1(9), 16.5(8))

PURSUANT TO THE *CHILDREN’S LAW REFORM ACT*

- Declarations of parentage, including orders for genetic testing to determine parentage (*CLRA* Part I);
- Parenting and contact orders;
- The court’s jurisdiction to make parenting and contact orders under s.28 of the *CLRA* is broad, including any additional orders that the court considers necessary and proper in the circumstances, including several “restraining-type” orders under *CLRA* s.28(1)(c);
- Variation of parenting and contact orders, except for parenting orders made under the *Divorce Act (Canada)* (*CLRA* s.29);
- parenting assessments (*CLRA* s.30);
- mediation (*CLRA* s.31);
- Restraining Orders against a party, restraining contact with the other party or any child in that party’s lawful custody (*CLRA* s.35);
- Order to locate a child, including police enforcement (*CLRA* s.36);
- relocation (*CLRA* s.39.4);
- Applications under the Hague Convention on the Civil Aspects of International Child Abduction (*CLRA* s.46);
- Guardianship and disposition of the child’s property;
- Confidentiality/sealing orders (*CLRA* s.70).

PURSUANT TO THE FAMILY LAW ACT

- Mediation (*FLA* s.3)
- equalization of net family property (*FLA* Part I ss.5,7);
- Determinations of questions of title between spouses (*FLA* s.10)
- Preservation orders (*FLA* s.12)
- matrimonial home (*FLA Part II* ss.23,24);
- child support (*FLA* Part III s.33);
- spousal support (*FLA* Part III s.33);
- The court's jurisdiction to make support orders includes express powers under s.34. These include powers not provided for under the *Divorce Act*, such as the power to require property to be transferred and orders with respect to the matrimonial home.
- Variation of support orders, except for support orders made under the *Divorce Act (Canada)* (*FLA* s.37);
- Restraining the depletion of property (*FLA* s.40)
- Restraining Orders (*FLA* s.46).
- Setting aside a domestic contract (*FLA* s.56)
- Enforcement of Arbitration Awards (*FLA* s. 59.8)

PURSUANT TO OTHER LEGISLATION

Pursuant to the *Courts of Justice Act*

- Orders made under the *Family Law Rules*, such as for costs (Rule 24), disclosure, case management orders;
- Referral to the Office of the Children's Lawyer (ss. 89 and 112 CJA)
- Certificate of pending litigation (s.103 CJA);
- Restraining Orders (injunctive relief) (s.101 CJA) (note: usually only resorted to if the restraining order provisions under the FLA and CLRA do not apply).

Pursuant to the *Family Responsibility and Support Arrears Enforcement Act, 1996, S.O*

- Required clause on all support orders: Unless the order is withdrawn from the Director's office, it shall be enforced by the Director and that amounts owing under the order shall be paid to the Director, who shall pay them to the person to whom they are owed. (s.9);
- Support deduction orders (s.10)

Pursuant to the *Partition Act, R.S.O. 1990, c.P.4*

- Partition and sale of a jointly owned property (s.3(1))

Pursuant to the common law and the law of equity

- Damages for unjust enrichment;
- Constructive trusts;
- Damages for tort claims (e.g. assault, battery, intentional infliction of mental suffering, defamation, breach of privacy)