

6. Identify at least two reasons why many women keep their birth surname after marriage.
7. Identify five reasons why same-sex partners argue they have the right to marry.
8. On what grounds is the ban on same-sex marriages being challenged?

13.5 Annulment and Separation

Marriage is a legally binding contract between a man and a woman. If the spouses want to end their marriage, it must be dissolved by the courts through a legal procedure: an annulment or a divorce. The death of either spouse also terminates a marriage.

Annulment

An **annulment** is a court order stating that two spouses were never legally married. It allows them to void the marriage, ending the partnership without a divorce. Annulments are usually sought to end marriages that have lasted for a very short time.

Grounds for an annulment are very specific and arise from the requirements for a legal marriage. The cause for the annulment must have existed at the start of the marriage—in other words, it must be shown that the parties could not have married in the first place. For example, one of the essential requirements for entering a marriage contract might not have been met. Genuine consent might not have been given; for example, one spouse might have been too immature to understand what was being promised. Or there might have been a major defect in the marriage ceremony; for example, the officiator might not have had the authority to conduct marriages at all. For any of these reasons, the marriage would be declared void, and a judge would issue a **decree of nullity**, a court order declaring that a marriage never existed.

An annulment may also be granted when one spouse is unable to consummate the marriage. If, however, a spouse refuses to have sexual relations, though physically capable of doing so, an annulment will not be granted.

Occasionally, a couple marries to allow one of the parties to remain legally in Canada, and neither party really intends the marriage to last. When this happens, the courts will usually consider the marriage valid and will not annul it because of nonconsummation.

The Roman Catholic, Jewish, and Islamic faiths also dispense religious annulments, which allow a person to marry again within his or her faith. These annulments do not have legal standing, and anyone who obtains an annulment through a religious court must also obtain one through a civil court to remarry legally in Canada. By the same principle, a legal annulment does not satisfy the requirements established for the followers of these faiths.

Case

Aisaican v. Kahnapace

(1996) 24 R.F.L. (4th) 143

Saskatchewan Court of Queen's Bench

The applicant, Shelley Marie Aisaican, sought to annul her marriage on the ground that the respondent, Sheldon Kahnapace, was impotent and could not consummate the marriage. Two weeks prior to the marriage, Kahnapace was shot by unknown persons and left a quadriplegic. The couple did not engage in sexual intercourse at all after the marriage. No medical evidence was presented to suggest that quadriplegics are incapable

of having sexual intercourse. The applicant's request for a decree of nullity was denied.

For Discussion

- 1. Should the fact that the applicant knew of her husband's condition at the time of the marriage matter? Why?**
- 2. Should the fact that the respondent didn't oppose the application matter? Explain.**
- 3. Why do you think the applicant's request was denied?**

Case

Juretic v. Ruiz

(1999) 49 R.F.L. (4th) 299

British Columbia Court of Appeal

The plaintiff, Nedjelko Juretic, advertised for a bride in a Honduran newspaper. He was interested in finding a Spanish-speaking woman who wanted to marry and be a homemaker. The defendant, Brenda Ruiz, answered the advertisement.

In 1995, Juretic spent two weeks visiting Ruiz and her family. With her parents' approval, she returned with him to Vancouver on July 28, 1996, and moved into his apartment. They were married on October 5, 1996. He was 66; she was 23.

On two occasions following the marriage, the defendant wife said that her husband could have sex with her as long as "he did not embrace and touch her." Juretic said that sex under those circumstances would be like rape, and he gave up

trying. The couple continued to sleep in the same bed until they separated on March 12, 1997. During their short marriage, they ate together, lived together, and represented themselves as a couple among their friends.

The plaintiff sought an annulment in the British Columbia Supreme Court, but his application was denied. His further appeal to the Court of Appeal was also denied.

For Discussion

- 1. On what grounds would the plaintiff base his application?**
- 2. How valid was his application? Explain.**
- 3. Why were Juretic's applications denied by both courts?**
- 4. What would the plaintiff now have to do to end his marriage?**

Separation

Separation is an intermediate step between marriage and divorce. It occurs when a couple decides not to live together as husband and wife; they "live separate and apart." Sometimes the parties go no further than this; they live out their lives separately, without getting divorced. This most often occurs when one or both spouses belong to a faith that does not recognize divorce.

The statutory phrase "living separate and apart" means that the spouses have separated physically and do not intend to live together again. Usually,

one spouse moves out of the family home. But, a couple could still be separated while living under the same roof. If either spouse can prove that they slept separately, shared little or no communication, had no common activities, and lived independent lives, Canadian law considers that a valid separation exists. Unless they obtain a divorce, the couple is still legally married. A separation does not end a marriage.

Separation Agreement

Couples do not need a legal document to separate, but most enter into a written separation agreement. “Do-it-yourself” separation agreement forms and divorce kits can be obtained from book and office supply stores and the Internet. However, since this agreement is a legal contract that is written, signed, and witnessed, each spouse should ask a lawyer for help in preparing a separation agreement. It is important that each spouse consult his or her own lawyer so that each person’s best interests are fairly and objectively represented. A separation agreement outlines the position of each spouse on such issues as the ownership and division of property and debts, who gets to stay in the family home or if it will be sold, support for either spouse and any children, and child custody and visitation rights. These issues are discussed in Chapters 14 and 15.

Although the spouses determine the contents of the agreement, the lawyers will probably advise them. The contract must be prepared carefully, or the couple may insert terms or conditions that become unacceptable in the future. It is essential to include provisions that will allow sections of the document to be changed if either party’s situation changes. The agreement must also be signed by both spouses in front of a witness. The witness’s signature makes the agreement legally binding.

The courts are not involved in the preparation of a separation agreement. Once the lawyers have prepared the document with the approval of the spouses, it becomes as enforceable as any other private contract. Spouses should be allowed to determine their own affairs without interference from the legal system. Since a separation agreement is a legally binding contract, each party can sue the other party for a breach of contract. For instance, if one spouse agrees to pay a certain amount of support each month to the other, but does not do so, the spouse who suffered the loss may ask the courts to enforce payment. Contract law is discussed in Chapters 16 and 17.



Figure 13-14

Do-it-yourself separation-and-divorce kits can be ordered over the Internet. These agreements are binding contracts when completed and signed.

A separation agreement does not give either party the right to remarry or to have sexual relations with another person. To remarry without a divorce is bigamy; to engage in voluntary sexual intercourse with another person outside the marriage is **adultery**.

Review Your Understanding (Pages 399 to 402)

1. Identify three ways of ending a marriage.
2. What are an annulment and a decree of nullity?
3. Under what circumstances is an annulment obtained?
4. Why might some couples prefer to obtain an annulment rather than a divorce?
5. When does separation legally occur?
6. Identify three issues arising from the separation that are usually included in a separation agreement.

13.6 Divorce

Divorce is the legal procedure that ends a valid marriage. You only need a divorce if you want to remarry. Otherwise, you could live forever, legally married, to someone from whom you are separated.

The procedures followed in a divorce case are similar to the civil procedures described in Chapter 11. The process begins with a document called a **petition for divorce**, outlining the grounds for the divorce and other essential information. The two parties involved in the action are the **petitioner**, the spouse seeking the divorce, and the **respondent**, the spouse being sued for divorce. If the divorce is based on the respondent's adultery, the **co-respondent** is the person with whom the respondent may have committed adultery.

Divorce actions are heard in the superior courts of each province, but about 90 percent of cases are settled before trial after many months of discussion and negotiation. There are self-help books and divorce kits readily available that outline the steps and procedures for a divorce. However, most people consult a lawyer if the divorce is likely to be at all complicated.

A divorce is final 31 days after judgment is pronounced. Either party may remarry after paying for a Certificate of Divorce from the court. This is the final step in the divorce. The purpose of the waiting period is to give the spouses one last opportunity to get back together. If this happens, the couple must apply to the courts to have the divorce judgment set aside. Another reason for the delay is to let either party appeal the judgment. If either spouse does so, the divorce is not final until the appeal has been heard. If both parties agree, and if there is a very good reason, the 31-day waiting period may be reduced. This may happen, for instance, if the woman is pregnant and wishes to remarry as soon as possible. However, the judge must be convinced of a special need before reducing the waiting period.

Looking Back

Canadian Divorce Law

The *Constitution Act* gave the federal government jurisdiction over divorce. However, before 1968, there was no federal law concerning divorce. Divorce law varied somewhat from province to province, although most of Canada followed England's divorce laws. In Newfoundland and Quebec until 1968, a federal Act of Parliament (passage of a private statute) was necessary to get a divorce, and most divorces were granted for adultery. This posed a problem for people who sought a divorce because they were unhappily married.

As a result of changes in social attitudes toward divorce and the need for additional grounds for divorce, the federal government passed the *Divorce Act* in 1968. This statute established a divorce law that applied fully and equally for the first time in all parts of Canada. The Act provided two main grounds for divorce: matrimonial fault or blame and marriage breakdown. Within these categories, there were 15 specific grounds, including adultery, mental or physical cruelty, bigamy, homosexuality, addiction to alcohol or drugs, imprisonment, and desertion. In each case, the petitioner had to find fault with the respondent before petitioning for divorce. The 1968 *Divorce Act* also recognized a three-year separation or a permanent marriage breakdown as a new ground for divorce. This new ground made divorce more acceptable to those who previously were reluctant to petition for divorce on a fault ground.

The legislation also outlined procedures for trying to save the marriage. Both lawyers and judges were specifically required by the Act to discuss the possibility of **reconciliation** (getting back together) between the spouses. The courts had the authority to adjourn divorce proceedings where there seemed to be a possibility that the couple might get back together. Judges could even recommend marriage counselling if they felt that it would assist the couple.



Figure 13-15

Before 1968, this couple could not have obtained a divorce. What is the cartoonist saying about marriage in this cartoon?

As time passed, legal and other experts continued to criticize the grounds for divorce. Pitting spouses against each other and finding fault with one party created much pain and suffering during the divorce process. Also, when both spouses agreed that the marriage had broken down and could not be repaired, a three-year waiting period was too long and created unnecessary hardships on the couple. These issues led to the *Divorce Act, 1985*.

For Discussion

1. Which level of government has jurisdiction over divorce?
2. What significant change did the 1968 *Divorce Act* bring to Canadian divorce law?
3. Why was it necessary to amend the 1968 *Divorce Act*?

Case

Barbour v. Barbour

(1980) 18 R.F.L. (2d) 80

Newfoundland Supreme Court, Trial Division

The Barbours were married in March 1973 in a tiny village in Newfoundland. There were two children from the marriage: a daughter born in 1974 and a son born in 1976. The couple separated in December 1978. The daughter lived with the father in the family home, and the son lived with the mother in her parents' home. Mrs. Barbour intended to petition for divorce in three years.

After the separation, Mr. Barbour was seen on many occasions in the company of another woman, Myrtle Sinclair. Mr. Barbour and Ms. Sinclair generally met in the family home or in the Horse Shoe Lounge, where Mrs. Barbour worked part-time. On several occasions, Mr. Barbour would hug and kiss his girlfriend in front of Mrs. Barbour. As well as

being intimate in the lounge in front of his wife, Mr. Barbour and his girlfriend spent the night together in a motel. On a number of occasions, the girlfriend's car was seen in Mr. Barbour's driveway.

Mrs. Barbour petitioned for divorce before the end of the three-year period and she succeeded in her action.

For Discussion

1. Why do you think Mrs. Barbour intended at first to wait three years before petitioning for divorce?
2. Based on the facts of the case, why was Mrs. Barbour successful in petitioning for divorce early?

Did You Know?

Before the 1968 *Divorce Act*, Canada's divorce rate was 8 percent. By 1987, the rate had jumped to 44 percent. Why do you think there was such an increase in the divorce rate?

The Divorce Act, 1985

The *Divorce Act, 1985*, was an attempt to simplify the law, streamline the many grounds for divorce, and respond to social change and pressure for reform. It came into effect on June 1, 1986. Under current divorce law, there is only one ground for divorce: **marriage breakdown**. This is the origin of the term **no-fault divorce**, which states that neither party is totally at fault or to blame for the divorce—the marriage has simply broken down. This occurs when one of the following conditions exists:

- The spouses have separated for at least one year and were living apart when the divorce petition was filed.
- The respondent has committed adultery.
- The respondent has treated his or her spouse with such serious physical or mental cruelty that it is impossible for them to continue to live together.

The Law

The Divorce Act, 1985

Excerpts from the *Divorce Act, 1985*

8.

- (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.
- (2) Breakdown of a marriage is established only if
 - (a) the spouses have lived separate and apart for

at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or

- (b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,
 - (i) committed adultery, or

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- (ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

For Discussion

1. Identify the one ground for divorce in Canada.
2. Summarize the circumstances under which marriage breakdown can occur.

Separation Leading to Divorce

Most couples now use separation of at least one year as proof of a marriage breakdown and the ground for divorce. The one year provides a balance between rushing into a divorce and requiring spouses who know their marriage is over to stay together longer. It does not matter which spouse left or why. Either spouse can begin divorce proceedings immediately upon separation, but the court will not grant the divorce until the year is up. The law also gives the couple the choice of applying to the court together for their divorce.

During the separation period, the *Divorce Act, 1985*, allows the couple to reconcile to try to save their marriage. However, they can reunite only for 90 days or less without affecting their one-year separation time. This can occur for one period of no more than 90 days, or on several occasions, provided the total number of days does not exceed 90 days. If the reconciliation does not work out within the 90 days, this time together does not affect the one-year period. If the couple stays together for more than 90 days, but then separates again, they begin counting another one-year separation period.

Did You Know?

According to the federal Department of Justice, over 90 percent of divorces in Canada are based on a one-year separation. Why do you think this is the most common ground?

Adultery

Adultery and cruelty have been grounds for divorce for many years. It is the petitioner's responsibility to prove that adultery actually occurred. The courts usually recognize that adultery took place on the basis of reasonable probability. For example, if the respondent and the co-respondent spend a weekend alone in a hotel room, the judge may assume that adultery occurred, unless the respondent can prove otherwise. It is adultery if sexual intercourse with someone else happens while a couple is separated.

Cruelty

Cruelty is of two types, physical and mental, and represents very serious conduct that makes living together impossible. Physical cruelty is often easier to prove than mental cruelty. Evidence in the form of medical reports and photographs of injuries can be entered by the injured spouse. Witnesses may also testify about the spouse's physical condition. In today's courts, physical violence by one spouse against the other is not tolerated.

Mental cruelty is more difficult to determine because certain kinds of conduct are open to interpretation. Which actions are so heartless or insensitive that they make living together impossible or intolerable? The daily arguments that arise in most marriages are not mental cruelty. Over the years, the courts have ruled that mental cruelty includes constant criticism, serious alcoholism, psychiatric disorders, and refusal to have sexual relations. The

e activity

Visit www.law.nelson.com and find out more about divorce proceedings in Canada.

definition of mental cruelty is very subjective and may differ from spouse to spouse and from judge to judge.

If one spouse has committed adultery or treated the other spouse with cruelty, the offended spouse can sue for divorce immediately. The offending spouse must wait for a one-year separation period. However, if you apply for a divorce on these grounds, your spouse may be more likely to oppose the application. This could lead to a longer and more expensive process.

Contested and Uncontested Divorces

As long as a marriage has broken down, either spouse may ask the court to grant a divorce. A judge won't refuse a divorce just because one spouse wants to stay married. If one spouse wants a divorce and the other spouse doesn't, the marriage has obviously broken down. If the spouses cannot agree on terms, such as custody of the children and support, this is a contested divorce. If this happens, the couple and their lawyers will need to work out these matters. As a result, the divorce may take longer to complete, but it will only delay, not stop, the divorce.

In Canada, most divorces are uncontested or resolved without having a trial before a judge. Usually, spouses have lawyers representing them, and the lawyers work out a fair and equitable agreement. Once an agreement has been reached, a judge will look it over. The

judge wants to know that the arrangement is fair to both parties and especially to any children of the marriage.

If the spouses do not dispute any issues, such as property division, support, or custody, the *Divorce Act, 1985*, makes it possible to obtain a divorce without appearing in court. In this procedure, the lawyer can present the evidence to the court. A judge reads all this documentation, along with the petition for divorce. If the judge is satisfied with the evidence, the divorce will be granted. Today, nearly 90 percent of divorces are uncontested.

A divorce also affects such issues as custody of, and access to, children, and child and spousal support. However, the *Divorce Act* does not govern property matters, which fall under provincial jurisdiction. Property matters are covered by provincial statutes, such as Ontario's *Family Law Act*, British Columbia's *Family Relations Act*, and Alberta's *Matrimonial Property Act*. Often, property matters are brought to court with the petition for divorce and are heard together. Unlike a divorce, which is final once the certificate of divorce is issued, custody, access, and support are never final and may be changed by the courts. You will read more about custody and access in Chapters 14 and 15.

Children and Divorce

Marriage breakdown can be very difficult, especially if children are caught in the crossfire of their parents' anger. Research indicates that children may be negatively affected by a divorce if parents use them to attack and wound

Marriage and Divorce in Canada

Year	Marriages	Divorces
1990	187 737	78 463
1991	172 251	77 020
1992	164 573	79 034
1996	156 691	71 528
1997	153 306	67 408
1998	153 190	69 088

Figure 13-16

What trends do you see here? What is the relationship between marriages and divorces during these 6 years?

You Be the JUDGE

"The decline in divorce could be due to ... the increase in common-law unions and also the increase in the average age of marriage, which increases the chance of stability."

—Statistics Canada

- Do you agree or disagree with this statement? Explain.

each other. Children are often faced with losing one parent, spending less time with both parents attending to their needs, and adjusting to a lowered standard of living. Some may suffer depression, long-term behaviour problems, low self-esteem, poor school performance, and truancy.

A 1998 report, *For the Sake of the Children*, prepared for the federal justice department, recommended changes to the *Divorce Act, 1985*, that would make divorce easier on children. A key suggestion, if adopted, would allow both divorcing parents the automatic legal right to be involved in all aspects of their children's upbringing. In theory, this concept of shared parenting could eliminate, or greatly reduce, confrontation between divorced parents and give children proper access to both parents. Parenting plans would establish who is going to pick up the child and take him or her to the doctor or to school, or even to activities such as a sports practice or music lessons. In short, these plans divide up parental responsibilities to provide the best possible arrangements for the children.

Some provinces also offer courses to help divorced parents raise well-adjusted children. In Alberta, a government course called Parenting After Separation has been compulsory for divorcing parents since 1996. In addition, the Canadian Bar Association has recommended that parents be required to take parental education courses. Most major Canadian cities already have these courses, but they differ widely in scope and content. Also, most are voluntary, not compulsory.

For the Sake of the Children also recommends more public education programs, better child-counselling services, and more mediation services. Another recommendation is a change in language. Many divorcing parents are bothered by terms such as "custody" and "access," which seem to suggest a winner and a loser parent. Instead, "shared parenting" and "parental responsibilities" are suggested as terms that focus more appropriately on the children.

Possibly the report's most important recommendation, and one supported by the Canadian Bar Association, is the enhancement of Unified Family Courts across Canada. Divorcing parents should be able to access this court system to obtain a variety of services, including legal advice, counselling, and parent education. Federal and provincial Justice Ministers are studying these recommendations, and changes to the *Divorce Act* are expected in 2002.

You Be the JUDGE

In August 2001, Virginia joined other U.S. states such as Connecticut, Florida, Massachusetts, and Utah in requiring divorcing parents to take a course on understanding divorce from a child's viewpoint.

- Should such courses be compulsory all across Canada? Discuss.

Agents of Change

Ontario's Unified Family Court System

Until the late 1970s, family law matters in Canada were heard in many courts. In Ontario, for example, family law disputes were divided between the Ontario Court of Justice and the Superior Court of Justice. Divorce and division of family property were heard in the Superior Court, while child protection and adoption cases began in the Ontario Court of Justice. Each of these two courts had control over

child and spousal support, as well as custody and access claims. This system was confusing and expensive for separating or divorcing families.

In July 1977, the first Unified Family Court (UFC) of Hamilton–Wentworth opened as a three-year pilot project. The UFC approach to family law was straightforward. Now one court would deal with all aspects of family law. The cost and confusion associated with

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settling family disputes would be reduced and children would be better served. This more user-friendly court became permanent in 1982.

The concept of the UFC was created as a result of a joint initiative by the federal and provincial governments to help divorcing families solve their disputes peacefully and to help parents make informed decisions in the best interests of their children. Chief Justice Patrick LeSage of the Superior Court of Justice has called UFC “a model for early intervention and quick resolution of the difficult and emotional issues affecting people involved in family crisis.”

In late 1999, the Ontario government added even more courts. Since 1995, the number of Ontario UFCs has tripled. Today, there are 17 UFCs in many jurisdictions in Ontario dealing with all aspects of family law and hearing all family law cases involving

- divorce
- child and spousal support
- custody of, and access to, children
- division of family property
- adoption
- child protection

In early 1998, the federal Justice Minister provided support and funding for expanding UFCs into Saskatchewan, Nova Scotia, and Newfoundland. This brought UFCs to half the residents of Ontario and Newfoundland, most of Saskatchewan, and portions of Nova Scotia. Other provinces are considering the benefits of Unified Family Courts.



Figure 13-17

Former Justice Minister Anne McLellan worked to expand the Unified Family Court system. She noted: “Having a single place where family members can find judicial and other services to help them resolve all legal issues is an excellent way of helping families, especially children.”

For Discussion

1. Identify the main benefit of a Unified Family Court.
2. The Canadian Bar Association is recommending the expansion of UFCs across Canada. Do you think this is a good recommendation? Why?

Review Your Understanding (Pages 402 to 408)

1. What are the legal names for the parties involved in a divorce action?
2. When can a person remarry after being granted a divorce?
3. When was Canada’s first *Divorce Act* passed? What were its two main grounds?
4. What were the two main reasons for amending Canada’s first *Divorce Act*?
5. What is the only valid ground for divorce under the *Divorce Act, 1985*? Identify the three ways this can be proven.
6. What is an uncontested divorce, and how common is it?
7. In a contested divorce, what are some of the key issues?
8. What are the benefits of a Unified Family Court?