

# PART I

## Introduction

- Chapter 1** Overview of the Breakdown of a Domestic Relationship
- Chapter 2** A Brief History of Family Law in Ontario



# Overview of the Breakdown of a Domestic Relationship



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## Learning Outcomes

After completing this chapter, you should be able to:

- Identify the most commonly encountered legal issues in the breakdown of a domestic relationship.
- Identify the sources of family law in Ontario.
- Explain the division of jurisdiction over family law between the federal and provincial governments.
- Name the key statutes governing the breakdown of a domestic relationship in Ontario.
- Name the courts with jurisdiction over family law in Ontario and explain the jurisdiction of each court.
- Understand the role a law clerk plays in a family law matter.

## Introduction

Harold and Wendy have been married for five years. They have two children—Sam, age three, and Deb, age six—and a cat and a dog. Harold is a partner in a small and successful accounting firm. Wendy gave up the practice of law to be a full-time mother. The couple owns a house, a cottage, a sailboat, and a variety of investments. Harold has just told Wendy that he is leaving her for a Canada Revenue Agency investigator whom he met when one of his clients was audited. Wendy is emotionally devastated, but she is also a lawyer and realizes the issues that have to be resolved with Harold:

- How will their parenting responsibilities be divided?
- How will the children be supported?
- Will Harold have to pay her spousal support; if so, how much and for how long?
- How will their property be divided?
- Will they divorce and, if so, when?

If Harold and Wendy are like the majority of separating couples, they will negotiate a settlement of all these issues and incorporate the terms of their settlement into a separation agreement without going to court, except to get a divorce. At some point after the separation agreement is signed, Harold, Wendy, or the two of them together will start divorce proceedings, and a divorce will be granted by the court without a trial.

If Harold and Wendy cannot agree on a settlement, either of them can start a court proceeding. They can ask the court to deal with the issues of support, parenting, and property in a divorce proceeding, or they can ask the court to deal with support, parenting, and property issues without seeking a divorce.

If Harold and Wendy are living together but are not married, they will have to deal with all of the same issues other than a divorce.

In this book, we will study the substantive law and procedure involved in resolving the issues that arise when domestic relationships break down. In this chapter, we will look at:

- the law that governs these issues,
- the courts' jurisdiction over these issues, and
- the role of a law clerk in a family law matter.

## Sources of Family Law

Whether Harold and Wendy settle their outstanding issues themselves or leave them for the courts to decide, both must know their legal rights and responsibilities. In Ontario, family law is governed by both statute law and case law.

Because of Canadian constitutional law, some family law issues are governed by federal legislation, some are governed by provincial legislation, and some are governed by both.

Sections 91 and 92 of the *Constitution Act, 1867*<sup>1</sup> divide statute-making power between the federal and the provincial governments. The Act gives jurisdiction over marriage and divorce to the federal government, and it gives jurisdiction over the

<sup>1</sup> (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

solemnization of marriage and property rights to the provincial governments. As a result, the legislation that governs divorce is federal, while the legislation that governs the division of property is provincial. Parenting and support (both spousal and child) are addressed in both federal and provincial statutes.

The jurisdiction over family law is divided between the federal and provincial governments, as set out in Table 1.1.

**TABLE 1.1 Jurisdiction over Family Law in Canada**

|                      | Federal Jurisdiction | Provincial Jurisdiction |
|----------------------|----------------------|-------------------------|
| Divorce              | X                    |                         |
| Division of property |                      | X                       |
| Parenting            | X                    | X                       |
| Child support        | X                    | X                       |
| Spousal support      | X                    | X                       |

If a claim with respect to parenting and/or support is made in a divorce proceeding, the federal divorce legislation governs. If a claim with respect to parenting and/or support is made without seeking a divorce, it is dealt with under the provincial legislation.

Table 1.2 sets out the relevant federal and provincial family law statutes that deal with divorce, property division, parenting, and support.

**TABLE 1.2 Relevant Family Law Legislation**

|            |   |
|------------|---|
| Federal    | <i>Divorce Act</i> , <sup>2</sup> which deals with dissolution of marriage, parenting, and support.   |
| Provincial | <ul style="list-style-type: none"><li>• <i>Family Law Act</i>,<sup>3</sup> which deals with division of property and support.</li><li>• <i>Children’s Law Reform Act</i>,<sup>4</sup> which deals with parenting.</li></ul> |

There have been many court decisions that have interpreted and applied the provisions of these statutes. These decisions form a part of Ontario family law as well.

2 RSC 1985, c 3 (2nd Supp).

3 RSO 1990, c F.3.

4 RSO 1990, c C.12.

## Jurisdiction of the Courts

If Harold and Wendy cannot settle the issues that arise from the breakdown of their marriage on their own, a court proceeding must be started. Although Ontario is moving toward the creation of a unified family court across the province, for now there are three Ontario courts with jurisdiction over family law:

1. Family Court of the Superior Court of Justice,
2. Superior Court of Justice, and
3. Ontario Court of Justice.

The party who starts the proceeding must know which court to use. In order to understand this jurisdictional division, it is helpful to examine the overall structure of the Ontario court system.

## Constitutional Framework Governing the Ontario Courts

Jurisdiction over the courts is governed by the *Constitution Act, 1867* and is divided between the federal and provincial governments.

Under section 92 of the Act, the provinces have the power to administer both civil and criminal courts in the province, while the federal government, under section 101, has the power to establish and operate the Supreme Court of Canada, the Federal Court, the Tax Court, and military courts.

Even though the provinces have the power to administer courts within the province, section 96 of the *Constitution Act, 1867* gives the federal government the power to appoint judges in the superior courts. The provinces have the power to appoint judges in lower-level courts only, under section 92 of the Act.

In addition, section 92 of the Act gives the provincial governments the power to create procedural law for civil matters only, while section 91 gives the federal government the power to create procedural law for criminal matters.

## Organization of the Ontario Courts

The *Courts of Justice Act*<sup>5</sup> is the Ontario statute that prescribes how the Ontario courts are established, operated, and administered. The rules of procedure for the various Ontario courts are provided in regulations made under the relevant statute—for example, the *Family Law Rules*<sup>6</sup> is a regulation made under the *Courts of Justice Act*.

There are three levels of courts in Ontario (see Figure 1.1):

1. Court of Appeal for Ontario,
2. Superior Court of Justice, and
3. Ontario Court of Justice.

The nature of the case, civil or criminal, along with the monetary value of the case in civil matters, and the nature of charge, in criminal matters, determine which court will hear a particular case.

<sup>5</sup> RSO 1990, c C.43.

<sup>6</sup> O Reg 114/99.

## Court of Appeal for Ontario

The Court of Appeal is the highest court in Ontario, and it hears appeals in civil and criminal matters from the Superior Court of Justice and the Ontario Court of Justice. Appeals are usually heard by a panel of either three or five judges. Its only location is in Toronto.

Judges of the Court of Appeal are appointed by the federal government.

## Superior Court of Justice

The Superior Court of Justice is a trial court of general jurisdiction, and it can hear any case on any matter that is not required by statute to be heard in another court.

As a trial court, the Superior Court of Justice hears all civil proceedings involving claims over \$35,000. It also has jurisdiction to hear family law matters of parenting, support, division of property, and divorce. With respect to criminal matters, the Court hears the more serious criminal cases under the *Criminal Code*.<sup>7</sup>

The Superior Court of Justice also administers three other courts:

1. Divisional Court—dealing mainly with appeals of civil judgments from the Superior Court of Justice involving less than \$50,000 and appeals of judgments from the Ontario Court of Justice in family law matters and summary conviction offences;
2. Family Court of the Superior Court of Justice—discussed below; and
3. Small Claims Court—a less-formal trial court dealing with civil matters involving less than \$35,000.

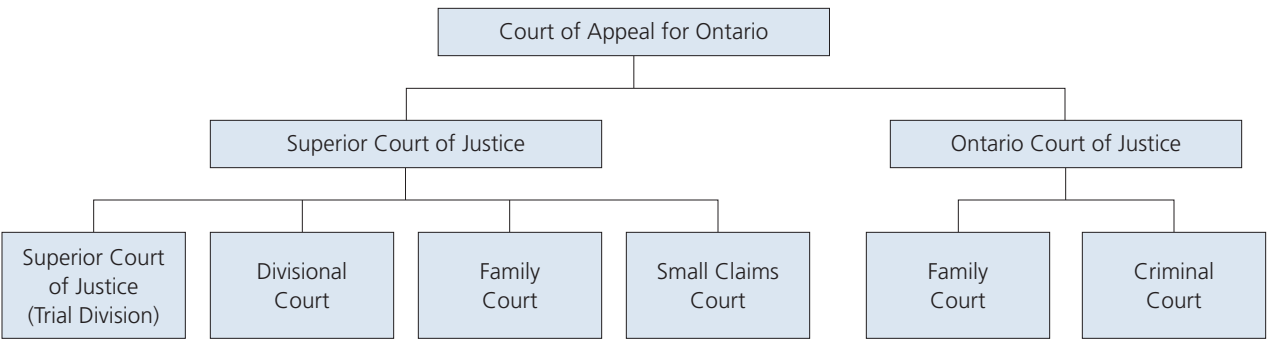
Judges of the Superior Court of Justice are appointed by the federal government.

## Ontario Court of Justice

The Ontario Court of Justice is also a trial court. However, unlike the Superior Court of Justice, it has jurisdiction to hear only those matters that are specifically given to it by statute. In the family law area, the Ontario Court of Justice has jurisdiction over adoption, child protection, parenting, child support, and spousal support. It does not have jurisdiction over divorce or property matters.

Judges of the Ontario Court of Justice are appointed by the provincial government.

**FIGURE 1.1** The Ontario Court System



7 RSC 1985, c C-46.

## Family Court of the Superior Court of Justice

Historically, jurisdiction over family law matters was split between the province's superior court (then called the Ontario Court (General Division)) and the province's provincial court. The superior court had jurisdiction over all family breakdown matters—divorce, property, parenting, and support—while the provincial court's jurisdiction was limited to parenting and support issues. (The provincial court also had jurisdiction over adoption, child protection, and young offenders.)

This split in jurisdiction was confusing, and for many years there was talk of consolidating jurisdiction over all family matters into one court. In 1977, a Unified Family Court was established in Hamilton-Wentworth as a three-year pilot project. The Hamilton court was made a permanent entity in 1982, and the province promised to create more unified family courts across the province. However, it was not until 1995 that the Unified Family Court was expanded to include four more sites.

When this book was first published in 2004, the Family Court of the Superior Court of Justice, a single family court at the superior court level, had 17 locations. Thereafter, the Ontario government at various times restated its commitment to the expansion of the Court across the province, and the federal government pledged additional funding to assist in the expansion. However, the number of locations did not increase until 2019.

At the time of printing, the Family Court of the Superior Court of Justice has 25 locations: Barrie, Belleville, Bracebridge, Brockville, Cayuga, Cobourg, Cornwall, Hamilton, Kingston, Kitchener, Lindsay, London, L'Orignal, Napanee, Newmarket, Oshawa/Whitby, Ottawa, Pembroke, Perth, Peterborough, Picton, Simcoe, St Catharines, St Thomas, and Welland, serving 24 of the province's 49 counties and judicial districts. These locations serve approximately half of Ontario's population.

In all other parts of the province, including the City of Toronto and the Regional Municipality of Peel, jurisdiction over family law matters continues to be divided between the Superior Court of Justice and the Ontario Court of Justice.

The Ontario government hoped to expand the Court to the remaining 25 counties and judicial districts by 2025. However, as of press time, that has not yet occurred. The Ontario Ministry of the Attorney General has stated that it continues to be committed to the expansion of the court in collaboration with the federal government, but no new timeline has been set.

In those places where it has been established, the Family Court of the Superior Court of Justice has jurisdiction over all family law matters, including:

- divorce,
- child support,
- support for spouses and common law partners,
- parenting of children,
- equalization of net family property,
- trust claims and claims for unjust enrichment,
- possession of the matrimonial home,
- adoption, and
- child protection.



The goal of the court is to provide timely, efficient, and effective access to justice for family law litigants. The court offers a variety of support services, including:

- *Mandatory information programs.* Family law professionals provide information about the court process, the effects of separation on the parties and their children, and the options available to help resolve the dispute.
- *Family Law Information Centres.* Information and referral coordinators can provide information about separation and divorce and related family law issues, family justice services, alternative forms of dispute resolution, local community resources, and court processes.
- *Legal support services.* Legal Aid Ontario advice lawyers and duty counsel may be available for low-income litigants either at court or over the phone.
- *Court-connected mediation.* The judge at a case conference may order the parties to do an intake with a court-connected mediation service where they will learn about how mediation may help resolve their issues. Parties may receive free, day-of-court mediation, regardless of their income.
- *Family court support workers.* They provide help to parties who have experienced family violence.
- *Supervised parenting time and exchange centres.* At these centres, parenting visits and exchanges can take place under the supervision of trained staff and volunteers.<sup>8</sup>

## Where There Is No Family Court of the Superior Court of Justice

In those areas of Ontario where the Family Court of the Superior Court of Justice does not exist, jurisdiction over family law matters continues to be divided between the Superior Court of Justice and the Ontario Court of Justice. Cases that include divorce or property claims must be brought before the Superior Court of Justice. Cases that involve only parenting and/or support claims may be brought before either the Superior Court of Justice or the Ontario Court of Justice.

The appendix to this chapter lists those provincial jurisdictions with the Family Court and those without.

The following examples illustrate how the divided jurisdiction of the courts works.

Ermanno and Cecilia have lived together for ten years. They never married. They have now separated. They have one child. Cecilia wants to start a proceeding against Ermanno with respect to parenting of the child and child support.

If they live in Peterborough, one of the locations that has the Family Court of the Superior Court of Justice, her proceeding will be brought in that court.

If they live in Toronto, which does not have the Family Court of the Superior Court of Justice, jurisdiction over family law matters is divided between the Superior Court of Justice and the Ontario Court of Justice. Since this case involves only parenting and support, it may be brought in either court.

<sup>8</sup> These services may also be available through the Ontario Court of Justice and the Superior Court of Justice.

Kamal and Anika have been married for eight years and have three children. They have now separated. Kamal wants to start a proceeding against Anika, both for divorce and with respect to parenting of the children and child support.

If they live in Ottawa, one of the locations that has the Family Court of the Superior Court of Justice, Kamal's proceeding will be brought in that court.

If they live in Brampton, which does not have the Family Court of the Superior Court of Justice, jurisdiction over family law matters is divided between the Superior Court of Justice and the Ontario Court of Justice. Since this case involves divorce, it must be brought in the Superior Court of Justice.

## The Role of the Law Clerk in a Family Law Matter

Law clerks work for or under the supervision of a lawyer, assisting the lawyer in their routine tasks. There is a great deal of work for a law clerk to do in a family law matter.

### Expectations of a Law Clerk

A law clerk working in any area of law is expected to be able to work independently, communicate well with other staff and clients (orally and in writing), use analytic skills, and be a good problem solver. A law clerk is also expected to assist in maintaining the authority and dignity of the courts and the integrity of the legal profession and to conduct themselves in a professional, diligent, and ethical manner.

A law clerk working in family law is expected to possess a general knowledge of the law, to understand practice and procedures involved within the family law field, and to carry out their tasks in accordance with the law firm's procedures and the individual lawyer's instructions.

### Professional Conduct Considerations

Lawyers are governed by the Law Society of Ontario (LSO)<sup>9</sup> and are required to follow its *By-Laws*<sup>10</sup> and *Rules of Professional Conduct*.<sup>11</sup> Law clerks are not members of the LSO and are therefore not directly bound by those by-laws and rules of professional conduct. However, a lawyer is responsible for the actions of a law clerk working under their supervision. As a result, a law clerk must be familiar with the relevant by-laws and rules.

Chapter 3 of the *Rules of Professional Conduct* sets out the obligations of a lawyer in their relationship with clients. Lawyers are expected to be competent in the areas of law in which they offer services and to give honest and objective advice to their clients. Lawyers are also required to care for and safeguard any property or documents given to them by or on behalf of the client. Most importantly, a lawyer owes a duty of

9 In November 2017, the Law Society of Upper Canada's governing body voted to change the regulator's name to the Law Society of Ontario.

10 Law Society of Ontario, *By-Laws*, online: <<https://www.iso.ca/about-iso/legislation-rules/by-laws>>.

11 Law Society of Ontario, *Rules of Professional Conduct* (1 October 2014; amendments current to 28 June 2022), online: <<https://www.iso.ca/about-iso/legislation-rules/rules-of-professional-conduct>>.

confidentiality to every client. This duty of confidentiality, known as solicitor and client privilege, is at the heart of the lawyer–client relationship.

By-Law 7.1 of the LSO and chapter 6 of the *Rules of Professional Conduct* govern the circumstances in which a lawyer may assign work to a law clerk. The lawyer must directly supervise the law clerk, is required to review the law clerk's work at frequent intervals, and is required to assume complete professional responsibility for all tasks performed by the law clerk, including all documents prepared by the law clerk.

A law clerk is not permitted to:

- accept new clients,
- give legal advice or opinions,
- give or accept undertakings without permission,
- exercise personal legal judgment,
- hold themselves out as a lawyer,
- appear in court except in a support role,
- be named as a member of a firm,
- be paid on a sliding scale unless an employee, or
- conduct negotiations unless routine.

## So, What Can a Law Clerk Do in a Family Law Matter?

The law clerk will be involved primarily in the preparation of the many documents discussed in this book, such as:

- applications (see Chapters 12, 13, and 14),
- financial statements (see Chapter 11),
- notices of motion and affidavits (see Chapter 13),
- orders (see Chapters 12 and 13),
- conference notices and briefs (see Chapter 14),
- domestic contracts such as marriage contracts and separation agreements (see Chapter 15), and
- Family Responsibility Office forms (see Chapter 17).

As the law clerk gains experience, they may be asked to interview the client to obtain the information necessary to prepare these documents.

The law clerk may also be required to schedule motion and conference dates, to arrange for the service and filing of documents, and to attend to routine correspondence.

In addition, a more experienced law clerk may be asked to assist in various calculations, such as:

- net family property (see Chapter 9),
- spousal support under the Spousal Support Advisory Guidelines (see Chapter 7),
- indexing of spousal support payments (see Chapter 16), and
- child support under the *Child Support Guidelines*<sup>12</sup> (see Chapter 8).

<sup>12</sup> O Reg 391/97.

## CHAPTER SUMMARY

When a domestic relationship breaks down, there are many issues to be resolved, including those of child support and parenting, division of property, spousal support, and, if the parties are married, divorce. If the parties cannot reach agreement on their own, the courts will have to resolve the matter.

The *Constitution Act, 1867* divided statute-making power between the federal and the provincial governments. The federal government has exclusive jurisdiction over divorce, dealt with in the *Divorce Act*. The provincial government has exclusive jurisdiction over the division of property, dealt with in the *Family Law Act*. The two levels of government share jurisdiction over parenting and support. If a divorce proceeding is started, those matters are also

dealt with under the *Divorce Act*. If no divorce proceeding is started, those matters are dealt with under the *Family Law Act* and the *Children's Law Reform Act*.

At present, the three courts with jurisdiction over family law in Ontario are the Family Court of the Superior Court of Justice, the Superior Court of Justice, and the Ontario Court of Justice.

In Ontario regions where the Family Court of the Superior Court of Justice has been established, that court has jurisdiction over all family law matters. In Ontario regions where the Family Court of the Superior Court of Justice does not exist, jurisdiction over family law matters remains divided between the Superior Court of Justice and the Ontario Court of Justice.

## REVIEW QUESTIONS

1. What legal issues must a separating couple resolve?
2. How do the majority of separating couples resolve the issues between them?
3. What are the sources of family law in Ontario?
4. Why are some family law issues dealt with under federal legislation, some under provincial legislation, and some under both?
5. What family law issues are dealt with under federal legislation only?
6. What family law issues are dealt with under provincial legislation only?
7. What family law issues are dealt with under both federal and provincial legislation?
8. Name the federal family law statute. What issues does this statute deal with?
9. Name two provincial family law statutes. What issues do each of these statutes deal with?
10. What are the three Ontario courts with jurisdiction over family law matters?

## DISCUSSION QUESTIONS

1. Alonzo and Gabriella lived together for five years and had two children. They never married. They have now separated. Gabriella wants to start a proceeding against Alonzo with respect to parenting of the children and child support.
  - a. Under what statute or statutes would this proceeding be brought?
  - b. If Gabriella and Alonzo live in Hamilton, in which court or courts can her proceeding be started?
  - c. If Gabriella and Alonzo live in North Bay, in which court or courts can her proceeding be started?
2. Amar and Ashitha have been married for five years and have two children. They have now separated. Amar wants to start a proceeding against Ashitha both for divorce and with respect to parenting of the children and child support.
  - a. Under what statute or statutes would this proceeding be brought?
  - b. If Amar and Ashitha live in St Catharines, in which court or courts can his proceeding be started?
  - c. If Amar and Ashitha live in Guelph, in which court or courts can his proceeding be started?

## Appendix: Judicial Districts and Counties

### Family Court Jurisdictions<sup>13</sup>

1. Regional Municipality of Durham—Oshawa
2. County of Elgin—St Thomas
3. County of Frontenac—Kingston
4. Regional Municipality of Haldimand-Norfolk—Cayuga
5. County of Haliburton—Perth
6. City of Hamilton—Hamilton
7. County of Hastings—Belleville
8. City of Kawartha Lakes—Lindsay
9. County of Lanark—Perth
10. United Counties of Leeds and Grenville—Brockville
11. County of Lennox and Addington—Napanee
12. County of Middlesex—London
13. Territorial District of Muskoka—Bracebridge
14. Regional Municipality of Niagara—St Catharines, Welland
15. County of Northumberland—Cobourg
16. City of Ottawa
17. County of Peterborough—Peterborough
18. United Counties of Prescott and Russell—L'Orignal
19. County of Prince Edward—Picton
20. County of Renfrew—Pembroke
21. County of Simcoe—Barrie, Simcoe
22. United Counties of Stormont, Dundas, and Glengarry—Cornwall
23. Regional Municipality of Waterloo—Kitchener
24. Regional Municipality of York—Newmarket

### Non-Family Court Jurisdictions

1. Algoma District—Sault Ste Marie
2. Brant County—Brantford
3. Bruce County—Walkerton
4. Chatham-Kent Municipality—Chatham
5. Cochrane District—Timmins, Cochrane
6. Dufferin County—Orangeville
7. Essex County—Windsor
8. Grey County—Owen Sound

<sup>13</sup> See r 1(3) of the *Family Law Rules*.

9. Halton Regional Municipality—Milton
10. Huron County—Goderich
11. Kenora District—Kenora
12. Lambton County—Sarnia
13. Manitoulin District—Gore Bay
14. Nipissing District—North Bay
15. Oxford County—Woodstock
16. Parry Sound District—Parry Sound
17. Peel Regional Municipality—Brampton
18. Perth County—Stratford
19. Rainy River District
20. Sudbury Regional Municipality—Sudbury
21. Thunder Bay District—Thunder Bay
22. Timiskaming District—Haileybury
23. Toronto
24. Wellington County—Guelph