

ABORIGINAL PRACTICE POINTS

Aboriginal persons in family law proceedings

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Key points

- Section 19 of the Federal Child Support Guidelines is used to 'gross up' the income of Aboriginal persons whose income is exempt of tax and who are ordered to pay child support.
- Courts will also look at grossed-up income in determining the amount of spousal support payable by a tax-exempt party.
- Section 89 of the *Indian Act* affects the enforcement of child and spousal support orders where the debtor is an Indian who lives on a reserve. If the person seeking to enforce the order is also an Indian, courts have held that attachment of on-reserve funds is valid. If a child who is the subject of a child support order is a status Indian, s. 89 will not apply and, provided the order specifies that the support is for the benefit of an Indian child, the creditor can enforce the support order. Non-Indian creditors will be precluded from seizing on-reserve assets or garnishing on-reserve funds.
- In determining custody, the courts are required to give paramount consideration to the best interests of the child. The child's Aboriginal heritage is a factor that is considered in determining what custody arrangement will be in the child's best interests. Judges have considered issues of blood ties, the preservation of Aboriginal cultural heritage, and the ability of prospective custodial parents to preserve and enhance that heritage, as factors in determining custody.
- The question of which parent will best contribute to a healthy racial socialization and overall development of the child is a question of fact to be determined by the courts on a case-by-case basis after considering all relevant factors.
- The Supreme Court of Canada has distinguished between the role of race in adoption cases, where a child may be denied exposure to his own heritage and race is therefore a more important issue, and custody cases, where the two biological parents each share part of the race or culture of the child.
- It is important in cases involving the issue of the Aboriginal culture of a child to marshal the most useful law and evidence regarding culture, customs and traditions, and their continuity.

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I. Introduction

When working on family law matters involving Aboriginal clients, counsel must be attuned to the fact that the law may differ. These differences may be due to, for example, the Indian status of one or more of the parties, or the location of property or assets on reserve land. This paper explores issues that arise as a result of this different legal landscape.

At the root of much of this difference is s. 91(24) of the *Constitution Act, 1867*, which mandates that “Indians, and Lands reserved for the Indians” are federal matters upon which provincial legislation cannot encroach. Section 88 of the *Indian Act*, R.S.C. 1985, c. I-5, provides that provincial legislation of general application will be applicable to and in respect of Indians, except to the extent that legislation is inconsistent with the *Indian Act*, the *First Nations Fiscal and Statistical Management Act*, S.C. 2005, c. 9, or any order, rule, regulation or law of a band made under these two acts, and except to the extent the provincial legislation makes “provision for any matter for which provision is made by or under” these two acts. Section 88 is also made “subject to the terms of any treaty and any other act of Parliament”. As a result, provincial legislation, which governs many aspects of family law, may be inapplicable to Aboriginal clients or their property or both.

It is also important for counsel to consider that many First Nations have enacted policies or bylaws or entered into agreements or treaties that may affect family law issues. It is important to research and consider these.

This chapter reviews the different laws applicable to Aboriginal clients with respect to child support, spousal support, enforcement of support orders, custody, and division of marital property on a reserve. It does not provide a comprehensive review of Aboriginal family law issues; in particular, child protection and adoption are not discussed in detail. For information on these subjects see the *British Columbia Family Practice Manual*, 4th ed., looseleaf (CLEBC 2006) (“BCFPM”), also available online at www/cle.bc.ca; specifically, see chapters 19 and 20.

II. Support

A. Child Support

Child support is available under both the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) and the *Family Relations Act*, R.S.B.C. 1996, c. 128. Each statute incorporates the Federal Child Support Guidelines (SOR/97-175) (the “Guidelines”), which include a table that sets out the amount of child support that must be paid per child according to the paying parent’s income. The recipient parent’s income is not relevant in that determination, but is relevant when considering the special and extraordinary expenses that must be paid in addition to the basic table amount, pursuant to s. 7 of the Guidelines. Recipient parent income is also relevant to considerations of undue hardship pursuant to s. 10 of the Guidelines.

The major difference in representing Aboriginal persons with respect to child support orders has to do with the application of s. 19 of the Guidelines. This section states, in part:

Imputing Income

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

...

- (b) the spouse is exempt from paying federal or provincial income tax;

The child support tables in the Guidelines are based on economic studies of average spending on children in families at different income levels in Canada. The payments are calculated using a mathematical formula that establishes various support amounts to reflect average expenditures on children by a spouse with a particular number of children at a particular level of income.

The Guidelines apportion support responsibility between the parents on the basis of gross (before-tax) income. If the paying parent is exempt from federal and provincial income taxes, a court will “gross up” that parent’s income before applying the table amount in the Guidelines to determine the amount of child support payable.

For example, in *Le Bourdais v. Le Bourdais* (1998), 36 R.F.L. (4th) 387 (B.C.S.C.), the father was a status Indian who lived and worked on an Indian reserve. He was exempt from paying both federal and provincial income taxes on income of \$61,400 per year. The court grossed up that amount to \$104,000, which was the amount that would produce a net income of \$61,400 after tax. The court ordered that for the purposes of child support, the father’s income was based on the amount of \$104,000 under the Guidelines. The court added (para. 8):

To ignore the impact of income tax on Mr. Le Bourdais’ income would preclude his children from benefiting from the financial means of both parents after separation, an objective found in section 1(a) of the Guidelines.

Le Bourdais was followed in *S.A.M. v. G.J.S.*, 2006 BCPC 354. There, Brecknell J. considered child support owing by a status Indian working primarily on reserve, with respect to a child over the age of majority attending a post-secondary educational institution. Brecknell J. found that he was bound by *Le Bourdais* to gross up the payor spouse’s income. He referred to Price Waterhouse’s Matrimonial Tax Tables for British Columbia and the DIVORCEmate software program (para. 55) in order to determine the gross income.

However, Brecknell J. accepted the payor spouse’s contention “that as a Hereditary Chief he has certain cultural duties which place a financial burden on him in order to maintain his position within that culture” (para. 53) and deducted \$7,000 from the calculated, grossed-up Guideline income to account for these additional financial obligations.

The court also factored in the financial assistance available to the child from her First Nation for expenses related to her education. Due to this assistance, and the age of the child in question, Brecknell J. did not apply the Guideline table amounts, but instead calculated support in accordance with s. 3(2)(b) of the Guidelines, after considering the “condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child”. The contributions of the First Nation toward the child’s expenses and the child’s ability to contribute to her own expenses were accounted for, and the remaining amount required was divided between the parents in accordance with each of their incomes (grossed up in the case of the payor spouse).

It is important to determine the payor spouse’s tax status in assessing the amount of child support that will be payable. Counsel should keep in mind that the fact that a person is a status Indian does not necessarily exempt the person from provincial and federal taxes. Many status Indians pay income tax because their income is earned off reserve.

If the paying parent is a status Indian, counsel should determine whether that parent has income that is non-taxable. If so, counsel should calculate child support based on income figures for the paying parent that have been grossed up. The grossed-up salary can be calculated

using the Matrimonial Tax Tables or the DIVORCEmate software. Counsel must also consider whether a payor spouse's cultural duties result in a financial burden such that an amount should be deducted from the paying parent's income for the purposes of calculating support.

Counsel should also review the financial contributions available to children from their First Nation with respect to, for example, education. This assistance may have an impact on the amount of child support owing, particularly if the child is over the age of majority and s. 3(2)(b) of the Guidelines is found to apply.

The income of either or both parents may have to be grossed up when calculating the division of extraordinary expenses under s. 7 of the Guidelines. Here, too, benefits available to children and families from their First Nation must be considered. If no agreement can be reached between the parties regarding the appropriate amount by which to gross up income, a court order imputing income under s. 19 of the Guidelines will have to be sought.

Chapter 3 (Assessing the Legal Issues) of the *BCFPM* and the *Family Law Sourcebook for British Columbia*, looseleaf (CLE, 1990) ("*FLSBC*") discuss child support in more detail. See *Family Law Agreements: Annotated Precedents*, looseleaf (CLE, 1998) ("*FLAAP*") for sample clauses regarding support. The latter two publications are also available online at www.cle.bc.ca.

B. Spousal Support

Both the *Divorce Act*, s. 15.3 and the *Family Relations Act*, s. 93.2, give child support priority over spousal support if both forms of support are being sought. The draft Spousal Support Advisory Guidelines ("Advisory Guidelines") may assist the courts in determining quantum and duration of spousal support. The Advisory Guidelines are not legislated and do not have the force of regulation, but can be a useful tool. Generally, the court will take into account the needs, means, capacities, and economic circumstances of each spouse in determining the amount of support to be paid (*Divorce Act*, s. 15.2, and *Family Relations Act*, s. 89).

As when representing Aboriginal clients with respect to child support issues, the significant factor in representing Aboriginal persons who are either liable to pay or claiming spousal support is their tax-exempt status. It is important to determine the tax status of the parties as the court will take that into account in determining how much income is available and how much is needed so that the actual means, needs and circumstances of each spouse are appropriately compared. In *Ninbam v. Ninbam* (1997), 29 R.F.L. (4th) 41 (Ont. (Gen Div.) (Fam. Ct.)), both parties were exempt from federal and provincial taxes due to their Indian status. In considering the amount of spousal and child support payable, the court grossed up the incomes of both parties before determining the amount of spousal support payable.

Counsel should be aware that the Advisory Guidelines use gross income in the "without child support formula" and net income in the "with child support formula". Therefore, the non-taxable income of an Aboriginal person may or may not be grossed up when using the appropriate spousal support formula.

Section 68 of the *Indian Act* addresses the maintenance of dependants and states:

- 68 Where the Minister is satisfied that an Indian
- (a) has deserted his spouse or common-law partner or family without sufficient cause,
 - (b) has conducted himself in such a manner as to justify the refusal of his spouse or common-law partner or family to live with him, or
 - (c) has been separated by imprisonment from his spouse or common-law partner and family,

the Minister may order that payments of any annuity or interest money to which that Indian is entitled shall be applied to the support of the spouse or common-law partner or family or both the spouse or common-law partner and family of that Indian.

The power provided to the Minister under this section is rarely used. Provincial laws on support payments have not been found to conflict with s. 68 due to its limited application to divert only “annuity or interest money” (*Alberta (Director of Maintenance and Recovery) v. Potts* (1979), 12 R.F.L. (2d) 144 (Alta. Q.B.)).

Again, Chapter 3 (Assessing the Legal Issues) of the *BCFPM*, the *FLSBC*, and the *FLAAP* provide further material on spousal support.

III. Enforcement of Support Orders

Once a party is obligated to pay child or spousal support under a court order or separation agreement, various remedies are available to enforce the support order. These include seizure of assets, garnishment of wages and bank accounts, committal hearings, and contempt of court hearings. For details of these procedures, see *BCFPM* Chapter 17 (Enforcing Orders and Agreements).

If the debtor is an Indian who has property on a reserve, a different set of issues arises due to s. 89 of the *Indian Act*. Section 89 provides as follows:

89 (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

The Supreme Court of Canada confirmed, in *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, that the phrase “situated on a reserve” in s. 89(1) of the *Indian Act* was to be given its plain and ordinary meaning. For the purposes of s. 89(1), this meant the physical location of real and personal property. At issue were federal government funds provided to the Indian band. A majority of the court found that the funds were not exempt from seizure because the funds were held in a bank account off reserve.

Section 89(1) of the *Indian Act* presents no difficulties when the spouse seeking enforcement of the support order is also an Indian. In that case, s. 89 does not protect the debtor Indian from garnishment or attachment proceedings.

As previously indicated, s. 88 of the *Indian Act* declares that provincial laws of “general application” will apply to Indians on reserves, subject to specified limitations. The application of s. 88 was addressed in *Potts v. Potts* (1991) [33 R.F.L. \(3d\) 174](#) (Alta. Q.B.), affirmed (1991), 31 R.F.L. (3d) 66 (Alta. C.A.), where both the husband and wife were Indians within the meaning of the *Indian Act*. The husband was also a member of the Peigan Band Council, which paid him a bi-weekly salary. He defaulted in paying spousal support under a divorce order, and his former wife sought the assistance of the Director of Maintenance Enforcement for Alberta. That office caused a “notice of continuing attachment” to issue from the Court of Queen’s Bench against the band council.

Objections to the garnishment were rejected by the Court of Queen's Bench. On appeal, the council and band argued that provisions of the *Maintenance Enforcement Act*, S.A. 1985, c.-0.5 were inconsistent with s. 89 of the *Indian Act* and were therefore not applicable pursuant to s. 88 of the *Indian Act*. It was common ground that the *Maintenance Enforcement Act* was a law of general application; the dispute was whether it met the second s. 88 test of consistency with the *Indian Act*.

The Court of Appeal confirmed that s. 89 was not intended to prevent Indians from using the service of non-Indians to obtain repayment of what was lawfully theirs. Although the attachment notice was issued through the director, it was issued for the wife's benefit and on her request. The director was a trustee of funds received and had no rights in the wife's claim.

In *Director of Maintenance Enforcement for the benefit of D. O'Connor, and the Penticton Indian Band* (14 March 1997), Penticton 2951 (B.C. Prov. Ct.), the issue was whether a band was bound by a notice of attachment. The creditor under the Family Maintenance Enforcement Program (the mother) was not a status Indian, and the notice of attachment was to enforce a support order for a child in her custody. However, the child was a status Indian as was the child's father.

The director's submission was that the band was liable under the notice of attachment because the order was for the benefit of the child, and the child was a status Indian. The band took the position that the notice of attachment was defective on its face because it did not identify the child as the person for whose benefit the order was made. Accordingly, s. 89 of the *Indian Act* applied and no liability could attach to the band.

The court accepted the director's submission that the child support was a duty owed to the child and a right of the child. However, the court cited the Alberta Court of Appeal decision in *Potts v. Potts* and held that because the notice of attachment did not make it known to the band that the maintenance order was for the benefit of the child, the director's application was dismissed. The court found that s. 89 of the *Indian Act* applied.

Potts was followed in *Re Guerrero and Paull and the Director of Maintenance Enforcement, and the Squamish Nation Trust* (15 June 2001), North Vancouver F3088 (B.C. Prov. Ct.). In this case, the director sought to enforce two orders made by the provincial court against two fathers who were status Indians and in arrears with respect to payment of child support. The children for whom the support orders were made were also status Indians. In both cases, although the orders were made for the benefit of the children, the mothers named as beneficiaries in the orders were non-Aboriginal.

The director sought to enforce the orders by way of two notices of attachment served upon the Squamish Nation Trust. The trust administers funds received pursuant to a land claim settlement. The director sought to attach disbursements owing from the trust to the fathers. The trust was reluctant to remit the payments without court approval. The court cited s. 89 of the *Indian Act*, and held that the child support was a duty owed to, and a right of, the children. The notices of attachment could stand and the trust was required to remit the money.

Accordingly, s. 89 of the *Indian Act* will not bar enforcement of a support order provided the child for whom support is ordered is a status Indian. However, if the support order is in favour of a child or spouse who is not a status Indian, then a debtor who is a status Indian can rely on s. 89 to resist enforcement proceedings for real or personal property on reserve. It is therefore important that counsel ensure that the order to be enforced is explicitly for the benefit of the status Indian spouse or child.

The non-Indian creditor will have to resort to other methods to enforce a support order, such as the seizure of assets off reserve, contempt of court proceedings, or committal hearings. For a further discussion of those other enforcement measures, see Chapter 17 (Enforcing Orders and Agreements) of the *BCFPM* and the *FLSBC*.

IV. Custody

The starting point for any discussion of the custody of children in family law proceedings is the legislation. An order for custody can be made under either the *Divorce Act*, s. 16, or the *Family Relations Act*, s. 24.

Section 16 of the *Divorce Act* provides:

16 (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

(3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquires, and to be given information, as to the health, education and welfare of the child.

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Section 24 of the *Family Relations Act* provides:

24 (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

- (a) the health and emotional well being of the child including any special needs for care and treatment;
- (b) if appropriate, the views of the child;

- (c) the love, affection and similar ties that exist between the child and other persons;
- (d) education and training for the child;
- (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

(1.1) The references to “other persons” in subsection 1(c) and to “each person” in subsection 1(e) include parents, grandparents, other relatives of the child and persons who are not relatives of the child.

(2) If the guardianship of the estate of a child is at issue, a court must consider as an additional factor the material well being of the child.

(3) If the conduct of a person does not substantially affect a factor set out in subsection (1) or (2), the court must not consider that conduct in a proceeding respecting an order under this Part.

(4) If under subsection (3) the conduct of a person may be considered by a court, the court must consider the conduct only to the extent that the conduct affects a factor set out in subsection (1) or (2).

As can be seen from these provisions, the test for custody decisions is “the best interests of the child”.

A. Aboriginal Heritage as a Factor in Determining Custody

In representing Aboriginal persons, it is crucial to consider the child’s Aboriginal heritage as a factor in the determination of who should have custody of the child. However, the extent of the role this factor plays in determining the best interests of the child or children depends on the facts of the particular case.

Although Aboriginal heritage is not specifically listed as a factor to be considered in either the *Divorce Act* or the *Family Relations Act*, it may be weighed with respect to the child’s best interests. In *T. (K.E.) v. R. (I.)*, 2003 BCPC 331, Auxier J. stated at para. 17:

Another factor which looms large in this case is the importance of S.A.’s aboriginal heritage. That is a factor that forms a guiding principle in the *Child, Family and Community Service Act* and is listed as a factor to consider in determining a child’s best interests under that legislation. I refer to section 2(f) “the cultural identity of aboriginal children should be preserved”, and section 4(2) “If the child is an aboriginal child, the importance of preserving the child’s cultural identity must be considered in determining the child’s best interests.” Although the *Family Relations Act* does not specifically refer to this issue, I am satisfied that it is a very important consideration and one which was canvassed very extensively in the course of these proceedings.

In *H. (D.) v. M. (H.)*, [1997] B.C.J. No. 2144 (QL) (S.C.), reversed (1998), 40 R.F.L. (4th) 370, affirmed [1999] 1 S.C.R. 328, the B.C. Supreme Court considered the custody of a child born in the U.S. The petitioners were the child’s maternal adoptive grandparents who had cared for him since shortly after his birth, and the respondent was the child’s maternal biological grandfather, who lived in Vancouver. The child’s mother, an Aboriginal Canadian, did not seek custody but supported the claim brought by the respondent, her biological father. The child’s father was African-American and lived in the U.S. He had no involvement with the child or the court proceedings.

The trial judge found that the petitioners and the respondent were each capable of offering the child a good home. The trial judge noted that the consideration of the child’s Aboriginal heritage should be given great weight in the proceedings and referred to the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, and in particular ss. 2 and 4:

2 This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

...

(f) the cultural identity of Aboriginal children should be preserved;

...

4 (1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:

...

(e) the child's cultural, racial, linguistic and religious heritage;

(2) If the child is an Aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interest.

While noting that the child's Aboriginal heritage and the ability of his biological grandfather to preserve and enhance it were important considerations, the court stated that it must not overlook the child's African-American background and American citizenship (paras. 46-47):

That heritage is also of importance and it is equally deserving of preservation and nurturing. This is not a case of taking an Aboriginal child and placing him with a non-Aboriginal family in complete disregard for his culture and heritage. The fact is that Melissa is the daughter of D.H. and N.H. and Ishmael is their grandson.

...

The submission that Ishmael's Aboriginal heritage is virtually a determining factor here, oversimplifies a very complex case.

The court went on to consider the best interests of the child with regard to the statutory factors in s. 24 of the *Family Relations Act* (at paras. 49 and 50):

In favour of H.M. are ties of blood, his obvious love and affection for Ishmael, his Aboriginal heritage, his demonstrated ability to provide a home and care for his family. On the less positive side are his lack of employment, the potential unsettling move to Manitoba and the uncertainties attendant upon it, and the problems Amanda has lately experienced and H.M.'s response to them.

In favour of D.H. and N.H. are the ties of adoption, their obvious love and affection for Ishmael, their desire and demonstrated willingness to encourage Ishmael in the appreciation of all facets of his heritage, the stability of their home and their apparent economic ability to provide Ishmael with many advantages.

The issue of Aboriginal heritage was but one factor considered in determining the best interests of the child. The trial judge also extensively reviewed the circumstances of the parties, including the stability of their respective homes. The trial judge did not agree that an order granting custody of the child to his maternal grandparents would uproot him from his culture.

On appeal, the B.C. Court of Appeal reversed the trial judgment and emphasized the apparent stability of the respondent's relationship with his common-law wife and the fact that the child appeared well integrated into his family. The court noted at para. 14 that "as a strict matter of the law, the *Child, Family and Community Service Act* is not applicable to the proceedings", but nevertheless concluded (at para. 13) that the trial judge had "underemphasized ties of blood and culture".

The Supreme Court of Canada restored the B.C. Supreme Court judgment. In reasons for dismissing a motion for a rehearing ([1999] 1 S.C.R. 761), the court concluded (at para. 5):

...[T]hat the trial judge had given careful attention to the Aboriginal ancestry of Ishmael, together with all the other factors relevant to Ishmael's best interest, and that there was no error in his decision, which was reached after five days of evidence and two weeks of

reflection, that justified its reversal by the Court of Appeal. The importance of the findings of the trial judge in custody cases cannot be forgotten. They should not be lightly set aside by appellate courts.

In *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, the court held again that racial identity is but one factor to consider when weighing a child's best interests in the determination of custody. The court stated (at para. 38):

[R]acial identity is but one factor that may be considered in determining personal identity; the relevancy of this factor depends on the context. ... All factors must be considered pragmatically. Different situations and different philosophies require an individual analysis on the basis of reliable evidence.

The court also noted (at para. 39) a distinction between the role of race in adoption cases and in cases involving two biological parents desiring custody.

In adoption cases, the situation might arise whereby the court must make an "either or" decision; in other words, the child is either granted or denied exposure to his or her own heritage. Here, however, we have two biological parents, each of whom shares a part of the race and culture of the child. Of these two biological parents, one will be granted custody and one will be granted access. The result here is that Elijah will have exposure to both sides of his racial and cultural heritage. ... [E]ven in adoption cases where it might play a more important role, race is not a determinative factor and its importance will depend greatly on the facts.

The court went on to say (at para. 40) that "race can be a factor in determining the best interests of the child because it is connected to the culture, identity, and emotional well-being of the child" and that "it is generally understood that bi-racial children should be encouraged to positively identify with both racial heritages."

B. Evidence Regarding Aboriginal Heritage and Culture

As can be seen from the cases discussed previously, race and heritage can be factors in determining the best interests of the child. In dealing with Aboriginal persons in these kinds of cases, it is very important to determine what evidence will be provided to the trial judge regarding a child's Aboriginal heritage and culture. It goes without saying that the court will look for cogent evidence. However, counsel should keep in mind that race and Aboriginal heritage will not be the only factors that the court will consider.

With regard to this evidence, counsel should review *L. (A.) v. K. (D.)*, 2000 BCSC 480, affirmed 2000 BCCA 455. This case involved a custody dispute between the child's natural father and the child's aunt and uncle, all of whom were Aboriginal. In determining the child's best interest, the Supreme Court considered, among other factors, the need for preserving and nurturing the child's cultural identity. This factor included a consideration for "preserving and nurturing any ties similar to love and affection that exist between the child and the traditional lands of his or her community" (at para. 52). In support, the Supreme Court referred to the 1996 Royal Commission on Aboriginal Peoples—in particular, the section on the significance of land to Aboriginal cultures—and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

The Supreme Court then stated (at paras. 54 and 55):

In this case, the Namgis and Tsawataineuk may or may not have site-specific Aboriginal rights. Likewise, they may or may not hold lands pursuant to Aboriginal title. At this point in our history these real questions remain open. However, while the evidence is by no means precise, I am satisfied that M.W. and D.K. both live either on or in close proximity to reserve lands of the Namgis.

In light of all this, in my opinion the preservation and nurturing of M.'s cultural identity, to the extent it entails her relationship to ancestral land, is clearly better served

by a life centered in Alert Bay, Kingcome Inlet, the Nimpkish Valley and the relevant surrounding area. In this context, formative years lived primarily in Mexico and to some degree Victoria inherently would be a long way from home.

The court also considered the continuity of the Aboriginal people's culturally integral practices, customs, and traditions, as perpetuated by the education and training of the child. The court cited (at para. 58) the Supreme Court of Canada decision of *R. v. Côté*, [1996] 3 S.C.R. 139, where Lamer C.J. noted that the continuity of an Aboriginal people's cultural practices, customs, and traditions is ensured by teaching:

In the Aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration.

Cultural continuity included the customary practice of potlaching as described by a Hereditary Chief of the Tsawataineuk. Owen-Flood J. stated (at para. 59):

In short, I find that, in terms of s. 24(1)(d) [of the *Family Relations Act*], potlaching can be understood as a form of moral education and lifeskills training. Furthermore, the potlach system of the Namgis and Tsawataineuk communities is, by its very nature, a traditional practice that transmits culture across generations. Thus, the opportunity to prepare and participate regularly in the potlaches of one's relations should be emphasized when considering how best to equip M. for life as an adult and, at the same time, preserve and nurture M.'s cultural identity.

Owen-Flood J. then quoted from para. 19 of *T. (E.J.) v. V. (P.M.)* (1996), 24 R.F.L. (4th) 269 (Man. C.A.):

[N]o authority is required to make a convincing argument that culture and heritage are significant factors in the development of a human being's most fundamental and enduring attributes. For anyone, Aboriginal or otherwise, they are the stuff from which a young person's identity and sense of self are developed. This being so, to suggest that concerns about a child's early upbringing and cultural environment can be addressed as if they were school courses to be taken at some later date totally misses the point.

The trial judge awarded custody of the child to the father, who lived in Alert Bay. The decision was upheld by the B.C. Court of Appeal.

This case is an excellent example of how to marshal law and evidence in custody cases when Aboriginal culture is a relevant factor. It is interesting to note that the court referred to the land title case of *Delgamuukw* as well as the Royal Commission on Aboriginal Peoples. It is also interesting to note that the court accepted evidence regarding the system of potlatch and how that affected the trial judge's consideration under s. 24(1)(d) of the *Family Relations Act*.

As indicated by the Supreme Court of Canada in *Van de Perre v. Edwards*, adoption cases regarding Aboriginal children require special consideration because they are more likely to result in "either or" situations where a child may lose contact with her or his birth parents. Increasingly, First Nations want to be involved in any adoption of their members and are also becoming more involved in the placement of children who come into the care of the Ministry of Children and Family Development. Sections 3(b) and (e) of the *Child, Family and Community Service Act* specifically state that Aboriginal people should be involved in the planning and delivery of services to Aboriginal children and families and that the community should be involved, whenever possible and appropriate, in the planning and delivery of services to families and children.

V. Division of Property

The *Family Relations Act*—in particular, Part 5—provides the legislative scheme for the division of family property in British Columbia. As previously discussed, provincial legislation cannot impinge on federal jurisdiction regarding "Indians and Lands reserved for

the Indians” and will not apply if inconsistent with the *Indian Act*. This creates significant difficulties with regard to the division of interests in family property on reserve. There has long been recognition of these difficulties, particularly for Aboriginal women, and of the need to establish legal regimes for the division of marital property on reserve lands.

Some First Nations have developed policies, bylaws, or other legal mechanisms to deal with this issue. Under the *First Nations Land Management Act*, S.C. 1999, c. 24, for example, First Nations who have agreed to operate under this Act must provide for community consultation regarding the “development of general rules and procedures respecting, in cases of breakdown of marriage, the use, occupation and possession of first nation land and the division of interests in first nation land” (s. 6(1)(f)).

As well, in September 2006 the Native Women’s Association of Canada began a Canada-wide consultation regarding matrimonial real property on reserve in order to hear the ideas and opinions of Aboriginal women. It is expected that new legislation addressing this issue will be tabled in 2007..

For the time being, unless a First Nation has policies, bylaws, or additional legal mechanisms for dividing marital property on reserve, courts can divide only family assets held by Aboriginal persons that do not constitute interests in reserve land. The Supreme Court of Canada in *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, confirmed that provincial laws dealing with ownership, right of possession, transfer of title, partition or sale of property, and severance of joint tenancy were in conflict with the *Indian Act* and could not be applied to interests in reserve lands. In that case, the court could not divide the parties’ interests in reserve lands but did award compensation to adjust the division of assets. Similarly, in *George v. George* (1992), 95 D.L.R. (4th) 333 (B.C.S.C.), affirmed (1996), 24 R.F.L. (4th) 155 (B.C.C.A.), the husband was ordered to make monthly payments to the wife by way of compensation in accordance with the rental value of the property at issue. (See also *S.J.O. v. R.V.O.*, 2004 BCSC 1153, citing *Derrickson* and *George*.)

When the payor spouse has property off reserve, an order may be granted with respect to that property, or the property may act as security for a compensation order. If all property is held on reserve, however, enforcing a compensation order may be difficult (see the discussion regarding enforcement of spousal support in the *BCFPM*). Additional problems may be encountered if the on-reserve property is held jointly by the spouses. In *Darbyshire-Joseph v. Darbyshire-Joseph*, [1998] B.C.J. No. 2765 (QL) (S.C.), the certificate of possession for the on-reserve family home was held jointly by the parties. Kirkpatrick J. found that she had no jurisdiction to order a transfer of either party’s interest to the other. Kirkpatrick J. also declined to make an order for compensation after voicing frustration at the legislative gap, but proceeded to discuss the appropriate quantum of compensation in the hope that this would “assist the parties in resolving the dispute outside of the Court’s process”. (See also *Baptiste v. Baptiste*, [1987] B.C.J. No. 1146 (QL) (S.C.).

In addition to limitations regarding division of assets, the court cannot grant an order for exclusive occupation of a family home on reserve as it can for one off reserve under the *Family Relations Act*, s. 124 (see *Paul v. Paul*, [1986] 1 S.C.R. 306). Neither can the court grant a restraining order with respect to the disposition of interests in reserve lands, although an order with respect to leasehold interests in designated lands should be available (see *Dunstan v. Dunstan*, 2002 BCSC 335).

Courts may, however, uphold agreements made between parties regarding interests in on-reserve property. For example, in *Kwakseestabla v. Kwakseestabla*, [1998] B.C.J. No. 283 (QL) (S.C.), the court upheld a consent order granting the wife a life interest in the matrimonial

property on reserve. The court confirmed that it had jurisdiction to uphold the consent order because the relief was based on the agreement of the parties, rather than on the application of a provincial statute.

When assisting a client whose spouse holds interests in properties on reserve, counsel should first consider whether the First Nation on whose reserve the property lies has any bylaws, policies, or agreements with respect to the division of on-reserve family property. It may be important to try to work with the First Nation as well as with the parties in resolving the matter. Counsel should also research whether any new federal legislation addressing marital property on reserve land is in effect.

Where the issue of division of marital property on reserve lands arises, counsel should immediately look into whether the spouse has any interest in properties off reserve, particularly real property, and should register a charge under the *Land (Spouse) Protection Act*, R.S.B.C. 1996, c. 246, or a Certificate of Pending Litigation against those properties. (See *BCFPM* Chapter 17 (Enforcing Orders and Agreements) for details of enforcement procedures.)

If the parties can reach agreement regarding their interest in reserve lands, a consent order should be entered as per *Kwakseestabla*. It is, however, unclear whether courts will enforce consent orders beyond the granting of a life estate.

Ultimately, counsel must advise clients that a compensation order may have to be sought rather than a division of on-reserve interests. At this time, orders for exclusive possession of family homes and orders restraining the disposition of assets may be difficult, or impossible, to obtain with respect to interests in reserve lands.