

Women, Violence and BC's New Family Law: Applying a Feminist Lens

March 9, 2012

Angela Marie MacDougall, Battered Women's Support Services

Susan B. Boyd, UBC Faculty of Law

Laura Track, West Coast Women's Legal Education & Action Fund

Agnes Huang, Barrister & Solicitor

[Thanks to John-Paul Boyd, Aaron Gordon Daykin Nordlinger, for allowing us to adapt his slides]

AGENDA FOR TODAY

Background to the new Act

Overview of the Act

Emphasis on Dispute Resolution

Protection Orders

Parenting and Guardianship

Discussion

BACKGROUND TO THE NEW ACT

- Current *Family Relations Act* dates back to 1970s
- 2006: *Family Relations Act* Review announced by B.C. Attorney General
 - Research commences
- 2007: AG releases 14 Discussion Papers for public consultation and feedback

- 2008: BC AG publishes report on public consultations
- July 2010: *White Paper on Family Relations Act Reform: A Proposal for a New Family Law Act* published
 - Feedback solicited for further three months
- SILENCE UNTIL . . .

- Nov 2011: Bill 16 tabled, debated in the BC Legislature, and enacted
- BUT: Most sections of new *Family Law Act* not yet in force
- For now, *Family Relations Act* still applies
- 2013: *Family Law Act* expected to come fully into force, rolling in incrementally

OVERVIEW OF THE NEW FAMILY LAW ACT: the positives

- Focus on Family Violence
- Definition of Best Interests of the Child
- New Definitions of Parenthood
- No Presumptions about Parenting Arrangements
- Support law now similar to Divorce Act
- Unmarried couples included in Property

Family Violence Highlights

- Broad definition of family violence (s. 1)
- Dispute Resolution Professionals required to assess for presence of violence and impact on party's ability to negotiate (s. 8)
- In assessing child's best interests, must look at impact of *any* family violence on child's safety, security or well-being (ss. 37, 38)
- Agreements and orders deemed not be in child's best interests unless protects child's safety to maximum extent (s. 37)
- New suite of protection orders available (s. 183 et seq.)

Family violence, s. 1

"family violence" includes

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

Best interests of children, s. 37

- (2) all of the child's needs and circumstances must be considered, including:
- (a) the child's health and emotional well-being;
 - (d) the history of the child's care;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) *the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;***
 - (h) *whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;***

(continued . . .)

Best interests of children, s. 37

- (i) ***the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;***
- (j) ***any civil or criminal proceeding*** relevant to the child's safety, security or well-being.

*****NOTE *****

(3) An agreement or order is *not in the best interests of a child* unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

Assessing violence, s. 38

For the purposes of section 37 (2) (g) and (h), a court must consider all of:

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

PARENTHOOD

- Definitions of who is a 'parent'
- Not all parents are Guardians
- 'Custody' and 'Access' no longer exists
- Instead we have 'Guardianship'
 - Parental Responsibilities
 - Parenting Time

Child Support

- Each Parent and Guardian has duty to provide support
- Courts must still order child support in accordance with the Child Support Guidelines (s.150)
- Hierarchy of obligations:
 - Obligation of *non-parent guardian* is second in priority to obligation of parent;
 - obligation of *stepparent* is secondary to both
 - Obligation of *stepparent* determined considering child's standard of living during the relationship and the length of time the child and stepparent cohabited (s. 147)

Spousal Support

- **Spouse** includes:
 - married spouses
 - persons who live in marriage-like relationships for a continuous period of at least two years
 - **and persons cohabiting in shorter marriage-like relationships who have a child together (s. 3) [new]**
- Objectives and factors for child support are now the same as in the *Divorce Act* (ss. 161, 162)

Property: Unmarried Spouses now can claim

- **Spouse** includes married spouses and persons who live in marriage-like relationships continuously for at least two years (s. 3)
 - [but note difference from definition for spousal support]
- Claims must be brought within 2 years of divorce or annulment for married spouses, and 2 years of separation for unmarried spouses (s. 198)

Property: new system

- **Exclude property** brought into a relationship, gifts and inheritances, court awards, certain trust interests (s. 85)
- **Family property** is:
 - all property owned by either spouse at separation
 - **AND** increase in value of excluded property after relationship started (s. 84)

Property & Debt Sharing

- **Separation** triggers in each spouse:
 - a right to a **one half interest** in all family property
 - **AND** equal responsibility for all family debts (s. 81) **[NEW!!]**

Family Debt

- all debt incurred by a spouse during the relationship to date of separation, and those debts incurred after the date of separation to maintain family property (s. 86)
- Family property and family debt is to be **valued** at date of agreement dividing property & debt or trial (s. 87)

Presumption of Equal Division

- Family property and family debt presumed to be divided equally, regardless of the spouse's respective use or contribution (s. 81)
- **BUT:** Court may order unequal division if “significantly unfair” to divide equally considering various factors

Excluded property

- is presumptively **not divided** (s. 96)
- But may be divided if:
 - if family property or family debt outside BC cannot be divided, or
 - would be “significantly unfair” not to divide excluded property considering length of the relationship or a spouse’s contribution to the excluded property

New Orders & Process

- Lots of new Orders available
- Lots of new Processes
- Emphasis on Non-Court Dispute Resolution

A NEW EMPHASIS ON NON-COURT DISPUTE RESOLUTION

Laura Track

- Parties encouraged to resolve disputes other than through court (s. 4)
- Lawyers must advise clients of available dispute resolution mechanisms (ss. 8, 197)
- Court may require parties to participate in non-court dispute resolution process (s. 224)
- Parties engaged in non-court process required to make full and complete disclosure (s. 5)

- Enumerated non-court processes: collaborative law, mediation, arbitration, parenting coordination (s. 1)
- *Commercial Arbitration Act* to be renamed and overhauled to accommodate family law disputes (s. 305 et seq.)
- Court given authority to appoint parenting coordinator without consent (s. 15)
- Parenting coordinators given authority to make binding determinations enforceable by court (s. 18)

New tools to manage litigants and court processes

Prohibitory orders

- where party makes a trivial application or conducts a proceeding in manner that misuses the court process, court may bar party from taking further steps without leave (s. 221)
- Order may include terms and conditions
- Order may require restrained party to pay other party's expenses, pay up to \$5,000 as a fine or sum to another person

Conduct orders

- Court may make conduct order to promote settlement, prevent misuse of court process or manage behaviour impeding resolution (s. 222)
- **Orders include:** taking counselling, participating in dispute resolution process, restricting communications, requiring maintenance of residence, posting security, reporting to court (s. 224 et seq.)
- Order may require party to do or not do anything in order to achieve conduct order purpose (s. 227)

Case Management Orders

- Court may make case management order for conduct order purpose (s. 223)
- Orders include:
 - dismissing or striking all or part of claim or application, adjourning proceeding, judge seizing self of further applications

Breach of conduct order

- court may make further conduct order, draw adverse inference, order reimbursement of expenses, require malfeator to pay up to \$5,000 as a fine or sum to another person, make any other appropriate order (s. 228)
- Conduct order restricting communications may be enforced by making of protection order (s. 228)

PROTECTION ORDERS

Agnes Huang

- **Protection order:** may be applied for by party or person on behalf of party and may be brought independent of litigation (s. 183)
- Orders include: restraints on communications, attending or entering place, following person, possessing weapons; directions to police to remove person from property, accompany person to remove belongings, seize weapons; requirement to report; other terms
- Expire in one year unless otherwise ordered

Making protection orders, s. 184

In determining whether to make an order under this Part, the court must consider at least the following **risk factors**:

- (a) any history of family violence by the family member against whom the order is to be made;
 - (b) whether any family violence is repetitive or escalating;
 - (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
 - (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
- (continued next page)

Making protection orders, s. 184

- (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
- (f) the at-risk family member's perception of risks to his or her own safety and security;
- (g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

Making protection orders, s. 185

If a child is a family member, the court must consider, in addition to the factors set out in section 184,

- (a) whether the child may be exposed to family violence if an order under this Part is not made, and
- (b) whether an order under this Part should also be made respecting the child if an order under this Part is made respecting the child's parent or guardian.

Temporary Orders re Property

- **Interim Distribution** of Property if necessary to fund dispute resolution, a proceeding, or obtaining of information or evidence (s. 89)
- **Family Residence** (owned or leased): exclusive occupation or possession or use of specified personal property (s. 90)
- **Protection of Property**: restraint on disposition

Determining Parentage & Parenting Disputes

Susan Boyd

Determining Parentage

- New provisions determine parentage for all purposes of BC law (s. 23)
- Different rules depending on whether “sexual” or “assisted” reproduction
- “Assisted reproduction”:
 - a method of conceiving a child other than by sexual intercourse (s. 20)

***Without* assisted reproduction**

- birth mother and biological father are parents (s. 26)
- Presumptions of paternity similar to *Family Relations Act* (s. 26)
- Court may declare parentage if there is “a dispute or any uncertainty” (s. 31)
- Court may order that samples be taken for the purposes of a parentage test (s. 33)

Assisted Reproduction

- If no agreement, birth mother is parent along with her spouse at time child conceived (s. 27)
- **Donors:** not automatically parent due to donation; **But** may be parent with pre-conception agreement (ss. 24, 30)
- **Surrogate:** not a parent if pre-conception agreement says she is not; **BUT** may be parent with agreement (ss. 29, 30)

Guardianship (no more custody)

- Parents are presumptively **guardians** while living together and after separation, unless agreement or order to contrary (s. 39)
- Parent who never resided with child **not** a guardian **unless** agreement or regular care (s. 39)
- Only Guardians may have **parental responsibilities** and **parenting time** (s. 40)

Parental responsibilities

- Making day-to-day decisions and having day-to-day care, control & supervision of a child (s. 41)
- Plus making variety of decisions, e.g. re: residence, with whom child will live, education & extracurricular, medical care, spiritual/cultural, passports, etc. (s. 41)
- Guardians must exercise parental responsibilities in the best interests of the child (ss. 40, 43)

Parental responsibilities: allocation

- Guardians must exercise parental responsibilities in **consultation** with all other guardians
 - unless agreement or order to contrary
 - Unless consultation would be unreasonable or inappropriate
- Parental responsibilities may be allocated among guardians (s. 40) by agreement or order (need not be shared)

No Presumptions!

- No particular arrangement to be presumed to be in child's best interests (s. 40(4))
- In particular, **no presumption** that:
 - Responsibilities should be allocated equally
 - Parenting Time should be shared equally
 - Decisions should be made separately or together

Parenting time

- is the time a child is with a guardian, allocated under an agreement or order (s. 42)
- During parenting time, guardian may make day-to-day decisions and have day-to-day care & control
- Subject to agreement or order to contrary

Parenting arrangements

- arrangements for parental responsibilities and parenting time (s. 1)
- **Informal parenting arrangements:** if ‘normal’ part of child’s routine, cannot change without consulting other guardians (s. 48), unless unreasonable or inappropriate
- But **orders** can make allocations, order dispute resolution mechanism, order transfer of child, or supervision of parenting time in child’s best interest (s. 45)

Changing Child's Residence (if no written agreement or order)

- Can ask court to order change in residence:
 - Looking at **Reasons** for change in addition to best interests
 - **NOT** looking at whether guardian would move without child

(Section 46)

Relocation (if written agreement or order)

- Means a change in residence of child -- or child's guardian -- 'that can reasonably be expected to have a significant impact on the child's relationship with a guardian or other person(s) having significant role
- Must give 60 days' written notice to other guardians or persons having contact:
 - unless risk of family violence or no ongoing relationship
- If no application by another guardian, can relocate (s. 68)

Relocation (if written agreement or order)

- Can apply for order permitting or prohibiting relocation (s. 69)
- Court must consider best interests factors, plus:
 - Special rules depending on whether ‘substantially equal parenting time’ or not (s. 69)
 - E.g. ‘Good faith’ and reasonable and workable arrangements to preserve relationships

Contact (non-guardians)

- **Contact** is time someone who is NOT a guardian is with a child, including people other than parents (ss. 1, 58)
- Agreements for contact are only binding if made with all guardians having parental responsibility for contact (s. 58)
- Orders for contact may include terms and conditions, and supervision requirement (s. 59)

Denial of Parenting Time: New Enforcement

- **Withholding of child:** court can require parties to participate in dispute resolution, attend counselling, give make-up time, reimburse expenses, pay up to \$5,000 as a fine or sum to another person; also supervision of transfer (s. 61)
- **Where Denial not Wrongful:** reasonable belief child might suffer family violence, drugs alcohol, child ill (medical note), repeated failure to exercise parenting time, etc (s. 62); make-up time can still be ordered
- **Failure to see child:** similar remedies (s. 63)