The New Family Law Act and its Implications for Battered Women

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For Battered Women's Support Services

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Introduction

On March 18, 2013, the family law legislation in British Columbia will drastically change. The current *Family Relations Act* will be replaced by the new *Family Law Act* (FLA). For women leaving or planning to leave abusive relationships, understanding their legal rights and limitations are often crucial considerations in the safety and financial planning involved for themselves and their children. As such, the changes that the FLA will bring to BC family law and its implications for women in abusive relationships have been a hot topic for discussion amongst advocates, lawyers, and other members of the community, since the first murmurs of its proposal were put forth in *The White Paper* of 2010.

There are already many excellent informational resources about the FLA that provide plain-language overviews of the changes in our legislation (see JP Boyd's post at *http://www.courthouselibrary.ca/training/stream/jpboyd/11-11-14/The_New_Family_Law_Act_A_brief_background_and_a_shorter_synopsis.aspx*, or Legal Services Society's *Guide to the New Family Law Act http://www.crownpub.bc.ca/Product/Details/7550004230_S*).

As such, this guide is not intended to replace the wonderful work already completed by legal professionals, or to provide a comprehensive summary of legislative changes. Rather, this guide intends to focus specifically on sections of the FLA that we believe will have the most significant impact on our work at Battered Women's Support Services, where we provide legal information, support and advocacy with an anti-oppressive analysis and understanding of the unique issues, concerns and barriers experienced by battered women in the legal system.

Who does the FLA apply to?

In BC, family law is governed by both provincial and federal legislation. The *Family Relations Act* (The *Family Law Act* as of March 18, 2013) is provincial legislation, and **applies only in BC**. The *Divorce Act* is federal legislation and applies **everywhere in Canada**.

Only **legally married couples** may access the *Divorce Act*, which has provisions for **divorce, child custody and access, spousal & child support**.

The *Family Law Act*, which has provisions for **guardianship, parenting arrangements,** and **contact** (to replace the old "custody and access" language)**, spousal & child support, property/debt division, protection and conduct orders, mobility rights** and **other forms of relief**, can be accessed by **married or unmarried couples**, as long as there is a **spousal relationship and/or children** involved.

DIVORCE ACT	FAMILY LAW ACT
Divorce	Guardianship
Custody	Parenting arrangements
Access	Contact
Child support	Child support
Spousal support	Spousal support
	Property/debt
	Protection orders
	Conduct orders
	Moving with children

Who is a spouse?

The notion of **spousal relationship**, up until the implementation of the FLA, has been restricted to *married* and *common-law couples* (couples who have lived together in a "marriage-like relationship" for at least two years). While child support for children can be granted regardless of relationship status, only spouses can apply for spousal support. However, the definition of "spouse" in the FLA has now been expanded, **for the purposes of spousal support only**, to include couples who have lived together for less than two years, but have a child together.

This new provision is a step forward in recognizing the impact of raising children in contributing to economic disparity between spouses, and the need for spousal support in those circumstances even in absence of a common-law or married relationship. This is especially important when considering that the mother is usually the one disproportionately impacted by children (e.g., taking time off work for childbirth and childcare).

Who can apply for spousal support?

Family Relations Act (old Act)	Family Law Act (effective March 18, 2013)
Married couples	**Married couples**
Common-law couples (lived together in a "marriage like relationship" for at least 2 years)	**Common-law couples** (lived together in a "marriage like relationship" for at least 2 years)
	Couples who have lived together in a "marriage like relationship" for less than 2 years but **have a child/children together**

The *Divorce Act* prohibits spousal misconduct to be taken into consideration when deciding upon spousal support, but the FLA offers more protection in allowing the court to take into account spousal misconduct that unreasonably prolongs a spouse's need for support or undermines a spouse's ability to pay support. Examples can include: deliberately under-working to avoid paying support, interfering with the other spouse's ability to find work, etc.

Property division & Debts – who can apply under the FLA?

Under the *Family Relations Act*, only **married** couples had automatic interest in family property, regardless of whether the property was owned by one spouse or both. Common-law couples had to use the principles of constructive trust law (not in the *Family Relations Act*) in order to ask for a share in property not under their name. However, under the new FLA, common-law spouses (note: *only* if they have resided together for at least 2 years) are now entitled to the same property division rights as married couples.

Family Relations Act (old Act)	Family Law Act (effective March 18, 2013)
Married couples	**Married couples**
	Common-law couples (lived together in a "marriage like relationship" for at least 2 years)

Property rights, however, have changed: There are now 2 categories of property: **FAMILY PROPERTY** and **EXCLUDED PROPERTY**.

FAMILY PROPERTY is property that either or both spouses acquire during the course of their relationship, as well as the **increase in value of each spouse's excluded property.** This includes, but is not limited to:

- Real estate;
- Business interests;
- Pensions and RRSPs;
- Bank accounts.

Spouses are presumed to have equal (50-50) interest in family property.

EXCLUDED PROPERTY includes:

- Property either spouse owned prior to living together or marriage, whichever came first;
- Property bought with excluded property;
- Insurance or payments for injury/loss that was only meant to compensate one spouse, unless it involves income lost during the relationship;
- Gifts or inheritances given to only one spouse.

In summary, the FLA essentially:

- Allows common-law couples to have the same property rights as married couples;
- Eliminates the old Family Relations Act test for determining family assets ("ordinarily used for a family purpose");
- Excludes certain property from the 50-50 "family property" split
- Adopts a more "what's yours is yours and what's mine is mine" approach

Debts

There is now legislation dealing with **family debts** (outstanding debts acquired during the relationship), with a starting presumption that **spouses** (common-law or married) share equal (50-50) responsibility for the debts.

***Note: Judges still retain the jurisdiction to divide the property or debt unequally if equal division would be "significantly unfair".**

However, this starting presumption of equal debt sharing combined with the "what's yours is yours/mine is mine" approach for property can place women at a severe economic disadvantage. Considering the lack of wage parity between sexes (men on average make significantly more money than women), this new legislation could result in circumstances where women leave relationships more impoverished than ever, and saddled with debts they did not incur.

Family Violence

At Battered Women's Support Services, we recognize that violence is a gendered phenomenon and that its impact disproportionately affects women. While we often associate violence with physical assault, violence against women can take on many (and often intersecting) forms, including emotional, mental, sexual, financial, and even systemic abuse. By failing to recognize this in the past, the BC family law system has constructed an impossible barrier for many battered women attempting to access its protections and justice. Additionally, many abusers have taken advantage of the gaps and learned to manipulate the system, wielding it as another weapon to abuse and control.

One of the most anticipated highlights of the FLA is its recognition of family violence as an integral consideration for family law decisions. The previous *Family Relations Act* did not have explicit provisions addressing violence, and violence against a spouse was generally not taken into consideration in family law decisions unless the violence was also directed toward the children. Even then, it was very rare for abusive fathers to lose access to their children. If a judge was persuaded that the parent was a risk to the children, supervised access tended to be granted over no access. However, that required either paying for a supervised access agency to facilitate the visits or arranging for friends and family members to supervise, which, when dealing with a hostile and abusive ex-partner, was easier said than done.

As a result, many women are bound by court orders that compel them to facilitate custody and access visits with abusive ex-partners, which allows the ex to continue the abuse and expose their children to violence. If a court order allowed for "generous access", women often feared that their exes would show up at any given time, demanding access. If a woman withheld scheduled access for safety reasons, she could find herself served with family court papers, where the ex asks for her to be found in contempt of court (which can have penalties ranging from fines to jail time) or for custody to be given to him.

In instances where a woman has compelling evidence of child abuse and a supervised access order is granted, supervised access is generally treated as a transitional remedy with the idea that with "continued good behaviour", often coupled with an anger management course or counselling, the abusive ex would eventually be able to see the children unsupervised.

The unfortunate consequence is that the family law system has enabled abusers to continue the cycle of power and control through their children, even long after the relationship has ended. In addition, the traditional legal notion that spousal abuse is irrelevant to the abuser's capacity to parent (and thus not considered when assessing the best interests of the child) has left a brutal impact on children who have witnessed their mothers being abused. Apart from traumatizing the child, it has served to minimize and even normalize abuse, perpetuating the cycle of violence.

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However, the FLA has taken steps in recognizing that abuse does not have to be physical or directed at the person to be classified as violence. The FLA defines **"family violence"** as:

- Physical abuse;
- Sexual abuse or attempts to sexually abuse;
- Forced confinement;
- Deprivation of the necessities of life;
- Psychological or emotional abuse, including harassment, intimidation, threats, coercion, stalking, etc;
- Financial abuse;
- Intentional damage to property;
- Exposing children directly or indirectly to family violence.

Children

The best interests of the child are now the **only** consideration. Where the *Family Relations Act* was silent, the FLA explicitly includes **the impact of family violence** as a consideration in determining the best interests of the child.

The FLA dispenses with the terms **custody** and **access** and replaces them with **guardianship, parental responsibilities & parenting time** (part of guardianship) and **contact** (the new access for those who are not Guardians of the child). Note that the *Divorce Act* still retains the "custody and access" language, which may lead to disparity in court order wording when invoking the *Divorce Act* for proceedings.

Under the FLA, a parent who has never lived with the child is not automatically a guardian unless they regularly care for the child, or is appointed one by agreement or order.

Relocating with Children

There is now a FLA process to specifically address issues of parents moving with their children.

If a guardian's move will impact the child's relationship with another guardian or someone who has contact, the guardian must now give them **60 days' notice** of the move in writing. Only other guardians can object, and must do so within **30 days** (they will need to go to court to get an order preventing the move). They can object on the basis that the move will not be in the child's best interests.

Whether the move will be allowed will be based on the moving guardian showing "good faith" in the move (e.g., not moving just to sever ties with other guardians/contacts) and reasonable arrangements to preserve the child's relationship with other guardians/contacts. Where guardians have equal or almost equal parenting time, the guardian moving must also demonstrate that it is in the child's best interests to move.

Alternative Dispute Resolution

One of the key developments in the FLA is the strengthened push toward alternative dispute resolution, i.e., resolving family law disputes outside of court. This could include **mediation** (mediator facilitates discussion between parties in hopes of coming to an agreement), **arbitration** (parties agree that a named third party will make a binding decision on their behalf), **parenting coordinators** (appointed professional settles future family law disputes after an agreement/court order has been reached), and other collaborative processes (e.g., lawyers helping parties reach an agreement).

However, mediation and other collaborative processes are rarely if ever appropriate for women who are experiencing partner abuse. The fairness of the process is undermined where the abuser uses threats, coercion, intimidation, and other techniques to pressure women into signing "agreements". Without intimate knowledge of the parties or appropriate anti-violence training, many lawyers and mediators are unable to pick up on dynamics of violence and control in family law negotiations, which can be as subtle as a certain "look" the abuser gives to the woman.

In addition, the lack of earning parity between the sexes means that women are often leaving a relationship with considerably less financial resources than their male partners. The women are usually not in a position where they can afford a lawyer, but may also not be eligible for legal aid. Lack of legal representation increases the existing imbalance of power on the bargaining table, especially if their abuser has retained counsel.

Most of the family law collaborative services are implemented with the expectation that they will be funded privately by the parties. Again, reflecting on the disparity in incomes between men and women, there will be the consideration of whether whoever pays the piper will be able to call the tune. Without an independent, impartial court setting (**judicial independence,** as it is sometimes called), there arises the question of bias, especially when only one party is paying for these collaborative services.

The other dark side of the coin may arise from an equal presumption of debt sharing – women may also be ordered to pay for half of the costly parenting coordination services. This opens up yet another opportunity for the ex to continue abusing her through the legal system. The woman may find herself forced back again and again to the parenting coordinator to resolve issues between her and the non-cooperative ex, causing her to miss work and incur unaffordable parenting coordination expenses.

Protection Orders

Replacing the old "restraining orders" in the *Family Relations Act*, judges may issue protection orders where there is family violence (as defined by the FLA). Apart from standard no-contact provisions, protection orders can also restrict a person from owning weapons, stalking, going to the spouse's or children's home, school, place of employment, etc.

Protection orders cover all **at-risk family members**, which could extend to members beyond the spouse and children (e.g., other relatives). However, the interpretation of "family member" seems to deliberately exclude dating relationships, which means that women experiencing dating violence must continue to look for recourse through the criminal justice system.

One positive and much-needed aspect of protection orders is its **paramountcy** provision. If a protection order conflicts with another order under the FLA, the protection order takes precedence.

So if you have a FLA order where the ex has parenting time or contact with the child, the protection order will **override** the contact/parenting time if the protected party must communicate with the ex to arrange the visitation. It is not uncommon under the old system to see battered women with every intention of obeying the court, yet struggling with paradoxical orders that make it practically impossible to do so.

Protection orders cannot be enforced under the FLA; they must now be enforced under the *Criminal Code*. That is, a breach of the order is now considered a criminal offence. There are many women who have called the police for assistance in enforcing a family court order, yet were refused because the court orders were of "civil jurisdiction". Women were often advised to include "police enforcement clauses" in their custody & access orders, yet that did not always guarantee police involvement. Hopefully, the additional clarity will ease some of the current confusion and problems regarding the enforceability of family court orders by the police.

The FLA also mentions **conduct orders**, where a judge can order things like restricted communication, case management (e.g., barring one party's frivolous and vexatious applications to court, fines) and other ways to manage the court process. Where a woman is unable to get a protection order, conduct orders may provide some alternatives in deterring an ex from using the court system as a form of abuse and harassment.

Rightful and Wrongful Denial of Contact

One of the common struggles faced by battered women with parenting orders include juggling the consequences of not obeying a court order with pressing concerns for the children's safety. The FLA has provisions to address those circumstances.

While denying the other parent access or contact to the children has been typically looked down upon in the court system, the FLA now addresses when a parent can "rightfully" deny contact or parenting time with the other parent:

- If they believed the child might experience violence;
- If the other party was impaired at the contact/parenting time;
- If the child was ill at the contact/parenting time (need note from doctor);
- If the other party repeatedly failed to use their contact/parenting time (without notice or excuse) in the last 12 months;
- If the other party said they weren't going to exercise contact/parenting time but showed up anyway without notice;
- Or any other appropriate circumstances.

Conclusion

The FLA has implemented a drastic overhaul to BC's family law system. While many of the changes appear positive, the new model also poses concerns and potential drawbacks for battered women accessing its system. At the time of this guide, we have yet to see the FLA's full implementation in the court system. We can only make educated guesses as to how judges will interpret and use this new legislation, which will continue to grow and be shaped by case law. Our hope is that the FLA will prove a much-needed stepping stone to providing better options, assistance and understanding to the women and children who are in greatest need of its protections.

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