CHANGES TO THE BC FAMILY LAW ACT: Q & A

In January 2013, EVA BC/CCWS facilitated four conference calls for anti-violence programs from around the province to answer questions about changes to the BC Family Law Act that came into effect on March 18, 2013. Following are some of the questions that were asked during the calls. Many thanks to Linda Thiessen, Civil Law Coordinator at LSS, for participating in all the conference calls and providing answers to questions.

Please note this is shared for general information purposes only. It is not intended to be, and cannot be relied upon, as legal advice.

Background

The new provincial Family Law Act (FLA) received Royal Assent on November 24, 2011, fundamentally altering the way family law matters will be handled in British Columbia. The new Act contains important and far-reaching provisions intended to provide better protection for women and children experiencing violence in the family context. The FLA came into force on March 18, 2013.

Q: What changes to the FLA will impact families?

A: Every change in the FLA is about families. It is a very different approach to the area of family law. There is an emphasis on resolving disputes out of court, but this is not meant to apply in cases of family violence. There is no additional government or non-government funding at this time for any of the new initiatives for out-of-court resolution of family law issues.

Q. How will this new Act help and/or not help women and children who are leaving abusive situations?

A: It is a tremendous improvement that family violence has to be considered in every case. There is now a professional obligation to assess and screen for family violence - and not just for lawyers, but anybody who works with family disputes.

Q. Will the new legislation address situations of misconduct by abusers who refuse to settle, sometimes dragging cases out for years?

A. Yes. This is very well addressed in section 222, which deals with "Conduct Orders". Conduct orders provide the court with a lot of tools to force people to do some things and stop them from doing other things. This will facilitate settlement and get a final determination.

Q: Are there any changes for clients with no access to legal aid and lack of funds?

A: While there will not be increased funding for legal aid, the presence of family violence, which will be more broadly defined, will be a key consideration in awarding legal aid. Violence has always been a key consideration for family law coverage decisions. This is not changing with the FLA, but LSS is using the broad definition of family violence contained in the FLA in making coverage decisions.

Q: What about women who are poor - how they will access these professionals? Will they still have access to legal help? Will they have to pay for these services?

A: There are things available for anyone who is eligible for legal aid, such as mediation and arbitration. Mediation has long been available as an option for clients who have family legal aid referrals. The current family tariff provides the lawyer with up to 10 hours to prepare for mediation and/or collaborative law processes and up to 15 hours to attend mediation and/or collaborative meetings with their client. The family tariff is being amended to allow lawyers to use this tariff item for mediation or arbitration or collaborative law processes or a combination of the three - mediation and arbitration and collaborative law.

Q: Will the new Act be used for all family court matters (within the FLA) as of March 18, 2013 or only new court files as of that date?

A: If a previous agreement or court order gives a party custody or guardianship, then that party is a guardian and has parental responsibilities and parenting time under the

new Act. If the party has access under the previous order or agreement, that party now has contact under the new Act.

Legal proceedings commenced before the new Act comes into effect carry on under the old Act with respect to property and pension division, unless the parties agree otherwise.

Q: What happens if the woman flees with any children where guardianship has not yet been decided?
Please note: Under the new Family Law Act, the term "custody" is changed to "guardianship" and the term "access" has been changed to "time with the child'".

A: Under the current Family Relations Act s. 34, in the absence of a court order, the person with whom the child usually resides is deemed to have custody rights. There is no equivalent provision in the new FLA.

Q: Under the new Act, if a woman is fleeing violence and takes the children with her, how will she be able to safely make decisions about the children's welfare if it is not clear that she has "de facto" custodial/guardianship rights under the Act, at least until a court order or legal agreement between the parties is reached?

Section 39 of the new FLA provides that while they are living together and after they separate, both parents are generally considered to be guardians of the child.

While section 40 of the new FLA says that normally guardianship rights are exercised in consultation with the other guardian, this is not the case where such consultation would be unreasonable or inappropriate in the circumstances:

> 40(1) Only a guardian may have parental responsibilities and parenting time with respect to a child.
>
> 40(2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.

Q: So what are the woman's options under the new Act?

A: A person should deal with the issue as soon as they can by going to court immediately to establish guardianship.

Refer to exemption to provide notice for relocation – there are some exemptions to having to give notice for relocation and also to have to consult with the other parent regarding decisions about the child [s. 40(2)]

Q: What considerations are in place in situations where there is concern for the child's safety when access is awarded to an abusive father, whether there is a charge or not?
Factors to consider: 1) trauma reactivation of the mother when she has to have contact with the father re: child access. 2) Women are at continued risk emotionally and physically when the father is not supervised. 3) Children continue to witness conflict, aggression and fear 4) Children experience themselves as pawns, with fathers using them to get access to the mother.

A: It used to be that best interest of the child was just one factor to take into consideration. Under the new Act, best interest of the child is to be the **only** consideration. The FLA specifies the impact of family violence on a child's safety as something courts **must** consider, including whether the person responsible for the family violence may be impaired in his/her ability to care for the child and whether requiring cooperation would lead to any risk. It will be up to counsel to argue these positions, but we hope for positive changes here.

Q: What is in place for women who are unable to leave the community with their children for safety?

A: There is no uniformity in case law. It goes back to the argument and persuasion. It is important to make sure the judge has all the information to make that decision.

A parent has to give 60 days notice of relocation to the other parent. When in doubt, call the Family Law Line. It is important not to make big decisions like this without getting legal advice. Relocation really depends on particular circumstances.

The court may grant an exemption from all or part of the requirement to give notice if satisfied that notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child, or, there is no ongoing relationship between the child and the other guardian or the person having contact with the child.

Q: What are the criteria to get a Protection Order?

A: In deciding whether to issue a Protection Order, the court will consider a number of prescribed risk factors including any history of family violence towards the at-risk family

member and her perception of risk (see the list below for risks). If there is a child involved, the court must consider whether they should also be included as a protected party. Even if it is not a prescribed risk factor, other relevant information should also be brought forward as it may also be considered.

Q: What kind of evidence will the court look for to decide whether they should grant a Protection Order?

A: The evidence/perceived risk to safety would include, but not be restricted to: history of family violence, whether family violence is repetitive, psychological/emotional abuse directed at at-risk family member, current status of relationship (separation or intention to separate), substance abuse, financial or mental health problems, access of weapons or history of violence, at-risk family members' perception of violence, vulnerability (pregnancy, age, etc.). These are all things that workers should canvas with clients before making applications.

Requiring the judge to consider these known risk factors may help to make the process of getting a Protection Order more straightforward.

For more information on FLA changes…

- EVA BC *Family Law Information Bulletin, June 2012* can be downloaded from www.endingviolence.org/publications
- LSS *Guide to the New BC Family Law Act* (available in Chinese, English, French, Punjabi and Spanish): http://www.lss.bc.ca/publications/pub.php?pub=432
- Provincial government section-by-section explanation of the changes at: www.ag.gov.bc.ca/legislation/family-law/index.htm
- JP Boyd Family Law Resource: http://www.bcfamilylawresource.com/common/introduction.htm