

# Family Law Act Overview

Amanda Rose

Atticus Legal

# Family Law Act Overview

- The *Family Law Act* came into effect on March 18, 2013
- It replaced the *Family Relations Act* (in place since 1970 something!)

## What Changed?

- Significant changes with **property division**,
- **Codification of case law** into the act on a number of issues: mobility/relocation,
- **Common-law couples** now covered on property division issues
- Expanded definition of **family violence**
- Inclusion of consideration of **family violence in the “best interests of the child”** test.
- Provisions that recognize **IVF, surrogacy and multiple parental** situations and Donors (sperm and egg).

# Family Violence

- The *FLA* defines family violence along the usual terms:
  - 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;
  - Sexual abuse of a family member;
  - Attempts to physically or sexually abuse a family member
- S. 37(2) is **not an exhaustive list**, so these factors will still be of some use

- The *FLA* also expands the definition of family violence:
- Psychological or emotional abuse of a family members, including
  - Intimidation, harassment, coercion or threats, including threats respecting other persons, pets, or property;
  - Unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy;
  - Stalking or following the family member
  - Intentional damage to property.

# Case Law: Family Violence examples

- Court should take a broad view of what constitutes family violence  
*M.W.B. v A.R.B.*, [2013 BCSC 885](#)
- Demeaning remarks, blaming parent to a child qualify as family violence  
*D.N.L. v C.N.S.*, [2014 BCSC 1417](#)
- Derogatory outbursts, demeaning comments qualify  
*D.N.L. v C.N.S.*, [2013 BCSC 809](#)
- Threats, minimal physical contact qualify  
*K.L.L. v D.J.*, [2014 BCPC 85](#)
- Litigation abuse, failure to cooperate qualify  
*M.W.B. v A.R.B.*, [2013 BCSC 885](#)
- Behaviour causing financial hardship and stress, threats to cause financial hardship qualify  
*Hokhold v Gerbrandt*, [2014 BCSC 1875](#)
- Deliberate failure to pay child support intended to inflict emotional harm or control behaviour qualifies  
*J.C.P. v J.B.*, [2013 BCPC 297](#); *S.N. v E.C.*, [2014 BCPC 82](#)

# Case Law: Impact of Family Violence



Analysis required involves consideration of each factor  
*N.C.R. v K.D.C.*, [2014 BCPC 9](#)

Expert evidence may assist court's analysis  
*Keith v MacMillan*, [2014 BCSC 1352](#)

Cons: Expensive, time consuming and on interim applications generally not possible.

# Failure to pay child support as Family Violence

- Although the failure to pay child support may not constitute family violence, **it can be a factor that** the court will consider in allowing relocation
- If the payee parent is so desperate to make ends meet that they are considering moving as a way to reduce expenses, this can be a factor in determining if the move is proposed in good faith (*Hokhold v. Gerbrandt*, 2014 BCSC 1875)

# Failure to pay child support as Family Violence

- Although the failure to pay child support may not constitute family violence, it can be a factor that the court will consider in allowing relocation
- If the payee parent is so desperate to make ends meet that they are considering moving as a way to reduce expenses, this can be a factor in determining if the move is proposed in good faith (*Hokhold v. Gerbrandt*, 2014 BCSC 1875)

# Options when there is family Violence

- Protection orders (practical problems include difficulty in parenting during order)
- Supervised access (expensive, short term) s59 of the FLA

Supervision orders must serve the interests of the child, nothing else; long-term orders are discouraged, but can be justified if in the interests of the child; case law sets out 15 factors that should be considered in making supervision orders

*L.A.M.G. v C.S.*, [2014 BCPC 172](#)

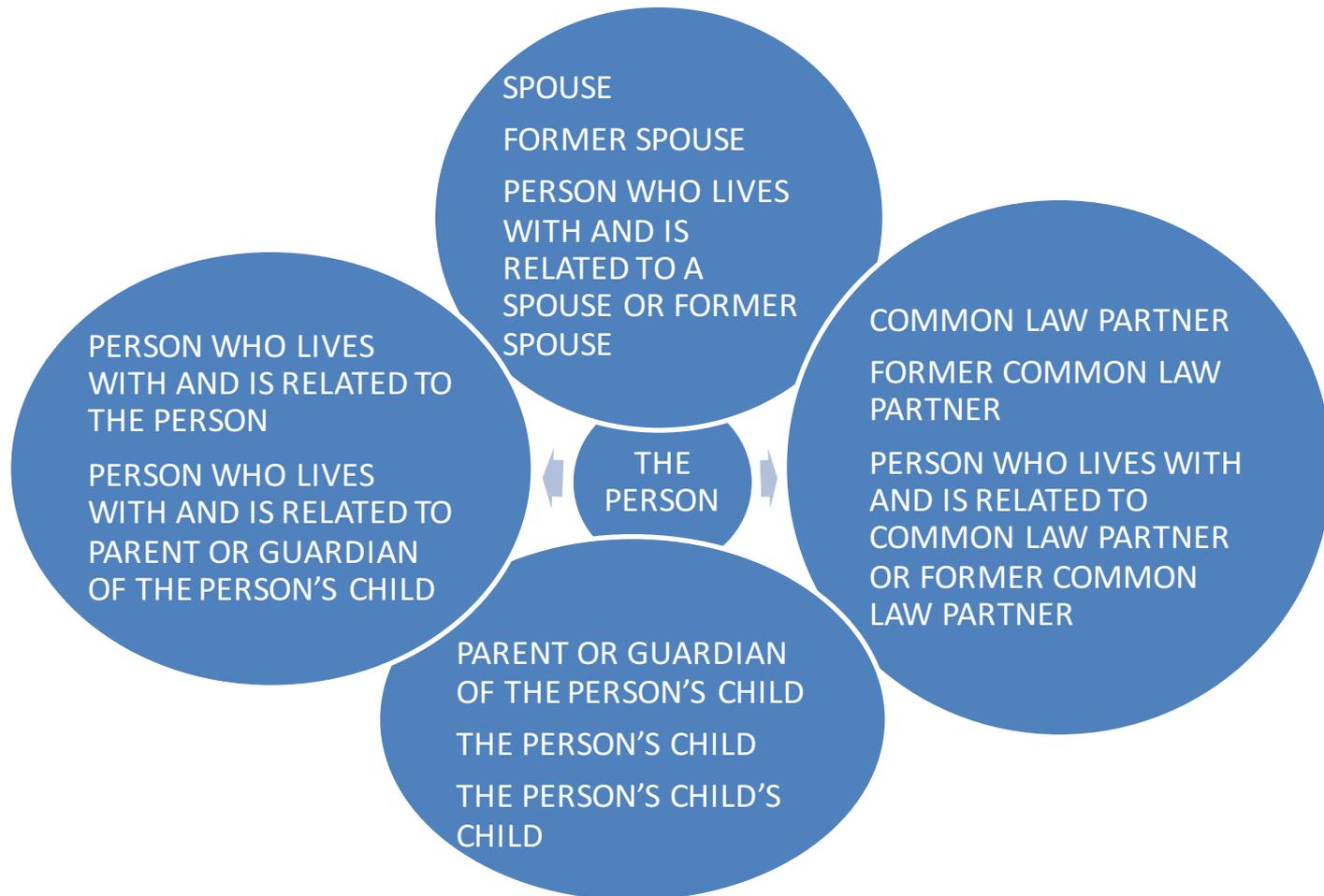
- Terminating guardianship  
(only granted in extreme cases)

# Who Can Apply for a Protection Order?

section 183(1)

- A family member who is claiming to be an “at-risk family member”
- A person on behalf of the “at-risk family member”
- The court can make the order on its own initiative

# Definition of “Family Member”



# Protection Order Applications

## Sections 183 and 186



**183.** A Protection Order may be brought as a stand-alone application. That is, a proceeding for parenting arrangements or property division or a divorce does not have to be started at the same time.

**186.** A Protection Order may be made on a without notice basis. If brought on a without notice basis, the Court can set aside the Order, or change or terminate the Order.

# Orders that can be made

## section 183(3)

- no direct or indirect communication;
- no attending or entering place regularly attended by the at-risk person (residence, school, workplace, etc.);
- no following the at-risk person;
- no possessing weapons;
- directions to police to remove person from property, accompany person to remove belongings, seize weapons;
- requirement to report to court;
- *Any terms or conditions the court considers necessary to protect the safety and security of the at-risk family member, or implement the order*

A Protection Order expires in one year unless otherwise ordered:  
section 183(4)

# Factors to be considered (1)

## section 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;

# Realities of Family Violence

## section 184(2-4)

- **Mutual Protection Orders:** Court must consider whether to make the order against *one person only*, taking into account: the history of/potential for family violence, extent of injuries/harm, and respective vulnerabilities.
- **Self-defence:** The *person who initiates an incident of family violence* is not necessarily the person against whom order should be made.
- **Protection Order may be made, even if...** The Court may make an order *regardless* of whether the family member has complied with a previous order; the family member is temporarily absent from home; the at-risk family member is in shelter/safe house; criminal charges have been laid, the at-risk family member has history of returning; or there's a order restricting communication under s. 225

# Restraining Orders

section 255 (transition provision)

- A restraining Order made under the *FRA* (s. 37, 38, 124 or 126) remains in force in accordance with the terms of the Order.

Enforcement – same as for Protection Orders

# Enforcement of Protection Orders

## Protection Orders

- may *not* be enforced under the *FLA* or *Offence Act*: section 188(1)
- are enforceable as an offence under section 127 of the *Criminal Code*.

Protection Orders from another Canadian jurisdiction are enforceable under the *Enforcement of Canadian Judgments and Decrees Act*: section 191

# Enforcement under the *Criminal Code* (1)

Under the *Criminal Code*, section 127:

(1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

- (a) An indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

...

# Enforcement under the *Criminal Code* (2)

The police have to lay charges for the breach.

The Crown has to decide to prosecute, and may not do so in cases of “minor” or singular breaches.

The at-risk family member has no control over the criminal process and may not always be notified of occurrences.

Actual service of the Protection Order seems essential given that *mens rea* (a guilty mind) has to be established.

The standard of proof is *beyond a reasonable doubt*.

The at-risk family member may have to testify and be subjected to cross-examination.

# **OTHER ORDERS TO “PROTECT”**

**Exclusive Occupancy**

**Conduct Orders**

**Restraining Order against Property**

# Controlling Litigation Abuse

## Sections 222 and 223

**222.** At any time during the proceeding, the Court can make orders to:

- a) facilitate settlement of the family law dispute or an issue in dispute,
- b) manage behaviours that might frustrate the resolution of a family law dispute, or
- c) prevent the misuse of the court process

**223.** The court may make one or more of the following:

- a) dismiss or strike out all or part of the party's claim
- b) adjourn the proceeding
- c) require all matters to be heard by the same judge
- d) require leave of the court for any application

# Orders that can be made

## section 183(3)

- no direct or indirect communication;
- no attending or entering place regularly attended by the at-risk person (residence, school, workplace, etc.);
- no following the at-risk person;
- no possessing weapons;
- directions to police to remove person from property, accompany person to remove belongings, seize weapons;
- requirement to report to court;
- *Any terms or conditions the court considers necessary to protect the safety and security of the at-risk family member, or implement the order*

A Protection Order expires in one year unless otherwise ordered:  
section 183(4)

# Dispute Resolution and Counselling

## Section 224

- (1) The Court may do one or both of the following:
  - a) require the parties to participate in family dispute resolution
  - b) require one party or more parties or, without the consent of the child's guardian, a child to attend counselling, specified services or programs.
  
- (2) In making any of the above orders, the Court may allocate payment of the above among both parties, or require one party alone to pay the fees for the dispute resolution, counselling, services or programs.

# Financial Abuse

## Sections 226 and 91

**226.** The Court may do one or more of the following:

- a) require a party to pay the rent, mortgage, taxes, utilities or other expenses related to the residence
- b) Prohibit a party from terminating specified utilities
- c) Require supervision for the removal or personal belongings from a residence

**91.** The Supreme Court (but not the Provincial Court) may make an order prohibiting a party from disposing of or transferring property in which the applicant *may* have an interest.

# Enforcing Conduct Orders

## Section 228

If a party fails to comply with a Conduct Order (sections 222 to 227), the Court may do one or more of the following:

- make a further conduct order;
- draw an adverse inference;
- order reimbursement for expenses as a result of the non-compliance;
- require payment of up to \$5,000 to the other party, the spouse or child;
- fine the person up to \$5,000

# Case Law Update

## What's been Happening?

Given the expanded definition of family violence, we are seeing an increase in protection orders being made. In particular, some interesting cases have been decided:

\* Protection Orders can be made even without physical violence. The courts have recognized that threats and words and emotional abuse constituted violence. *Morgadinho v. Morgadinho 2014 BCSC*

- *One act of violence* is sometimes enough to provide a basis that it could occur in the future .

*Dawson v. Dawson 2014 BCSC*

# Case Law Update

- A parent can seek an order of protection against their adult child
- “Risk” of violence is subjective (however, the court still has to assess objectively the overall circumstances)  
*E(JR) v. 07-BcyLtd 2013 BCSC 2038.*
- The court can consider “any circumstances” that might lead to an increase in the risk of family violence – in this case, they made a property division order that the husband was likely to be angry about, so they continued the protection order.
- Protection orders can still be continued EVEN if the Crown drops criminal charges or choose not to charge, and MCFD does not consider allegations substantiated. “*Fitzgibbon v. Fitzgibbon 2014 BCCA 403*”.

# Relocation

- Also referred to as MOBILITY
- The *Family Relations Act* didn't have a specific section that deal with. Judges made discretionary decisions based on the best interests of the child. Typically the "status quo" was considered.
- The Family Law Act sets out a new regime.

# Relocation under the *FLA*

- s. 65(1): relocation is a change in the child's residence that can reasonably impact the child's relationship with another guardian or someone else with a significant role to play in the child's life – a move within the Lower Mainland “should not be considered a relocation” (*Berry v. Berry*, 2013 BCSC 1095)
- S. 65(2)(b) only applies if there is an order or agreement parenting arrangements or contact

# BUT: transitional provisions apply

- s. 251: if you have guardianship or custody through an order or agreement made before the *FLA*, you have guardianship under the *FLA*
- So: the relocation provisions apply if there is guardianship or custody granted under the *Family Relations Act*, the *Family Law Act*, or the *Divorce Act*

# The process under the *FLA*

- s. 66: person proposing to relocate must give 60 days notice in writing to any other guardian including the proposed location and date of relocation
- s. 68: relocation is permitted on or after the date proposed in the notice unless the person notified files an application to prohibit relocation

# Granting orders for relocation under the *FLA*

- In granting an order for relocation, the court must consider the factors set out in s. 69(4)(a):
  - Proposed relocation must be “in good faith”
  - Relocating parent must propose reasonable arrangements for the other parent and any persons having a significant relationship with the child to continue that relationship

# Equal and unequal parenting time

- If the relocating parent has the “substantial majority” of parenting time, there is a presumption that, of the factors in s. 69(4)(a) are satisfied, there is a presumption that the move is in the best interests of the child, meaning that the non-relocating parent must argue that the move is not in the best interests of the child
- If the parents have equal time, then the relocating parent must also satisfy the court that the move is in the best interests of the child generally, with reference to s. 37(2)
- If a relocating parent is unable to establish the factors in s. 69(4)(a), the court still has the jurisdiction to determine that the move is nevertheless in the child’s best interests (*Hadjioannou v. Hadjioannou*, 2013 BCSC 1682)

# Granting orders for relocation under the *FLA*:

- If the Parties have “substantially equal” parenting time the court must then consider whether the proposed move consider the “best interests of the child” as set out in s. 37(2):
  - The child’s health and emotional well-being;
  - The child’s views, unless it would be inappropriate to consider them;
  - The nature and strength of the child’s relationship with other persons in the child’s life;
  - The history of the child’s care;

# Granting orders for relocation under the *FLA*:

- The child's need for stability
- The ability of the Parties to exercise responsibilities associated with guardianship;
- The presence and impact of any family violence, and what the violence says about the violent party's ability to exercise parental responsibilities
- The appropriateness of the parties' sharing responsibilities, particularly in view of any violence

# The *FLA* in practice: s. 69(4) what constitutes “substantially equal time?”

- Unequal parenting time: 36% is not “substantially equal time” (*M.K.A. v. A.F.W.*, 2013 BCSC 1415)
- However, approximately the same amount was held to be substantially equal (*M.M. v. C.J.*, 2014 BCSC 6)

# The *FLA* in practice: s. 69(4)(a) what is “good faith”?

- Defined in s. 69(6): the court must consider the reason for the proposed relocation:
  - whether the quality of life of the child and/or the relocating guardian will be enhanced by the move;
  - whether notice was given;
  - whether there is a non-removal order or agreement
- A move to avoid the need to commute from Kelowna to Edmonton for the relocating Party to be with her new spouse, in the face of some efforts to avoid the move was found to be in “good faith”
- Increased opportunity for employment and financial security, the presence of a new relationship in the location proposed, the separation from persons with whom the child has relationships such as extended family speak to the quality of life issue (*M.K.A. v. A.F.W.*, 2013 BCSC 1415)
- It was helpful to a litigant that her educational and career plans were realistic and not readily available in her current location (*S.N. v. E.C.* 2014 BCPC 0082)

# The *FLA* in practice: s. 69(4)(a) what is “good faith”?

- Where a father’s was deficient in meeting his financial support obligations, more weight was lent to the mother’s need to relocate in order to achieve employment stability (*S.N. v. E.C.* 2014 BCPC 0082)
- The factors in s. 69(6) are not exhaustive (*L.J.R. v. S.W.R.* 2013 BCSC 1344)

# The *FLA* in practice: s. 69(4)(b) what are “reasonable arrangements”

- Assessment of any proposal must be made with reference to the proposed location i.e. what is reasonable given that the child will be living in Tennessee (*L.J.R. v. S.W.R.*, 2013 BCSC 1344)
- A proposal involving time with the non-relocating parent for two months each summer and two weeks each winter was found to be “reasonable and workable, and extremely generous” (*L.J.R. v. S.W.R.*, 2013 BCSC 1344)

# The *FLA* in practice: s. 69(4)(b) what are “reasonable arrangements”

- The requirement for reasonable arrangements to be made require the relocating parent to demonstrate how the other party’s relationship with the child can be preserved, not augmented or enhanced
- What is required is nothing “other than a reasonable and workable arrangement” (*T.C. v. S.C.* 2013 BCPC 217)

# Best interests of the child

- The “best interests of the child” test existed under the former FRA, although not specifically enumerated under any section similar to 37(2) of the FLA
- Decisions under the FRA boiled down to 12 factors: (Gordon v. Goertz, [1996] 2 S.C.R. 27; One v. One, 2000 BCSC 1584)

# Best interests of the child

- Parenting capabilities of and children's relationship with parents and new partners;
- Employment security and prospects of each spouse and, where appropriate, their partner;
- Access to and support of extended family;
- Difficulty of exercising proposed access and quality of proposed access if move is allowed;
- Effect upon children's academic situation;
- Psychological/emotional well-being of children;
- Disruption of children's existing social and community support and routines;

# Best interests of the child

- Desirability of proposed new family unit for children
- Relative parenting capabilities of either parent and respective ability to discharge their parenting responsibilities
- Child's relationship with both parents
- Separation of siblings
- Retraining/educational opportunities for the moving parent

# Significance of Family Violence to relocation

- The presence of family violence is particularly relevant to the considerations set out in s. 69(6) (whether the move is proposed in “good faith”)
- In particular, no matter what the effect of the family violence is on the child(ren), s. 69(6)(b) indicates that the emotional well-being of the relocating parent is a factor to be considered
- The presence of family violence is a factor militating towards relocation away from the abuser, even where there is no evidence that the violence directly impacts the children
- This is true even where what constitutes the violence is emotional and “financial” abuse (*Hokhold v. Gerbrandt*, 2014 BCSC 1875)

# Resources

- For emergency family law order, duty counsel (free lawyers at the courthouse) can help
- Vancouver and Surrey have more resources.
- Legal Aid funds financially eligible family law cases if there is family violence.





















