



POLICY GUIDE

Family Law

Prince Edward Island Advisory Council on the Status of Women
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At Issue ...

During adulthood, individuals usually commit to sharing their lives with another adult partner. Such agreements - made between a married man and woman, an unmarried man and woman, or two individuals of the same sex - unite couples in an intimate and economic collaboration that may, one day, cease to serve the interests of either or both of the partners. The Advisory Council on the Status of Women is concerned about inequities in family law that make it more difficult for women to dissolve such partnerships and to restructure any ensuing monetary and/or parenting relationship while, at the same time, maintaining personal safety and financial security.

The Advisory Council understands that provincial and federal governments share jurisdiction over family law. Prince Edward Island's *Family Law Act* legislates the division of property between married persons who separate, along with child/spousal support and custody/access provisions for separating couples, both married and common-law. The federal *Divorce Act* enables divorces and legislates child/spousal support and custody/access provisions for divorcing couples. Neither government has involved itself in the dissolution and restructuring of same-sex partnerships, except in child custody matters. Two provinces, Quebec and Nova Scotia, provide for the official registration and termination of domestic partnerships between unmarried people, including gay and lesbian couples.

In typical divorce scenarios, each partner usually consults a lawyer upon separating and then, through negotiation and/or mediation, the couple works to develop a legal agreement that outlines division of assets, custody and maintenance of any children, and any spousal support. Then, application is made to the PEI Supreme Court for an order that outlines the terms of the separation. Such an order usually repeats the terms of the couple's agreement. When couples cannot reach agreement, litigation occurs, and a judge renders a decision on the matter. After the couple lives separate and apart for one year, the PEI Supreme Court can issue a certificate of divorce and the marriage ends. Typical common-law scenarios follow a similar pattern, except that partners do not require a certificate of divorce.

At Issue (continued)

In any scenario, support refers to money paid by one partner to another partner. Child support is for expenses related to children's care. Spousal support is to ensure that both partners maintain economic parity after the relationship ends. When a support agreement has been registered at the Maintenance Enforcement Office, recipients can apply to use that office's resources to enforce payments not provided voluntarily.

Generally speaking, having custody means possessing the legal authority to make decisions regarding children's care. Typically, one parent, the custodial one, manages the daily care of the children and makes major decisions while the access parent has regularly scheduled opportunities to interact with the children. Joint custody generally means that the two parents maintain legal responsibility for decision-making regarding their children's care. Exact living arrangements, schedules, decision-making processes, and financial contributions vary with each family in both single and joint custody scenarios.

Over the past number of years, family law reform has given women increased legal support for their choices. However, family law requires continued reform at the federal and provincial levels so that women can choose to end relationships, divide assets, establish custody arrangements, and generate support payments without facing consequences that are far more severe than those experienced by men.

Our Analysis ...

The Island's *Family Law Act* requires amendments to correct its inherent inequities. While providing for equal property division between separating spouses who were legally married, it fails to legislate the same division between common-law spouses. And, by defining spouse as being "either of a man and woman," it eliminates same-sex partners from its provisions. These inequities likely violate the *Canadian Charter of Rights and Freedoms*. For example, in a recent Nova Scotia case, the Court of Appeal found that its provincial legislation, similar to our own, violated the *Charter* equality guarantee because it "perpetuated the view that unmarried partners are less worthy of recognition or value." Here on the Island, although a common-law partner can apply to the court for another ruling, the person whose name is on the deed or receipt, typically a man, may be the only person entitled to the property. Thus, women in common-law partnerships carry an increased legal burden for obtaining an equitable property settlement. And, same sex couples receive no legal protection at all.

Except in situations involving dependents, a domestic contract can override our *Family Law Act* and the rights entrenched in it. Such agreements are private so nobody knows how often they are used. And, nobody knows whether women, typically the ones asked to sign such contracts, had access to independent counsel to ensure full understanding and equal negotiation. Legislative safeguards around access to independent counsel are required to ensure that women can enter into such contracts with full knowledge and consent and that they can challenge them afterwards.

Our Analysis (continued)

The *Family Law Act* encourages mediation as a means to establish the terms of a couple's separation. At present, there are no provincial standards or certifications for mediators. Anyone may offer this service to separating couples. That is a concern, especially when one considers recently published research revealing that experienced, practicing mediators do not articulate a common definition, purpose, or methodology. The Province needs to be explicit about professional requirements.

The Province's *Probate Act* legislates the disbursement of property when an individual dies without leaving a legal will. Family lawyers report that some people falsely presume that, because the *Family Law Act* allows for equal property division upon separation, a similar principle applies after death. In fact, the *Probate Act* requires the deceased person's spouse to split property with any children. Also, unless a will exists to state otherwise or the division of property has already occurred, if a person has left the deceased spouse and lives with someone else, that person is not legally entitled to any property. A spouse or child can apply to the PEI Supreme Court for another allocation of benefits under the *Dependents of Deceased Persons Relief Act* but that action is an additional legal burden that could be avoided through more appropriate probate legislation. Overall, the *Probate Act* requires re-examination so that the principle of true economic partnership between spouses established in the *Family Law Act* is upheld in death as well as in life.

The *Civil Service Superannuation Act* and the *Teachers' Superannuation Act* outline pension entitlements for provincial government employees. Both pieces of legislation require review to establish a definition of spouse to include common-law and same-sex partners and to ensure that pension benefits are divided equally like any other property.

Recent amendments to the Province's *Maintenance Enforcement Act* have given this collection program increased authority to enforce child/spousal support payments. As well, the Canadian Ministers of Justice have adopted an inter-jurisdictional protocol for cross-province collection. These are positive steps but Island women wonder whether the program exercises its full authority. Have any persistent defaulters been jailed? Have employers who fail to garnish wages been fined? They also wonder if the program has sufficient resources. They feel that they must bear the burden of ensuring that the office pursues their claim and they have concerns about timely responses. This is likely an appropriate time to review the program and assess its capability to carry out the mandate.

The Department of Health and Social Services operates a related program called the *Family Support Orders Program*. When a person applies for welfare assistance or a daycare subsidy and reveals that he or she has an ex-spouse who is not paying legally mandated support, the intake worker automatically forwards the file to this program. Staff lawyers meet with the applicant and decide whether or not to locate the ex-spouse and enforce the payment. They may also prepare a custody agreement. Through this process, the applicant may be forced to resume an unwanted and potentially dangerous connection with a former partner. And, even if the former partner was not abusive, women may fear harassment over money issues.

Here on Prince Edward Island ...

1978

Province proclaims *Family Law Reform Act*. Establishes law regarding asset division, support obligations, home ownership, and domestic contracts based on the principle that "*marriage is a partnership of equals with each partner entitled to an equitable division of assets and each having equal responsibilities for supporting dependent family members.*" Makes distinction between family assets and business assets.

1980

Legal aid services expanded to family cases.

1986

Government of Canada proclaims new *Divorce Act*. Divorces awarded on "no-fault" basis after one year's separation. Custody decisions based on "*the best interests of the child.*"

1988

Province proclaims *Custody Jurisdiction and Enforcement Act* to enforce custody and access orders, including those from outside the province.

1990

The provincial Legislative Committee on Family Law Reform conducts public hearings. **ACSW makes presentation.**

1991

Province publishes the *White Paper on Family Law Reform* and forms a special committee to work on its recommendations. **ACSW contributes to the committee.** For financial reasons, Legal Aid begins to restrict the provision of family law services.

1992

Province forms Maintenance Enforcement Review Committee. **ACSW works on committee.**

1994

Maintenance Enforcement Office gains increased authority to obtain support payments. Justice Kenneth MacDonald renders a decision regarding division of property that includes a commentary regarding family law and women's unpaid contributions. Province begins *Family Support Orders Program* pilot project to ensure that social services recipients receive court ordered support. **ACSW supports Justice MacDonald's statements. ACSW serves on Planning Committee for CLIA Project on public education regarding family law.**

1995

Each province must pay for all civil legal aid, including family law. Province proclaims new *Family Law Act*. Establishes new law regarding the division of assets between legally married persons. Allows separating couples to use mediation services. Establishes law for child and spousal support in legal marriages and common law partnerships. Allows a person to apply for a restraining order in abusive situations. **ACSW hosts press conference to respond to new Act. Supports reforms and suggests additional ones. Upon request, ACSW provides suggestions to Province regarding a family law public awareness campaign.**

1997

Government of Canada proclaims *Bill C-41*. Contains child support guidelines, enhanced enforcement, and new tax rules. PEI Supreme Court adopts child support guidelines.

1998

Special Joint Committee of the Senate and the House of Commons on Child Custody and Access holds nationwide hearings. **ACSW presents a brief to the committee and expresses concern in Atlantic Canada Advisory Councils Joint Response to the Report of the Parliamentary Committee on Child Custody and Access.**

2001-2002

Province drafting a family law strategy. Women's Coalition conducts research project and sponsors conference on family law and legal aid reform. Justice Canada conducting consultation on custody, access, and child support. **ACSW meets to discuss the provincial strategy, attends conference, and participates in federal consultation. ACSW releases "Moving On," a comprehensive guide for women leaving relationships.**

Here on Prince Edward Island (continued)

Legal Aid on PEI

Potential clients undergo a flexible means test to determine their eligibility for service. Staff lawyers provide 90% of the criminal legal aid services and 62% of the family legal aid services. Additional service is provided by private members of the PEI Law Society and paid for by the Legal Aid Program or, in family cases, the Law Foundation Project. There is a set hourly rate and a price ceiling for private service.

Top priority is given to cases where the emotional and physical safety of those involved is in danger. Additional priority is given to applicants with children. Of all new cases opened in 1998-99, 67% were by women.

Mediation on PEI

Family Court Services offers a voluntary, free service to mediate custody and visitation rights only. Private mediators are available at various rates of pay to work out all issues. Both parties must agree to utilize the services of one mediator.

UPEI's Centre for Conflict Resolution offers a certificate program in mediation that graduated its first students in 2000.

Across Canada ...

A Snapshot of the 21st Century Canadian Family (Vanier Institute of the Family, 2001)

- One in eight families have a father who works and a mother who stays home to keep house and care for the children.
- In most families, both parents have to work because it usually takes two incomes to avoid poverty.
- There are fourteen times as many divorced Canadians now as there were thirty years ago.
- Up to 40% of today's marriages end in divorce.
- Half the couples that separate have children.
- There is one common-law couple for every eight married couples. Common-law couples are increasing faster than married ones and separate at a higher rate.
- More than 41% of common-law couples have children in the home.
- One child in five grows up in a family headed by a single parent, usually the mother.
- 58% of divorced women and 71% of separated women with custody of their children live below the poverty line.
- 9% of divorced men and 30% of separated men without custody of their children have income below the poverty line.
- 29% of all Canadian women formally report physical or sexual violence at the hands of a marital partner (common-law unions included). For 10% of these women, the violence was so severe they expressed fear for their personal safety and their lives.
- Almost one woman in three is at some point the victim of a physical or sexual assault by a partner or a former partner.

Our Analysis (continued)

With or without equity-oriented legislation, women need help in accessing the justice system. The 1993 Working Group of the Attorney General concluded, “Current legal aid schemes across the country have failed to provide women with adequate justice.” Things have gotten worse since then. In 1995, the federal government reorganized its funding mechanisms and, now, although criminal legal aid continues to be cost-shared, the Province must fund family cases. A 1997 national legal aid review revealed that the Island has the lowest per capita expenditure for its legal aid program. The PEI Law Foundation has provided some relief with a program that provides limited payment for private counsel in specified family cases. The Province has provided some additional funds, but it remains true that not all income-eligible Island women are able to assert their rights. And, those who do receive the required service have difficulty obtaining it in a timely manner.

This is more than a money issue. Some legal analysts suggest that the funding inequity is a *Charter* matter as it “withholds or limits access to opportunities, benefits, and advantages available to other members of society.” The current arrangement favours men’s legal problems over those of women. Only 15% of Canadians charged under the *Criminal Code* are women while women initiate 87% of legal aid family cases.

The trouble is that society tends to examine legislation and services to see if they are gender-neutral instead of gender-fair. Aiming for gender-neutrality is not just useless; it is impossible. Women and men lead different lives. They do not arrive at the moment of separation in a state of utter and complete equality. While living with a male partner, the woman still carries an unequal share of domestic labour and childcare, work that utilizes her time and energy and for which she receives no pay. As well, a considerable number of women have already endured violent acts by their partners. Statistics Canada reports that 29% of all Canadian women have been assaulted by a spouse. Women and men do not emerge from the separation process as equals, either. Typically, the woman will have custody of the children, she will be left poorer than the male partner and, in abusive situations, she will likely face escalated levels of violence.

Given these realities, family law analysis must scrutinize two disturbing trends that, on the surface, appear to satisfy the need for equality and neutrality but, upon closer examination, do not necessarily protect individual rights and safety. Over the past number of years, there has been a move towards using mediation as a means to establish separation terms and, at the same time, courts have leaned towards ordering joint custody, a parenting arrangement without a set definition or established boundaries.

Generally speaking, mediation is a process of joint decision-making under the guidance of a third party. Of course, this approach is successful when both parties have equal standing, believe in the process, and desire the best solution for everyone. But, remembering what we know about women’s relatively lower economic status, given the statistic that 70% of women who initiate the separation process list abuse as one factor in their decision, and knowing that women are typically younger than the male partner, how often does such equality, good will, and positive intention actually exist?

Our Analysis (conclusion)

In truth, ending a relationship can be an adversarial situation with major power imbalances. Women need advocates, particularly in situations where there has been abuse. Women emerging from violent relationships typically have low self-esteem, have difficulty expressing themselves, and experience depression. They are not able to participate in and cannot be subjected to a decision-making process with the person who has already demonstrated contempt for her, their children, and the law.

Research provides a mixed picture of mediation results. One study showed that women are less likely to be abused by their former spouses after using mediation rather than negotiation. Another found that the assaults actually increased. One study shows that mediation costs more than lawyer negotiation. Another found the opposite to be true. Given these uncertain outcomes and the potential for victimization, mediation is certainly not a catch-all solution. It is one option that must remain completely voluntary.

Joint custody usually means that both parents maintain legal responsibility for decision-making regarding their children's care. Ideally, yes, women support the concept of collaborative parenting. But, realistically, women know that a court cannot force someone to be a good parent. Numerous studies have shown that, except in situations where the father is the primary caretaker, over time, contact with the father always decreases, no matter what custody arrangement has been ordered. In fact, the majority of separated Canadian women would like their children to see their fathers more often.

Women have reason to be wary of court-ordered joint custody. Early research shows that, typically, the mother remains the primary caretaker but has less decision-making power and less financial support from the former partner than if she was in a typical custody/access arrangement. Furthermore, court-ordered joint custody may force an abused woman to maintain legal ties with her abuser. And, given the high burden of proof required to do otherwise, she may even have to allow unsupervised time with a former partner who abuses her children.

With no evidence to prove that contact with both parents is always the healthiest option and with no available research regarding the long-term effects of joint custody arrangements on the well being of children, women suspect that this trend has more to do with financial and/or power needs than protecting children's interests. Overall, they see that men have greater resources that can enable them to use the legal system to cause difficulty for their former partners, dragging out the separation/divorce process until women feel compelled to settle custody and support matters quickly, if not equitably.

Aiming for efficiency and accessibility, the Province is currently reorganizing the way it delivers family law services. The PEI Advisory Council on the Status of Women supports this effort but reminds decision makers that such service must be offered without bias towards any particular method of settlement or any particular type of settlement. Each family is different and their matters must be settled voluntarily on a case-by-case basis with special sensitivity towards the inevitable power imbalances between men and women.

Our Recommendations ...

The PEI Advisory Council on the Status of Women recommends that the Province of Prince Edward Island take these actions:

- Amend the *Family Law Act*. Include people of the same sex in the definition of “spouse.” Apply all aspects of the law equally to all spouses, including the division of property for common-law spouses. Provide a vehicle for overriding domestic contracts in specified circumstances. Establish special provisions and procedures for situations involving family violence.
- Amend the *Probate Act* to ensure that it reflects the principle of economic partnership as established in the *Family Law Act*.
- Create legislation that establishes rigorous standards for the mediation profession.
- Conduct a review of the *Maintenance Enforcement Program* to assess and recommend program resources and service improvements.
- Revise the *Family Support Orders Program* so that women with a history of abuse from the non-supporting former partner can opt out of the program without incurring financial penalties.
- Work with the federal government so that, if it amends *The Divorce Act*, the legislation will include a range of custody options with no presumption for any of them except in cases of family violence where special provisions and procedures should apply.
- Work with the federal government to initiate a nationally standardized, cost-shared family legal aid program that is available to all income-eligible applicants who require legal representation in matters of property division, child/spousal support, and custody arrangements.
- Establish an agency as a first point of entry for women, men, and children upon the breakdown of the family unit to provide information, assessment, and referrals for legal and non-legal professional services. Some non-legal services could include distributing self-help kits and enabling supervised custody, along with providing voluntary counseling, mediation, and parenting programs.
- Provide training to agency staff, mediators, lawyers, and judges about the realities of family violence and its after effects.
- Following changes in legislation or service provision, conduct a comprehensive communications campaign to inform the public regarding the real, practical effects on their partnerships and families.