

BILL C-22: WHERE NOW?

By Pamela Cross

When Bill C-22, *An Act to Amend the Divorce Act*, died in November 2003, a long chapter in NAWL's work on reforms to custody and access legislation came to a close. We now find ourselves in a position to consider the broader question of women's equality within family law generally. This issue of *Jurisfemme*, largely focused on the topic of family law, is the start of that work. This first article provides a brief update on Bill C-22.

Bill C-22 was many years in the making. The federal government began its most recent examination of custody and access law in 1997 with the establishment of the Special Joint Committee on Child Custody and Access, which released its report "For the Sake of the Children" in December 1998. (For more background information on this report and the history of activities undertaken by women's rights organizations, visit the NAWL website at www.nawl.ca or the Ontario Women's Justice Network website at www.owjn.org)

Since the release of the 1998 Report, the Federal, Provincial, Territorial Committee on Family Law, various Ministers of Justice, women's equality-seeking and anti-violence organizations and other Canadians, including "fathers' rights" groups, have all been actively involved in the legislative reform process.

Both before and after the introduction of Bill C-22 in December 2002, the following issues have been of particular concern to organizations working for women's equality:

- The language to be used to describe custody and access arrangements between parents
- The best interests of the child test
- Women's access to justice

NAWL's strong position with respect to each of the issues can be summarized as follows:

- While there are difficulties with the existing language of custody and access, the proposed language of parenting orders, parental responsibility, parenting time and shared decision making will prove even more difficult. It will endanger women and children leaving abusive relationships, expose children in some situations to international kidnapping, confuse the existing child support guidelines and greatly increase litigation.
- There needs to be a best interests of the child test with specific criteria, including past caregiving history, the presence of violence, the ongoing safety of the children and their primary caregiver, violence risk factors, race and ethnic origin and Aboriginal heritage.
- Women must be assured access to justice through properly funded legal aid, independent, community-based services and mandatory training on violence against women and children for lawyers, judges and all family court personnel. Mediation must never be mandatory.

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NAWL is a national non-profit women's organization which promotes the equality rights of women through legal education, research and law reform advocacy. We recognize that each woman's experience of inequality is unique due to systemic discrimination related to race, class, sexual orientation, disability, age, language and other factors. In our view, a just and equal society is one which values diversity and is inclusive of it. We are committed to working collectively and in coalition with other groups to dismantle barriers to all women's equality.

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Common Law Partnerships and Marital Property: Time for a Change?

By Karen Busby

INTRODUCTION

Every family law lawyer is aware of the pervasive, but mistaken, belief that long term common law heterosexual partnerships are now treated in law in the same way as marital partnerships. They can all tell stories of women who learn too late that they cannot rely on marital property laws to make an equal division of property on the breakdown of a partnership or that they do not benefit from laws that make a spouse the primary beneficiary if a partner dies without having made a will.

The Supreme Court of Canada decided in *Walsh v. Nova Scotia*, [2002] 4 S.C.R. 325, that the constitutional equality guarantees did not require that provincial property laws treat marital and common law heterosexual partnerships in the same way. Recently some Canadian jurisdictions have changed their laws on partnerships and property, usually as part of their comprehensive legislative response to the Supreme Court of Canada's decision in *M. v. H.*, [1999] 2 S.C.R. 3, which required that same sex partnerships be given some legal recognition. Saskatchewan, Nunavut, and the Northwest Territories laws treat married and common law partners in the same way for most, if not all, property laws if the pair have lived together for two or three years depending on the jurisdiction. This treatment can be called an "ascription" system. Quebec and Nova Scotia treat common law partners who have formally registered their union the same way as married partners for property law purposes. Manitoba has both an ascription and a registration system for recognizing common law partnerships.¹ All of these laws apply to both same and opposite sex common law partnerships, except in Nunavut which only recognizes opposite sex partnerships.

In my view, there are four reasons why the provinces² should adopt an ascription system that gives all same and opposite sex common law partners the same property rights as married partners when the partnership ends. I will focus on marital property but the same analysis applies to other property laws.

RATIONALES FOR MARITAL PROPERTY REGIMES

Three rationales support marital property laws. First, such laws recognise that both partners make equal, although perhaps different, contributions to the financial well-being of a partnership and therefore a presumption of equal division is the fairest presumption to make if the partnership ends, unless the parties have specifically agreed otherwise. Second, they ensure that the more financially vulnerable member of a partnership is protected if that partnership breaks down. Finally marital property laws provide an expeditious process for resolving disputes.

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Sharia as Family Law in Canada?

By Alia Hogben

Some Canadian Muslims are proposing the implementation of sections of Shariah (Muslim law) to settle family disputes outside the court system through arbitration committees or tribunals. Due to provisions of the *Arbitration Act*, the arbitrated agreements may be accepted by law, resulting in a bypass of the court system.

The Canadian Council of Muslim Women (CCMW) has concerns about such a move. We see no compelling reason to live under any other form of law. We want the same laws to apply to us as to other Canadian women. We prefer to live under Canadian laws, governed by the *Charter of Rights and Freedoms*, which safeguard and protect our rights. Although the judicial system is not perfect, we know that there are mechanisms for change. Because some believe that Shariah is sanctified by divine authority, it is not as easily subject to change.

We are also concerned that, in deference to their religious beliefs, some Canadian Muslim women may be persuaded to use the Shariah option rather than seeking protection under the law of the land.

In 2003, Women Living Under Muslim Law (WLUML) completed a research study entitled "Knowing Our Rights: Women, family, laws and customs in the Muslim World." The study looks at 15 countries that apply Shariah law and demonstrates the various understandings and implementations of Shariah and how these affect women.

There is no agreement among Muslims on the laws of Shariah. For example, some countries where Muslim law is applied, such as Tunisia, have interpreted the law as limiting marriage to monogamy, while others, such as Pakistan, allow polygamy if the first wife agrees. In some Shariah schools of jurisprudence, inheritance laws favour males, a husband can divorce his wife leaving her without legal recourse, financial support for wives can be for a limited time period, granting of alimony is questionable, division of property can ignore women's interests, and child custody can be given to fathers according to the age of the child. There is also ongoing debate about the static or evolving nature of the jurisprudence and its adaptations to the realities of today's world.

Sharia is not divine law. Although it is based on divine text, the Quran, the injunctions were interpreted more than 100 years after the death of the Prophet Mohammad by jurists in different countries who themselves insisted that these were but interpretations. Shariah is a vast, complex system

of jurisprudence; it is interpreted differentially in different countries and we question how, why and by whom it will be implemented in Canada. What will be the role of the arbiters and what will their training be in a complex and variant system of law, and who will ensure the competence of the individuals who serve as jurists?

We understand that because there are inefficiencies or ineffectiveness within the court system, there is a growing alternative system of law outside the courts in an attempt to address court backlogs and costs associated with resolving family disputes. Within this context, there is real concern that, rather than attempting to address the issues of the traditional family justice system, policy makers are focusing on mediation and other forms of settling disputes as an expedient and cost-saving option. The alternative system may have certain advantages, but consideration has not been given to the impact on women and children. "Family Mediation in Canada: Implications for Women's Equality" (by Sandra A. Goundry, Yvonne Peters, Rosalind Currie, and Equality Matters! Consulting in association with the National Association of Women and the Law (NAWL)) discusses difficulties for women using publicly funded Canadian Mediation Programs. According to the paper, there appear to be no criteria to measure whether women's equality is protected or undermined, family mediation services are "removed from state regulation and public scrutiny," and "no public record detailing the nature of the dispute or the terms of the agreement is necessarily attached to a mediated case."

Given these difficulties with mediation, we question what legal assurances will be put in place to ensure Muslim women's rights are protected when they obtain binding arbitrated agreements using Shariah. It is worrying that there may not be any monitoring of women's equality rights. Further, the proposed binding arbitration within a realm of "privatization and removal from public scrutiny" should be a major concern to law makers in terms of justice and equality of both parties. Canadian Muslim women may be treated differentially from other Canadian women in family disputes regarding marriage, divorce, property settlements and child custody.

Will there be any provision within the court system to ensure that agreements do not result in unfair or unjust settlements for Muslim women, and that there are no inconsistencies with *Charter* values? Will there be legal representation for women? Will there be a two-tier system of justice for Canadian Muslim women comprised of

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Disability and Family Law

By Jean Pauls

My life as a single parent began shortly after a motor vehicle accident that left me a quadriplegic. My husband was not able or willing to make the commitment to having a wife with a disability. While I was in a rehabilitation hospital, he told me that I was not going to be coming home to him and our two young sons. He did not bring our sons to visit me. When I saw them, it was because my parents brought them to me.

At that time, I was fully absorbed with accepting what had happened to me and beginning to adapt to my life as it had become. I did not realize that my biggest battle would be to maintain my relationship with my sons.

Very early, my father mentioned that I should talk to a lawyer, but I did not think I needed one. I did not want anything but to be a mother to my sons again. It did not occur to me that I would need a lawyer to get this. After all, I had been their mother up until now. As the months and then years passed, I realized just how much the family law, in the hands of an abusive man, can stand in the way of mothers with disabilities.

When I was first discharged from the rehab centre, I lived with my parents, which was some distance from where my sons were living with their father. There, I met with a lawyer who has represented me ever since. She told me I could apply for joint custody of my children, which differed sharply from my husband's assertions that the children would have to be in his custody because of my disability. He had told me that the best I could hope for would be to have the children with me half the time I was not working.

Although the two months I spent with my parents was very difficult because I was away from my boys, it was also the first time I shared what my husband was telling me with anyone. While my husband had convinced me that my sons could not be with me because of my physical limitations, my sister reminded me what mothering was really about. One day as my niece helped transfer me from my chair to my bed, my sister pointed out that there was no reason my sons could not do this. After all, my body had been broken but there was nothing wrong with my mind, my love for my boys or their love for me.

When my parents found me a place to live back in the city where I had lived before my accident and where my sons still lived, I returned with the strength and determination to resume my mothering role.

Today, after six years of dealing with the family law system, I am still married and have only an interim joint custody order.

My family law case has been through many stages. First, my husband wanted sole custody. After one family assessment began, he agreed to joint custody. More than a year later, during a trial to deal with property issues, it became evident that my husband was once again seeking sole custody, with only limited access for me to my sons. Another family assessment was ordered, and my parenting was once again questioned.

Throughout this process, everything about me has been questioned: my body functions, attendant care; even things that would not be questioned for able-bodied women like who the children and I spent time with. My family, friends and church were criticized. The boys were told by their father what they could and could not do at my home. Restrictions were placed on them vacationing with me. Two complaints were filed with the child protection service against me. In both cases, the complaints were found to have no merit.

My husband found ways to interfere with my time with my sons that directly took advantage of my lack of mobility. Before I got a court order requiring him to transport the children, he refused to bring them to me or to allow my attendant to pick them up for me, which meant I had to wheel to his house (even in bad weather) to pick them up. He refused to assist in transporting them to school when they were with me, even though he had to drive through the area I lived every morning.

My husband has done everything he can to minimize his financial responsibility to both the boys and me. I had to get a court order to be maintained on his workplace insurance plan. In the year it took to do this, my parents paid for my supplies and nursing care. I still have received no spousal support.

I have an excellent lawyer who understands and represents my needs. Without the financial support of my parents, this would not be the case. In this respect, I am much

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Race(ing) Family Law?: The Challenges

By Zara Suleman

The process of responding to the proposed amendments to the once “live” Bill C-22 sparked a series of continued conversations across Canada among Aboriginal women, women of colour, and immigrant and refugee women as to how race would and should be addressed within the *Divorce Act*. Although it is now uncertain what will happen with the *Divorce Act*, the concerns and flags that have been raised regarding race are essential to future strategies, lobbying and recommendations for changes to family law.

The *Divorce Act* does not acknowledge, respect, or address Aboriginal rights, historical and present manifestations of colonialism and the specific impacts and lived realities of Aboriginal women, children and communities. Notions of “family”, “culture”, “best interests”, are reflective of dominant colonial definitions that have a history of violating Aboriginal culture, heritage, values, and beliefs. How, or if, the *Divorce Act* can be amended or applied to benefit Aboriginal women, children and communities is something that continues to be discussed between feminist family law reform coalitions and Aboriginal women’s groups.

There is a particular concern from women of colour who advocate for racialized women in custody and access matters as to how a test like the best interests of the child can be implemented with any critical analysis of race that situates the assessment of racial identity in relation to experiences of racism. Although the *Van de Perre v. Edwards*¹ case recognized race as a valid factor in determining the best interests of a child, it did so on a limited basis with no broader social, political or historical analysis that would have acknowledged the impact of systemic and institutional racial oppression. In addition, the court considered racial identity to be only one factor for consideration, not a key or essential factor. The Vancouver Custody and Access Support & Advocacy Association (VCASAA) submission regarding changes to Bill C-22, cautioned how race is understood by the courts:

It must not be left to mis-interpretation that what it intends to protect is the child’s access to dominant European/white values but that it protect the interests of racially marginalized children within a dominant European/white society/context.²

In addition, the VCASAA submission stated:

What is lost, without appropriate guidance, is how ‘culture’ can be invoked, in Canada and internationally, to threaten universal respect and promotion of women’s equality which is being fought for by women within ALL cultures.³

The dominant lens through which family law cases are addressed by the judiciary is from the perspective of privilege, to reinforcing white, male, heterosexual, middle-class, able-bodied norms of what constitutes “best interest”. This makes it inherently difficult to trust how the applications of race would be interpreted and applied by the courts. The reality is that the legal system is strongly “raced” by the privileging of whiteness. As highlighted in *S.B. v. S.H.J.G.*⁴, a recent custody and access case from the B.C. Supreme Court, the mother, Ms. S.B., who identified as a Caribbean woman, expressed her concern to the court about her daughter’s (B.B.G.) need to be exposed to her “racial/cultural heritage”. As noted in the case, Ms. S.B.:

...is concerned that Mr. S.H.J.G. and his friends will not be able to assist B.B.G. in many aspects of her life, that they, as Caucasians, simply lack the understanding to do so, though they may have the best will in the world.⁵

Justice Brown addressed the issue of race in *S.B. v. S.H.J.G.* by referencing *Van de Perre*:

As in the *Van de Perre* case, B.B.G. has two parents, each of whom shares part of the race and culture of the child. Each parent will expose B.B.G. to a part of her racial and cultural background. I am satisfied that the generous access which I am providing for Ms. S.B. will allow her to educate B.B.G. with respect to that aspect of her racial/cultural background.⁶

The father, Mr. S.H.J.G., gained full custody of B.B.G., while the mother, Ms. S.B., was given generous but supervised access. The following factors, as highlighted in the case, demonstrate the complexities and reflect many aspects shelters and women’s centres see and hear about from women who are before the courts in family law matters: child abuse allegations made by the mother against the father; threats made against the mother by the father; the mother fled the

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Legal Aid in Nova Scotia

By Pamela Rubin

Through a series of provincial meetings and focus groups conducted by the Nova Scotia Coalition of Women for Justice between 2000 and 2002, women in Nova Scotia identified access to adequate legal representation and legal aid as a primary focus, along with racism, for equality research and advocacy. The Coalition carried out narrative research in 2002-2003 with women who had been clients of Nova Scotia Legal Aid, and with Nova Scotia Legal Aid lawyers to identify barriers to women's access to legal aid and justice.

Our research confirms that equitable legal representation for women in family law cases is not only a matter of dollars going to civil versus criminal law. Rather, the societal inequality experienced by women and their increased legal needs in order to respond to this inequality must be examined. The sometimes-frustrated lawyers and their women clients participating in the research agreed on the following key qualitative issues related to legal aid and adequate and equitable civil or family law.

- Woman abuse is a frequent factor in clients' legal needs, but it is not often screened for, nor consistently addressed.
- Civil legal aid, which is often seen as primarily serving women's needs, is serving system needs, not women's legal needs as women would define them.
- Legal representation dealing with questions of minimal social and economic entitlements is women's law, and is inadequately addressed. This has significant impacts on women's ability to respond in family law matters.

WOMAN ABUSE AND ITS IMPACT

Lawyers identified many ways woman abuse affects client needs:

I have clients under 19 with children who can't live at home because of abuse and they can't get support. I've argued with Community Services

over this. It leads to the loss of the child because of "no stable place to live."

There needs to be more coordination between community services and legal services. Typically, [woman] abuse is the crisis and children are involved but there are time delays in getting support – women can't wage a legal battle without resources.

Male judges don't appreciate the weight that should be given to abuse issues.

Where the father is abusing, the mother may be powerless to stop it.

Lawyers need to receive training on partner violence and its impacts on cases.

Currently in Nova Scotia, the responsibility to identify abuse issues is left to individual lawyers who are not provided with screening tools or protocols. Women report that legal aid lawyers generally don't inquire about abuse. When abuse is brought to light, lawyers' responses are mixed. Some treat it sensitively, understand the fears and risks, and use this knowledge in seeking just results. Others ignore it. Some lawyers feel they simply do not have access to enough resources for expert witnesses to speak in court on the impact of woman abuse on the abusive partner's ability to parent or on endangerment.

The Nova Scotia Coalition of Women for Justice recommends the following ways of partnering with Nova Scotia Legal Aid.

- Work together to create a screening tool to identify partner abuse in clients' lives.
- Increase judicial education on abuse issues by creating an education package including academic work on the impact of intimate partner abuse on parenting ability and on the risks for women and children where access is not limited.
- Increase resources available for research and expert opinion on matters where woman abuse is a factor.

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WFF CAMPAIGN 2004 – IS ON!

The **Women's Future Fund** is pleased and proud to announce the launch of Campaign 2004. Building on the success of last year's campaign, this year we hope to raise \$50,000 in cash and pledges to be divided between our 9 members.

Running from International Women's Day on March 8th to Mother's Day on May 9th, the WFF Campaign has two purposes. The first purpose is to raise profile and the second is to raise funds.

The goal of the Women's Future Fund is to increase the self-sufficiency of national women's organizations that are working for equality and an increased quality of life for women and girls across Canada.

Under the theme – **"Enlarging the Pie"** – 9 national women's organizations have joined together for the purpose of collaborative resource development. Rather than cutting the existing funding pie smaller, the WFF goes beyond traditional sources of assistance to reach out to women and men in the Canadian workplace and ask for their support through workplace giving. We start Campaign 2004 with 22 workplaces already committed to our members' work.

The Women's Future Fund is a major step in our ability to tell our story, increase our resources and build new partnerships. The backbone of our work is a network of trained volunteers who are working across the country to identify, approach and access private and public workplaces. As the only national Women's Federation in Canada, we are a concrete example of women's commitment to work together – and we need your help!

- Can the WFF introduce our Campaign in your workplace? Let us know!
- Join us as a volunteer; we'll do the training!
- Designate the WFF as the recipient of your payroll deduction.
- Or, make a monthly credit contribution by contacting us at:

Email: wffinfo@web.ca

Phone: (416) 516-5500

Fax: (416) 516-5506

Web site: www.womensfuturefund.com

We are proud of work, excited by our Campaign and grateful to all the WFF Member organizations for your support over the past year. We look forward to working with you during Campaign 2004! Give us a call!

WFF MEMBERS

Accéd Foundation / Fondation Accéd

Canadian Association of Elizabeth Fry Societies (CAEFS) / Association canadienne des sociétés Elizabeth Fry

Canadian Research Institute for the Advancement of Women (CRIAW) / Institut canadien de recherches sur les femmes

Canadian Women's Foundation (CWF) / Fondation des femmes canadiennes

The Women's Legal Education and Action Fund (LEAF) / Le Fonds d'action et d'éducation juridiques pour les femmes

Media Images of Women Educational Society / Société d'éducation L'image des-femmes dans les médias

National Action Committee on the Status of Women Trust (NAC Trust) / Fiducie pour la recherche et l'éducation, Comité canadien d'action sur le statut de la femme

National Association of Women and the Law Charitable Trust for Research and Education (NAWL) / Fiducie pour la recherche et l'éducation, Association nationale de la femme et du droit

National Congress of Black Women Foundation (NCBWF) / Fondation du Congrès national des femmes noires du Canada

Dear Prime Minister....

The Coalition for Women's Equality sent this letter to the Right Honourable Paul Martin in response to his government's initial Throne Speech on February 2, 2004 and after he responded to that speech in the House of Commons on February 3, 2004.

February 13/04

Dear Prime Minister,

The Women's Equality Coalition joins Quebec women's groups in expressing disappointment with the Throne Speech and your response to it. We have found little evidence of support for the women's equality agenda in either of these speeches that constitute your government's debut.

The speech sets out the goal of government as achieving "a Canada with strong social foundations, where people are treated with dignity, where they are given a hand when needed, where no one is left behind." Yet, there is little or no indication of investment in social architecture in either of the two speeches that would give women hope. There is mention of a "commitment to gender equality"; but, we have been given almost no indication that your government understands the complex nature of women's equality and has any plans to address it. We are surprised to see the use of a neutral term, "gender equality". This is not synonymous with women's equality. Our concern is and continues to be women's inequality and the fact that the two speeches have done little to assure us that your government will provide redress.

The stark facts are that over the last two decades women have become steadily impoverished. Today almost 19% of adult women are poor – the highest rate of women's poverty in two decades. Fifty-six percent (56%) of families with children headed by sole-support mothers are poor; 47% of women under 65 who are on their own are considered low-income; 49% of unattached women, aged 65 or older have low incomes. Poverty rates are even more distressing among Aboriginal women, Visible Minority women, immigrant women and women with disabilities. The women of Canada need your government to show leadership, to engage with these shameful facts and to address them. Since the women's equality agenda was not addressed in the Throne Speech and your subsequent speech, we fear that women will be left out of the budget.

Mr. Prime Minister, in your response to the Throne speech, you asserted that in order to work, globalization and the trade agreements must benefit everyone. We urge you to recognize that globalization and free trade to date have had a negative impact on women's employment and standard of living not only in Canada but also around the world. We are asking you to re-visit the question of globalization and develop a different, more Canadian vision of globalization that is open, transparent, democratic and conscious of our responsibilities to developing countries.

In the interests of women's equality, we are also asking you to expand the grounds for granting refugee status under the Immigration Act to include: persecution based on sex, sexual orientation, violence against women, genital mutilation and what in some countries are considered "crimes against honour".

We applaud your commitment to democratic reform in the Houses of Parliament. In this regard, there are two pressing points that we would like to bring to your attention. First and foremost, a means must be found to equalize the number of women and men elected to Parliament. You had promised to make this a priority during your leadership campaign and we respectfully wish to remind you about it. Secondly, we ask you to consider the implications of free or conscience votes in the House of Commons for human rights issues. There is a potential that minority rights, never a popular subject, will be in jeopardy. An enlightened government has an obligation to protect and advance human rights.

The government, Prime Minister, has a considerable surplus. We will be watching the budget for an indication that you do recognize the problems of women's inequality and are ready to allocate resources to alleviate women's poverty and to support strong initiatives to diminish the incidence and impact of violence against women. We will be watching for funded initiatives that will breathe life into your promises to address quality childcare and to have Aboriginal people, Visible Minorities, newcomers and people with disabilities share fully in Canada's relative prosperity. We will be watching to see that discrimination on the grounds of race, ethnicity, sexual orientation and disability are addressed.

We are very willing to meet with you and your officials before the budget is finalized to assist in fleshing out the details of a programme that would help the government move women in Canada forward towards equality. We are actively seeking a meeting with the Honourable Jean Augustine, Minister of State for

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DEAR PRIME MINISTER.... – Continued from page 8

Status of Women and will count on her to facilitate our meeting with you.

We look forward to hearing from you.

Thank you in advance.

Sincerely yours,

Anu Bose, PhD, Executive Director, NOIVMWC

On behalf of the Coalition for Women's Equality:

Michèle Asselin, Presidente, FFQ

Melanie Cishecki, Executive Director, MediaWatch

Bonnie Diamond, Executive Director, NAWL

Lise Martin, Executive Director, CRIAW

Jo Sutton, Executive Director, Womenspace

Elaine Teofilovici, Chief Executive Officer, YWCA of Canada

Charlotte Thibault, Co-Chair, FAFIA

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It is important that we continue to advance these positions with the new federal government and the new Minister of Justice. "Fathers' rights" organizations have been a powerful lobby force, with friends both inside the Liberal caucus and within other parties. We must assume the organizations will continue their campaign for a presumption in favour of shared parenting and reduced child support responsibilities for non-custodial parents.

The present *Divorce Act* desperately needs amendment. The "friendly parent" rule and its lack of criteria for the use of the best interests of the child test leaves women and children without adequate protection. Legislative reform alone will do little to improve either women's equality or the best interests of children, so it must be coupled with increased services, including those outlined above.

It is anticipated that this government will call a federal election before reconsidering amendments to the *Divorce Act*.

This would provide NAWL and other women's rights organizations with time to develop a long-term lobby strategy that can be used both during and after an election campaign. To this end, NAWL is bringing together custody and access activists from across the country to a meeting in Ottawa in late March, at which we will discuss custody and access and a variety of other family law issues. It is intended that this meeting will produce the beginnings of a national strategy that can then be further discussed and developed in communities across the country.

To be kept informed about the development of NAWL's family law strategy through our listserv, please contact Pamela Cross, Family Law Reform Coordinator at pam@nawl.ca.

Pamela Cross is NAWL's Family Law Reform Coordinator and the Legal Director of the Ontario Women's Justice Network and Metropolitan Action Committee on Violence Against Women and Children.

THE 40% RULE

The issue of custody and access is closely linked to that of child support even though, in law, these are technically two distinct issues. The 40% rule, provided for in the Federal Child Support Guidelines, has proven especially problematic. This rule states that the Guidelines amount of support does not apply to any parent who has custody of the children at least 40% of the time. In these cases, child support is calculated differently and at a lower level. This has led to significant abuse by men who seek to evade their child support responsibilities by fighting for joint custody of their

children, even when this is clearly not in the children's best interests and/or exposes women to ongoing abuse.

Unfortunately, the mandated five year federal review of the Guidelines undertaken in 2002 supported the continuation of the 40% rule, despite the fact that feminists and others had strongly advised the government that it was highly problematic.

Until the matter of the 40% rule is addressed, improvements to custody and access legislation will have a limited positive impact on women and children.

Each of these three rationales for having marital property laws apply with equal force to common law partnerships. Most long term heterosexual common law partnerships are functionally equivalent to married partnerships in terms of, for example, joint planning for the future, especially retirement; gendered divisions of labour, including child caring responsibilities; the strength of a female partner's labour force attachment or detachment through child bearing or moving to support a male partner. While same sex partnerships are less likely to be characterized by gendered divisions of labour, people in these partnerships do make joint decisions about what is in the best interests of the partnership rather than individual self interest and these decisions will often adversely affect the income earning power of the lower income earning partner to the benefit of the higher income earning partner. Income tax planning provisions, like the income splitting provisions create tax incentives for second income earners to leave paid labour. Intra-couple transfers for tax purposes that apply both to marital and all common law relationships tend to promote economic dependency especially where there are significant disparities between spouses' incomes.

I should underscore that an ascription model should only apply to a partnership that has lasted for more than 3 years unless there are children. This relatively lengthy time period makes sense because the joint economic decisions and compromises made between couples, which are the rationale for marital property regimes, are unlikely to have been significant in partnerships of less than three years.

ARBITRARINESS OF THE EXCLUSION

Many people in common law partnerships have sought, through litigation and law reform, the public and private benefits and obligations given to married people, and the exclusion of some property rights now seems, at best, arbitrary. As Kathleen Lahey has observed,³ Canadian income tax and transfer income policies have actually moved significantly in the opposite direction of many other countries, that is, toward using the couple as the basic unit in government policy in increasing numbers of programs. Tax policy, in particular, has struggled to bring intra-couple transactions into line with laws relating to family property. Thus if tax policy recognizes all couples as basic units of taxation in a number of programs the lack of symmetry with provincial regimes can be unfair.

Two examples help illustrate this unfairness. There was litigation for years on the inability to register RRSPs that did not permit survivorship rights for common law partners on the presumption that people would make retirement plans relying on these survivorship rights. The division of pension plans on the breakdown of these partnerships is really nothing more than a rearrangement of these plans in light of the fact that the parties will now not be together during retirement. Another example involves the claim for a capital gains tax exemption on the appreciation on a principal residence. Common law partners can only claim the exemption on one principal residence. If the property is held in the name of one partner only, only one party will benefit from the ability to exempt appreciation unless property division regimes apply.

WHAT PEOPLE BELIEVE THE LAW TO BE

In reading *Walsh v. Nova Scotia*, I was struck by the Court's repeated observation that people entered marriages to obtain the contractual advantages of that partnership and that they were in common law partnerships to avoid those obligations. I think the Court is mistaken in this observation and that most people living in common law partnerships (same or opposite sex) have given little thought to what should happen if their partnership breaks down or, in the case of most heterosexual people, that they mistakenly believe that marital property regimes do apply to their partnerships. For example, for about 15 years I have asked law students in a Gender and the Law course to list the reasons why people get married. This spirited discussion usually lasts for close to an hour, but in 15 years no student has ever volunteered that they or others get or would get married to get the legal benefits of marriage. Desire for a commitment, religious reasons, family pressures, the fantasy wedding or "the natural thing to do" are the common answers. Thus while the outcome in the *Walsh* case is not surprising, especially given the Court's real reluctance right now to find legislation unconstitutional, their reasoning that the popular rationale for marriage is founded on contract law rests on a weak foundation.

The law should reflect what people believe it to be – especially when the law was one intended to address historic inequities – unless there are good reasons not to reflect these beliefs. In short, since people in heterosexual common law partnerships believe marital property laws apply to them, they should.

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What then of those people who have chosen common law unions in order to avoid marital property regimes? People who do not want their partnerships governed by marital property regimes, that is, those few people who have actually come to agreements with their partners on how to deal with property, are not affected by this legislation as long as they have put their agreement in writing, or in the case of some pensions, filled out specific forms. Indeed the most important paradigm shift in including common law partners in marital property legislation by ascription is a change in the “default” position when couples have not discussed what would happen in the event of a breakup. The current regime favours the economically stronger partner (who will likely have greater bargaining power) whereas an ascription regime favours the weaker party.

RECOGNITION OF GLBT PARTNERSHIPS

During the last three years, I and others involved in organizing and law reform in the gay, lesbian, bisexual and trans (LGBT) community have participated in discussions in a variety of forums on whether to support extension of marital property regimes to GLBT partnerships. In my view, a strong, although not unanimous, consensus emerged that marital property laws should apply to GLBT partnerships for the same reason as they apply to married partnerships. Additionally as GLBT people cannot marry in most Canadian jurisdictions, amendments to numerous provincial property laws were necessary to ensure that our partnerships could be treated in an equitable way and, as importantly, were not perceived as second class partnerships not worthy of as full protection as the provincial government could give.

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- 1 The Manitoba law received Royal Assent in August 2002 but, as of February 2004, it has not yet been proclaimed in force.
- 2 Except, perhaps, Quebec because its laws on property at the termination of a partnership and its overall treatment of common law relationships are based on different principles from the other common law provinces and therefore I do not feel qualified to comment on that regime.
- 3 “The Benefit/Penalty Unit in Income Tax Policy” (Law Commission of Canada, 2000), and “The Impact of Relationship Recognition on Lesbian Women (Status of Women Canada, 2002).

binding arbitration according to Shariah and the court system as an overseer?

We acknowledge the well-meaning intentions of some to reflect the sensitivities of Canadian Muslims, and for their need to have a presence and some power in society to ensure their interests are met. However, the introduction of a Shariah council may not solve the problem and may in fact exacerbate the issues for families. We are concerned that there is an idealization of Shariah and a lack of understanding of the impact the practices will have on Muslim women.

CCMW's objective is to assist Canadian Muslim women to live under Canadian law with its emphasis on equality and justice, which are the cornerstones of Islam and should be the basis of any Muslim law anywhere. Please see our website at www.ccmw.com for more information on CCMW.

CCMW plans to collaborate with the National Organization of Immigrant and Visible Minority Women of Canada and NAWL to research the questions we have

raised; to write about the findings; and to write a paper for Muslim women, politicians, sister organizations and the media about the ramifications of adhering to Canadian law or to Shariah law. The paper will be written in easy to understand language and will be translated to ensure its accessibility by all Muslim women. We will use these materials to advocate for changes in Canadian law if necessary so that there is equality for all Canadian women, regardless of race, religion or ethnicity.

CCMW is cognizant that our stand regarding Shariah places us in a difficult position. We are a pro-faith organization of Muslim women. We do not want to provide further ammunition to those who are keen to malign Islam. Yet we must be honest about issues that affect us within the Muslim and non-Muslim communities. Silence is not an option.

We hope to have the support of other women's organizations and other religious groups to ensure that Muslim women's rights are protected under Canadian law.

Alia Hogben is the Executive Director of the Canadian Council of Muslim Women.

DISABILITY AND FAMILY LAW – Continued from page 4

more fortunate than many other women with disabilities who do not have the support of their families. Every woman should have access to good legal representation through a properly funded legal aid system.

The family court process should move more quickly. This is true for all families, but especially for women with disabilities, who have many other issues to deal with. I have had to delay important surgery because my doctor did not want me to undergo a procedure while I was stressed by court appearances.

Where one parent is controlling or abusive, shared parenting and decision making are not appropriate, as the family will be in court to deal with even the smallest of issues.

I was a good mother before my accident and I am one now. Quadriplegia does not affect my ability to parent; it just means I do things differently. Family law needs to understand this so it can support women with disabilities and limit the actions of controlling and abusive men who want to turn women's disability to their advantage.

Jean Pauls is a single mother and disability rights activist.

RACE(ING) FAMILY LAW? – Continued from page 5

country with her child to be closer to her family; and, the mother was not a Canadian citizen and had sought shelter in a transition house.

The court in this case, as it did in *Van de Perre*, dealt with the access to the race and culture of one parent, as instructional, neutral, equal – as if it is only to learn about special events or aspects of one's heritage. The multi-layered impacts on women and children due to the intersections of their identities needs to be addressed in the family law context. Multiple issues are linked. For example, factors such as race, class, gender, immigration status, and violence against women cannot be easily prioritized or balanced when together they create a lived experience that reduces access to legal aid resources, impoverishes, enhances fear, isolates and, generally, makes women and children incredibly vulnerable in society.

The courts need specific direction as to how to address race so that it is not used as a vehicle for abuse primarily by men/fathers to gain further control over their ex-partners/children. This direction has been given somewhat through submissions and briefs on Bill C-22. How the best interests of the child and issues related to the *Hague Convention on the Civil Aspects of International Child Abduction*

and mobility rights will continue to evolve before the courts are some of the many concerns for which racialized women in particular will need responses.

Race(ing) family law, specifically in the test for the best interests of the child, is done in some of the many submissions put forward regarding Bill C-22 by a variety of women's organizations, but not all. Although the courts could further marginalize Aboriginal women, women of colour, and immigrant and refugee women, the challenge ahead for women who are organizing around family law reform will be to continue to push for legislation, stated and in practice, that reflects and respects the realities and experiences of ALL women. The issue of whether legislation will address and/or benefit racialized women in custody and access matters by the inclusion of race as a factor in determining best interest of the child, is yet to be determined. What is essential is that issues and impacts of systemic, institutional and historic racism be discussed, explored, and kept on the table for current and future family law reform lobbying and organizing

Zara Suleman is an activist and former front-line rape crisis and shelter worker and advocate from Vancouver; a member of VCASAA and in her final year of law school at the University of Ottawa.

1 [2001] 2 S.C.R. 1014.

2 VCASSA Submission to the House Standing Committee on Justice and Human Rights Re: Changes to Bill C-22 – Divorce Act Amendments (August 2003), online: www.harbour.sfu.ca/freda/issues/vcasaa.htm at 4.

3 Ibid.

4 [2003] B.C.J. No. 478.

5 Ibid at para 59.

6 Supra note 4 at para 61.

WOMEN'S NEEDS OR SYSTEM NEEDS?

Women reported legal aid lawyers' limited ability to conduct investigations when ex-partners are not providing full or accurate financial disclosure – a limited ability likely associated with caseloads. Legal aid lawyers expect women to do much of their own investigation but women are very limited in their ability to do so due to lack of resources or child care, or because they fear provoking abuse from the ex-partner.

Almost all lawyers interviewed identified caseload as a challenge:

I am spreading myself thinner and thinner.

It would take me 5 minutes to help women with some civil matters, but my caseload is so high, I can't.

I am so busy I just keep my head down.

They're so busy in that...office, they're just processing cases, so you're not going to fight...

In family law practice, the source of the overwhelming workload is not only the sheer numbers of cases, but the nature of the family law cases being handled through legal aid. Lawyers described burdens related to child apprehension matters:

25% of my file load is child protection, but it takes up 80% of my time. In Metro, salaried justice lawyers can devote their full time to these...they bombard you with paperwork.

In Children's Aid cases...there is a high level of intimidation [of clients] and Children's Aid is non-supportive of mothers. I have to fight hard for the smallest concessions. A lot of these assessors are on fishing expeditions. They say she has to do x, y, z – it's hard to fulfill addressing every issue she's ever had in her life.

There is an imbalance on cases involving Children's Aid. I get affidavits attacking on all issues and then social workers can't help with the needs [in a timely fashion vis a vis hearings], as they are "waiting for assessments."

The fundamental issue is that social workers do

not have the resources to help women with parenting. This is frustrating for legal aid because you can't just consent without hearings on these cases but at hearings you don't have anything to show because enough was not done [by parents to address the issues raised by Children's Aid Society]. It's very discouraging work.

Black women clients in particular identified themselves as unfairly targeted for child apprehension. Lawyers do not (and perhaps feel they cannot, given caseloads) consider raising discrimination in fighting these apprehensions.

Some family lawyers also questioned the time spent on cases generated by Community Services' requirement that all women with children receiving social assistance seek child support:

I see many women in here because Community Services wants them to pursue maintenance. Community Services should have its own lawyers to do this. And women may not want to pursue for legitimate reasons, but then abused women are threatened with being cut off from social assistance.

These lawyers feel they are servicing the needs of Community Services, not of women, because measures provide no net gains for women even when they are successful. These efforts are sometimes seen as dangerous for women when the other partner has been abusive. If not dangerous, they are sometimes seen as potentially disruptive of women's lives in other ways, such as when the woman has no wish for a long-gone male parent to be a presence in her family and to have an effect on her survival. When lawyers perceive contact with the other parent as dangerous, they reported being able to successfully "fight" Community Services to drop the requirement to pursue. However this takes away from their time and resources.

ECONOMIC AND SOCIAL ISSUES

A holistic view of legal aid representation that addresses women's actual life situations, inequality and legal needs would encompass representation in vital civil matters other than family law. Legal aid in Canada now seldom provides coverage for those pursuing economic

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or social entitlements from the state or others holding power over their lives, such as landlords, utilities, and schools, unless they are directly related to covered family law matters. Many long-time legal aid lawyers identified the dropping of these types of services as a disappointing change in their practice over the years. Many lawyers identified these areas as gaps disparately affecting women who are the majority of adults living in poverty. Comments from lawyers include:

Women need help with challenging determinations of disability benefits and CPP.

We need to get the courts to look at positive obligations to provide social assistance, especially where liberty is on the line.

Economic, social justice, cultural issues – there is just one person [on staff].

Income support and housing – eligibility [for social assistance] and department policies – their interpretation disparately impacts women – such as “man in the house” rules.

WOMEN NEED ADVOCACY ON THE RIGHT TO ADEQUATE ASSISTANCE

Positive state obligations to provide economic and social benefits is a growing area of analysis, and one that is of great concern to women, who are less moneyed than men as a group. While the Supreme Court of Canada decision in *Gosselin v. Québec (Attorney General)* 2002 SCC 84, is discouraging to some, other analysts look to the dissent and even parts of the majority decision for the basis of future litigation approaches. Along with consideration of the existence of such positive obligations comes the need for entitlement to legal aid to pursue them, without which such rights would have little meaning.

Addressing women’s legal needs including social and economic entitlement may be better served by a move away from categorical entitlement schemes. As Mary Jane Mossman states in “Gender Equality and Legal Aid Services (1993)” published in the *Sydney Law Review* 30 at pages 41- 42:

Categorical entitlement is a major feature of legal aid schemes in Canada... On the surface, such a scheme appears gender neutral in terms of...choices about the eligibility of applicants and categories of entitlement. From the perspective of feminist analyses however, legal categories that define rights and obligations may frequently conceal hidden (and gendered) bias...[F]eminist analyses have consistently challenged the neutrality of legal categories, either because women were not involved in defining categories...or because their interests may have been regarded as less important.

A new way of viewing services that fairly and holistically reflects women’s needs should be developed and resourced. The current menu of services and categorical schemes need to be reviewed altogether by government with attention to disparate impacts on women and with input from women’s organizations.

The starting point for defining appropriate legal aid coverage should be women’s lived experiences of poverty, abuse, family responsibility and inequality for which legal representation is necessary to remedy. To pursue claims for equality in legal aid representation through litigation will require building on the *Gosselin* dissent and reviving and expanding earlier Supreme Court of Canada directions in defining equality.

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