Submission of West Coast Women's Legal Education and Action Fund (West Coast LEAF)

To the Ministry of Attorney General Justice Services Branch Civil and Family Law Policy Office

Family Relations Act Review
Phase III Discussion Papers

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I. About West Coast LEAF

West Coast LEAF Association ("WCLEAF") is the British Columbia branch of the national Women's Legal Education and Action Fund ("LEAF"). West Coast LEAF is a charitable, non-profit society that was founded in 1987 to secure equal rights for Canadian women as guaranteed by the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). To this end, LEAF and WCLEAF engage in test case litigation, equality research, law reform and public legal education. Through such endeavors, the organization has developed particular expertise with respect to the interaction between equality among persons and laws having a particular impact on women.

West Coast LEAF has also been engaged in the area of family law reform as it impacts the equality rights of those most unrepresented and underrepresented in family law matters through the work of WCLEAF's Family Law Project. WCLEAF has been active in making submissions both provincially and federally to address issues such as funding for family law legal aid, immigration reforms, poverty law advocacy and same-sex law reform measures. In 2003, WCLEAF made submissions to the Standing Committee on Justice and Human Rights in Response to Bill C-22, *An Act to Amend the Divorce Act*. Also in 2003 WCLEAF established the Affidavit Campaign which documented, via affidavits, women's difficulties with navigating the family law system without legal representation. In 2005/2006 WCLEAF established a Court Watch Program which monitored the experiences of women in court for family law matters. Two reports published from these initiatives are: *Legal Aid Denied* and *The Court Watch Report*, both publications can be found on the WCLEAF website under Law Reform – Family Project at www.westcoastleaf.org

Building on the work of WCLEAF's Family Law Project and our submissions responding to the federal *Divorce Act* amendments, this submission represents the views of WCLEAF.

II. Context of Women's Inequality

Moving from Inequalities to Substantive Equality

Women are disproportionately affected by such realities as: poverty, male violence, lack of access to legal services, restrictive immigration policies and homelessness.[1] Women assume the majority of primary caregiving tasks for children and elderly family members.[2] Women are under represented in political, economic and social policy decision-making positions.[3] Women's lives are diverse and are impacted not only by systemic gender inequality but also inequality based on: Aboriginal heritage, race, ability, sexuality, class, religion, age, language, and immigration status.

In family law only 5-10% of cases go to court and of these the majority involved disputes about spousal support, child custody and property matters.[4] Of the contested disputes the majority are identified as being "high conflict" relationships, which can be identified primarily as those involving male violence against women and children.[5] Several research studies indicate a significant overlap, between 30-60% in family law cases where "family violence" and child abuse are present.[6]

In a 2005 evaluation report of the B.C. Supreme Court Self Help Information Centre 82% of women using the service were seeking help in family law matters.[7] The report also highlighted that 60% of those using the centre do so because they cannot afford a lawyer and that family law is the primary service area for the centre.[8] In a 2004 study on self representing litigants in B.C., "family law was the most frequently cited area of law which self-representing litigants seek assistance".[9] One Pro bono service provider commented that, "family is 70% of our clinic work."[10] In addition, in Vancouver the "estimate is that 80% of the volume of self-representing litigants at the Supreme Court are in the family law area." [11]*Legal Aid Denied* highlighted the severe impact women experience in having to represent themselves in court. As one woman shared:

> "After I became self-represented I had to draft my own court documents such as the Notices of Motion and Notices of Hearing. I had to do my own research and present my own evidence in the court…Dealing with this case became like a part time job for me because it was taking up so much of my time…This has meant keeping very late hours in order to ensure that my children do not have to deal with what is going on…Because of the time I had to spend working on this case I lost a job working at a restaurant because I didn't have the time to do both the job and prepare for court appearances." *Legal Aid Denied Affiant #17* [12]

Self-representing research also highlights that client groups faced "enormous barriers – owing to culture, language, education, poverty or disabilities –in trying to represent themselves at any level of court."[13] As one immigrant and refugee serving advocate in this study commented: "My clients would not dream of representing themselves. They don't have a basic understanding of our laws and don't know how the court system works. And language is always an issue."[14] As another immigrant woman facing abuse and who was denied legal aid commented about her situation: " [It is] Not fair…we are victimized again and put our lives in danger again…If we have money and pay [a] lawyer then [there] is no problem…a lawyer can then talk to [the] judge…that would be nice." [15] This woman also identified feeling "victimized and abused" in the court process.[16]

Women experiencing domestic violence have indicated that the most useful assistance and support they have utilized in accessing the legal system is the advocacy of domestic violence workers.[17] Women and children with multiple and intersecting barriers lack access to court systems and understanding legal rights and information causing further hardship. The outcomes of inaccessible services hinder women's and children's ability to make choices that preserve their equality rights and interests. In many cases where violence is present, women and children are placed in unsafe situations with increased potential of harm.[18]

These contextual snapshots provide a clearer reality of the compromised status women and children experience by family law legislation and the complexities of their cases before courts, lawyers and the family law system, e.g. Family Justice Counsellors, Parenting After Separation Groups, etc.

Reform to the *Family Relations Act* must be viewed within the above realities and contexts of women's current, historical and ongoing inequalities that disproportionately disadvantage all women. Family law reforms must take a substantive equality analysis to create and adapt legislation to provide access and the promotion of all women's equality rights. Family law reform must look at the historical context of the institutions of "family" and "marriage" that have perpetuated and promoted women's inequality. The language, substance and application of such law reform must be considered with an analysis to provide for substantive equality rights to exist. In *Willick* v. *Willick*, Justice L'Heureux-Dubé (as she was then) stated:

> [I]t is important that statutory provisions be interpreted in such a way as not to <u>contribute</u> to that inequality in a way that is contrary to the values of substantive equality embodied in our Charter.
>
> An assessment of whether a particular interpretation of a statute is consistent with these Charter values necessitates a contextual approach which contemplates the social framework in which the Act operates. Interpretation consistent with the values of substantive equality espoused by the Charter requires that both words <u>and</u> results be contemplated.[19]

Cuts to Legal Aid

> "After being denied Legal Aid in 2002, I represented myself twice in court. Volunteers from a transition house came with me, but I had to stand up alone. I did not know what I was doing and it felt like nobody listened to me. My ex-partner's lawyer was brutal towards me. No one in the courtroom recognized that I was representing myself or that English is not my first language. I was standing there alone trying to protect the boys. This new judge…disregarded the other judge's decision. She said that my children could go back to overnight visits. The judge said my ex-partner's actions were 'just different parenting'. I had practiced going to court and representing myself, but this did not matter because I cannot argue with a lawyer. I am not a lawyer. I am just a mother." *Legal Aid Denied – Affiant #14* [20]

Family Law reform in B.C. must be situated in the reality of drastic legal aid cuts that have impaired women from accessing legal representation in family law matters. The 40% cuts to funding for legal aid have disproportionately disadvantaged women's rights to access justice.[21] This inability to have legal representation has further disadvantaged women who are: Aboriginal, racialized, immigrant and refugees, poor, working poor and women with disabilities in accessing justice. Chief Justice Beverley McLachlin has referred to this reality as an "epidemic of lack of representation" in the courts.[22] The Chief Justice has also referred to access to justice being a "basic right" for Canadians.[23] Dalhousie University law professor Rollie Thompson has also commented on the state of B.C.'s family law system stating: "The B.C. family legal aid system has been totally decimated".[24]

WCLEAF with the Canadian Centre for Policy Alternatives has highlighted the severe impact of *Charter* rights to women and other equality seeking groups in the report, *Legal Aid Denied*. We respectfully submit that the Attorney General take into consideration the following highlighted points from this report for the FRA Review process:

- Women are less likely to be eligible for the legal aid services they need because it is easier to access criminal legal aid than family legal aid.[25]
- The impact of cuts to legal aid are even more devastating when combined with the broad-based cuts by the provincial government to programs, services and funding for community organizations.[26]
- Without adequate legal representation, women are losing custody of their children, giving up valid legal rights to support, and being victimized by litigation harassment. This is not the result of simple private disputes, but of clear policy choices by government.[27]
- These expansive cuts have raised many concerns about the state of women's equality in B.C. Even the United Nations has agreed that the actions of the provincial government may have undermined women's equality and breached Canada's international treaty obligations.[28]
- Women's ability to be free and full participants in the economic, social, political and cultural life of British Columbia is severely undermined by the cuts to civil law legal aid, particularly family law legal aid.[29]

Frontline advocates working with women, especially women survivors of abuse have also identified the vulnerable position women face when they do not have legal aid. As one advocate highlighted:

> "The [court] process is long, complicated and frustrating for women because the legal help they receive, if any, is piece meal. They may be able to obtain summary advice from family duty counsel, but are generally left to represent themselves at trial. Many women are intimidated by the court process, especially if violence or control has been an issue in the relationship, if the other party has legal counsel or if the case is at all complex….Unfortunately, I have seen many women forego some or all child support, and

> division of property in light of the barriers they face (lack of representation, time and money, retaliation by spouse)." [30]

West Coast LEAF is deeply concerned about the damage to fundamental human and equality rights for women and children's rights in these contexts.

Upholding *Charter* Rights and International Commitments

In addition to the contextual factors and intersections of women's lived realties, we submit that the *Family Relations Act* must be guided through the lens of upholding, promoting and protecting *Charter* rights. Judicial interpretation of the FRA has a significant impact on the Sections 7, 15, and 28 *Charter* rights of women and children in B.C.

Equal access to justice for women is impaired by the current legal aid funding constraints to family law matters and the interlocking reality of women's disproportionate economic disadvantage in being able to privately fund legal representation. Equality rights for women are also challenged by maintaining legal aid funding for criminal law matters which are primarily accessed by men while drastically reducing and eliminating legal aid funding for family law matters which are primarily accessed by women. The framework of the FRA must promote women's equal benefit and access to the law to adhere to Section 15 and 28 equality provisions of the *Charter*.

Failing to provide legal services in family law matters, has also been held to violate Section 7, the right to the security of the person in the Supreme Court of Canada decision *G.* (*J.*).[31] In this case, a mother whose children were apprehended was not provided legal aid by the government of New Brunswick. The court provided the following analysis in their decision:

> For the hearing to be fair, the parent must have an opportunity to present his of her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child…I find that the appellant needed to be represented by counsel for there to have been a fair determination of the children's best interests. Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's s.7 right to security of the person.[32]

Women forced to represent themselves in court or participate in any mandatory dispute resolution or mediation processes without the opportunity to access and be provided the comprehensive and ongoing services of family law legal counsel places women in very vulnerable and potentially dangerous situations. West Coast LEAF's Bill C-22 submission noted these similar concerns:

> The situation is particularly serious for women who are leaving abusive situations and who are regularly left without legal assistance, or with inadequate legal assistance. Without legal counsel, already overburdened community advocates are inappropriately forced into assisting unrepresented women with very complex legal issues. Further, many women who do not have adequate legal representation give up their rights in the face of seemingly incomprehensible and intimidating legal system and issues and some cases are even forced back into abusive situation because of lack of access to legal aid. The lack of legal aid for family law has and will continue to have a devastating effect on some of the most vulnerable members of our society, including poor women, women of color, women with disabilities, immigrant women and women who have difficulty with the English language.[33]

In this context women and children experience a fundamental failure of protection by the legal systems that put their security, safety and liberty at risk. A view to protecting *Charter* values and rights must guide the review of the FRA and subsequent programs, policies and training measures that emerge from these family law reform measures.

International Commitments

We are encouraged to see reference in the discussion paper, "Chapter 10 – Defining Legal Parenthood", on the desire for Canada to adhere to the international commitments made to such undertakings as the *UN Convention on the Rights of the Child*. We strongly support the direction of the provincial government to give full effect to the international commitments Canada has agreed to protect and promote. We also agree that the only way to give full effect to these international commitments is by ensuring that federal, provincial and territorial laws and policies reflect these commitments in legislation and in practice.

In addition to the *UN Convention on the Rights of the Child* we also submit that the FRA reflect in interpretation and application Canada's international obligations under the *Convention on the Elimination of All Forms of Discrimination against Women*; the *Beijing Platform for Action*; the *Convention of the Elimination of All Forms of Racial Discrimination*; *International Covenant of Civil and Political Rights* and the *Declaration on the Elimination of Violence against Women*.

Women's rights to autonomy, safety, security, access to legal representation, access to justice and basic human rights must be reflected and interpreted throughout the legislation of the FRA, as well as in any programs, training, and resources that are created to implement the FRA.

As highlighted in the *Covenant of Civil and Political Rights* of which Canada is a signatory:

> Article 14 (1.) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…

And,

> Article 23 (4.) State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provisions shall be made for the necessary protection of children.

The significant reality of male violence against women and children in the family must also be specifically addressed reflecting the gendered reality of power and control in violence. As the *Declaration on the Elimination of Violence against Women* states:

> [V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into subordinate positions compared to men
>
> States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should…
>
> (f) Develop, in a comprehensive way, preventative approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of

> women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.[34]

Women and children's risk of violence increases post-separation and in many cases violence escalates to causing severe harm and in some cases the death of women and children.[35] Family law matters involving violence against women and children are often inappropriately cast as "private" law matters. WCLEAF addressed this in their report *Legal Aid Denied* by providing the following:

> To suggest that family law is a simple private matter between two individuals also ignores the key role government plays in the complex web of law that governs family breakdown. Through the provincial *Family Relations Act* and the federal *Divorce Act*, the government provides abused women with the right to apply for civil legal remedies to enhance safety of themselves and their children. Policies inappropriately limit access to legal representation, effectively bar women's access to these remedies. Because women require these remedies much more often than men, the lack of access to essential legal services can be viewed as discrimination in relation to women's right to life, liberty and security as well as to equal protection of the law.[36]

West Coast LEAF submits that a gender-based analysis that promotes women's substantive equality rights is essential and integral to the protection of children's best interests and children's equality rights. A gender-based analysis must also address the impacts of racism, ableism, homophobia, heterosexism, transphobia, ageism, classism, colonization and the ongoing struggles for Aboriginal communities.

III. Recommendations - Overall Key Elements

Although we understand that the focus of the FRA Review is exclusively on legislative changes, West Coast LEAF submits that legislative recommendations must be guided with action related proposals to assist in the implementation of legislative amendments. To be effective, West Coast LEAF respectfully submits that any proposed legislative changes must have the following mandatory action, implementation and interpretative components:

i. An Application section that provides guidance for implementing the legislation - i.e. in the same spirit of West Coast LEAF's Bill C-22 Submission. NAWL and VCASAA proposed the use of a preamble in Bill C-22 Submissions and we also support the intent of these preamble frameworks for the FRA. We propose the following Application Section be included:

The *Family Relations Act* is to be construed and applied in a manner that:

(a) gives paramount consideration to the safety of children and their caregivers in all decisions made under this Act;
(b) recognizes that women disproportionately provide the primary care of children;
(c) recognizes the disproportionate prevalence of violence against women and children which negatively impacts the equal participation of women and children in society;
(d) acknowledges women's historical and ongoing disadvantaged position in family and in society;
(e) recognizes the need to support and validate women's autonomy and substantive equality rights;
(f) recognizes the complex and diverse lived experiences of women and children that create barriers and challenges in accessing justice;

(g) provides a comprehensive analysis and transparent decision-making process that illustrates an awareness of historical, social, political, and economic intersecting inequalities;
(h) permits the inclusion of relevant criminal, immigration, poverty and human rights matters in family law proceedings;
(i) ensures that decisions taken under this *Act* are consistent with sections 7, 15, and 28 of the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination on the basis of age, sex, class or socio-economic condition, Aboriginal heritage, race and ethnic origin, disability and sexual orientation. We would also include discrimination based on the basis of transgender identity, immigration status, and religion; and
(j) complies with international human rights instruments to which Canada is a signatory, including the *Convention on the Elimination of All Forms of Discrimination against Women*, the Declaration *on the Elimination of Violence against Women;* the *Convention of the Elimination of All Forms of Discrimination*, the *Beijing Platform for Action, and the Convention on the Rights of the Child.*

ii. Training and education of lawyers, judges and family law system workers, is a necessity to ensure that any legislative changes are fully understood by those in positions of power to interpret, use their discretion, make decisions and impact in any way the outcome of family law matters in B.C. There must be a requirement attached to any proposed legislation for lawyers and judges to be educated on complex intersections - in particular – of violence against women and children, racism, immigration, ability, poverty, LGBT issues, etc. It is critical that the training in these areas be provided by front-line advocates working with women facing violence, immigrant and refugee issues, poverty, etc. Training must reflect the lived experiences of those most disproportionately disadvantaged in family law matters, for substantive equality to be achieved.

iii. Publicly, fully-funded family law legal aid for all and funding for advocacy and support programs for women and children. A commitment to making legal representation accessible for all in family law matters and in particular from the position of West Coast LEAF access for women, is the only way to promote women's equality.

iv. West Coast LEAF proposes a family law system that provides the following:

- A legal and policy framework based on the best current gender based research about primary care-giving, family violence, racism, immigration, poverty, Aboriginal identity, disability, LGB and T issues;
- A focus on securing women's equality rights and preserving women's autonomous decision-making powers and that do not penalize women for making decisions that consider their well-being and best interests;
- A range of tools for resolving disputes that families can access equally regardless of financial ability, language ability, education, etc. including fully funded legal counsel that will best address the concerns and issues that need to be raised in an individual's specific family law case;
- A system that has the capacity to identify and screen for violence, litigation harassment, racism, homophobia, classism, ableism, etc. and respond accordingly; and
- Articulates the best interests of the children that recognizes the historic role and related economic disadvantage women experience and assume in caring for their children.

IV. Recommendations – Chapter 10 – Defining Legal Parenthood

> We have known for some time the flaws in the presumption of paternity –the presumption that the husband of a woman who gave birth is the genetic father of the child, originally designed primarily for patriarchal inheritance purposes. [FN8] However, only since egg donation became feasible was the common law presumption that the woman who gave birth was also the genetic mother disturbed. [FN9]Suffice to say that easy presumptions about parenthood can no longer be drawn from the facts of either birth or marriage.[37]

Legal Scholars such as Susan B. Boyd, Fiona Kelly, and Angela Cameron have engaged in critically addressing the issues of defining legal parenthood and notions of "family" through analysis which focuses on gendered impact and lived experiences of same-sex couples and families.

These legal scholars and others have highlighted that conversations of parenting engage not only legal definitions but also biological and social parenting concepts that are multifaceted and diverse. Navigating where these lines of parenting are drawn and what resulting "rights" emerge from these delineations must be carefully approached so as to not reproduce unequal gendered power relations.

The FRA has not addressed the complexity of legal parenthood for women, same sex couples, and single women (heterosexual, lesbian, bisexual and transgendered) who desire to make autonomous decisions regarding the formation and quality of the families they want to create. The specific impact for lesbian couples is also not accounted for the in FRA. In addition, the FRA does not consider fully the implications of *The Assisted Human Reproduction Act*[38] and the power relations that emerge making parties vulnerable, in particular women and lesbians, more specifically non-biological lesbian mothers, to have their parenting roles subordinated or their parenting arrangements disturbed by including parties, such as sperm donors, as legal parents.

The current system regarding parenthood in family law creates a two-tiered approach, one for heterosexual couples and another for single women and same-sex couples. Non-biological lesbian mothers are still left unprotected and at risk regarding their parenting rights under the provisions, and lack thereof, in family law legislation. In addition, the reality for gay men, as individuals and as couples, seeking to create families through assisted reproduction and surrogacy also require additional analysis. Furthermore issues of surrogacy must focus on balancing women's equality interests with the ability to support other parties desire to conceive children.

A critical analysis and creation of new family law provisions in this area must engage gender, race, class, sexual orientation, ability and other issues that mark unequal power relations to be relevant and sensitive to the complicated dynamics legal parenthood poses.

The three main areas West Coast LEAF seeks to provide feedback on are legal parenthood issues specifically with a focus on issues of gender and sexual orientation; donor identification and finally some review of provisions from other family law jurisdictions that West Coast LEAF proposes to endorse.

Legal Parenthood and Creating "Family"

> Despite the enormous increase in lesbian motherhood and the numerous legal victories mothers have recently achieved, lesbian mothers remain legally vulnerable. Non-biological mothers in particular are subject to the whim of both biological mothers and the courts, while the legal status of known sperm donors remains largely unresolved. It is not yet certain, except possibly in Quebec, that a married lesbian couple will be automatically recognized as the exclusive legal parents of a child born into their marriage if a known sperm donor or genetic father exists or makes a claim. In a legal climate which appears to prioritize both finding fathers for children and paternal genetic ties [FN3], a lesbian-headed family that chooses not to involve a genetic father remains an anomaly.[39]

As Boyd and Kelly have highlighted in the above quote, the legal landscape for lesbian mothers leaves little predictability or security of preserving concepts and roles of how a lesbian couple might envision or plan their "family" to be formed. The priority to focus and centre biological and genetic connections to identify legal parenting relationships, versus looking at the significance of intent to parent (or be a family) and the role of social parenting[40] undermines lesbians, queer families, and single women choosing to have children.

Law reform, with same-sex marriage and challenges to discriminatory legislation based on sexual orientation, attempts to expand unequal definitions and roles in family law to be more reflective of lesbian and gay parents thereby making language more gender neutral to be inclusive. However, as Boyd, indicates, family law remains a gendered space:

> The fraught area of post-separation parenting disputes has shown that the field of parenting remains gendered even in the face of an increasingly formalistic, gender neutral, stance in the field. The status of fathers in relation to children has been strengthened, whereas the caregiving labour and responsibility of mothers is often, and possibly increasingly, undervalued or rendered invisible.[FN18] It is not clear that the best interests of children are served under this trend. As well, women's inequality in society and in the family is increasingly overlooked – even, disappointingly, in Canadian equality rights jurisprudence.[FN19] Indeed, in the 21st century the gender of custody law has become perversely invisible at the level of public policy in Canada. [FN20] Ironically, the increased invisibility of motherwork[FN21] has arguably occurred in part due to the need to make family law more gender neutral so as to accommodate same-sex relationships. Bringing a gender sensitive analysis to parenting law, can, then generate some degree of tension with the politics of inclusion for same sex families. However, in

> a society that remains highly gendered, including in relation to parenting, it is I suggest, necessary to do so.[41]

Kelly, has also identified in a review of same-sex parenting research from the United Kingdom, United States and Austrailia, that a gendered impact also manifests for lesbian parents/families in relationships where the parties have chosen to have known sperm donors play a role in the care of the children conceived with the assistance of the donor. Kelly indicates:

> [M]ost significant, is that each of the studies show that in approximately one half of all lesbian families donors play some role in their children's lives. This suggests that any law reform in this area needs to acknowledge and protect these relationships in some form. However, the research also shows that the role played by the donors varies with some acting as fully functional "father", others taking o the role of "kindly uncle" and others yet playing the role of occasional visitor... Given this reality, law reform must take into account the fact that caregiving remains a gendered phenomenon, even in lesbian and gay families.[FN52] [42]

Kelly highlights that in these studies, of the few men that took on "day to day care" of the children they still did not assume "equal"care. The primary caregiving and decision-making was still assumed by the lesbian "primary parents".[43]

Balancing concepts of genetics, social parenting and intention of parties to assume parental roles or become a "family" require an analysis that takes into account historical, political, economic and social histories of gender, class, race, sexual orientation and other realties that are disproportionately disadvantaged in the framing and continued practice of family law. Further research and analysis from leading academics in the area of legal parenthood need to be considered. West Coast LEAF recommends the Attorney General FRA Review Team to take direction from the academic work of professors Susan B. Boyd and Fiona Kelly at the University of British Columbia. In addition, the work of legal scholar, Angela Cameron on assisted human reproduction and queer families provides useful insight for family law reform.[44]

Primary caregiving continues to be undervalued and made invisible in all forms of parenting and any discussion on legal parenthood must consider the impact of which parent or parents are responsible for all of the work involved in primary caregiving. Research indicates that the role of primary caregiver continues to be assumed by women.[45]

In recent interviews conducted in 2005 by Kelly for her dissertation research on lesbian mothers, 49 lesbian mothers in B.C. and Alberta were interviewed. Kelly highlights three key concerns that were raised in the interviews:

> First, the women were frustrated by the law's failure to automatically recognize both mothers as legal parents. They were particularly concerned with the ongoing vulnerability of non-biological mothers. Second, the women felt that the law

> should be capable of recognizing more than two legal parents (or only one legal parent) *provided* that was the arrangement to which the parties had agreed. Finally, and in light of the increased emphasis on the rights of genetic fathers, the mothers wanted the law to clarify – and sometimes limit- the rights and responsibilities of known donors. While they supported expansion of the legal family to include a donor when the parties had agreed to this arrangement, they also wanted the ability to exclude a donor in situations where he was not intended to parent.[FN10] [46]

It is clear from this brief snapshot of Kelly's research that women either as sole parents or within lesbian relationships want to protect their role as parents and their desired or intended family from the legal privileges and power of genetic donors. In addition, a focus to preserve the legal rights of non-biological lesbian mothers and women who choose to be sole parents is also sought from family law reform. The real concern of "fathers" being inserted into family models that are either formed by single women or lesbian couples, where this is not the intention of the women further challenges women's equality rights to make decisions about their lives autonomously. As Boyd writes:

> As in child custody law, it no longer seems possible for women who become mothers to form autonomous decisions about their family units if a known father who has not engaged in criminal conduct asserts a claim.[FN121] The huge emphasis on contact between children and fathers that has emerged over the past two decades precludes such female autonomy when there is a known father. While the new interest of men in fatherhood is notable, even laudable in many cases, the way in which family law deals with it needs to be attentive to the complexity of family forms.[47]

West Coast LEAF encourages family law provisions regarding legal parenthood that encourage women's autonomous and equal decision-making abilities for the family structures they have chosen. Lesbian mothers, in particular non-biological lesbian mothers, face a disproportionate disadvantage in establishing and maintaining a parental right. In addition, a variety of parenting and family structures must be recognized, for lesbian and gay families, as well as for single women. Some of these families/parenting models may follow dominant nuclear family models with two parents, some may have multiple parents in varying degrees of parenting or caregiving roles and others yet may choose to have a family of where only one parent exists.

It will be necessary to address power relations and de-centre foundational underpinnings of family law to push at meanings and legal rights regarding genetics, biology, social parenting, and construction of families that fit outside of dominant norms of how "the family" has been established by the law.

Best interest of the child in these contexts then must also go beyond looking at only one factor, such as social parenting or genetics or intention to establish parenting roles. Exploring responsibilities versus rights of parents would be useful. Responsibilities of primary caregiving, for example need to be made more transparent and given weight in

such best interest of the child considerations. The reality of women as primary caregivers, whether as a single parent or within lesbian relationships must continue to inform the FRA review.

Donor Identification and Parenthood

As indicated from above, simplistic formulations based on genetics need to be expanded and contextualized to consider the role donors will, if any, play in the lives of donor conceived children. A move towards, "a right to know one's genetic history" has a profound gendered impact for women and their equality and autonomy and therefore requires a more complex analysis.

Research on donations of sperm, eggs, and embryos indicate a gendered framework of how donation is constructed when men donate sperm versus when women donate eggs or embryos.

In "Egg and Embryo Donation and the Meaning of Motherhood", Maggie Kirkman identifies the significant and gendered responses to donation of genetic materials between men and women donors. Kirkman identifies that the, "there is a cultural association between eggs (and, by extension, embryos) and motherhood that does not apply to sperm and fatherhood."[48] (Fatherhood versus paternity) Research indicates that women donors are known while sperm donors are anonymous and that women donors are "more interested in the outcome of their donation than semen donors", in addition women's main reason for giving is identified in the research for "altruism"; women feel they are helping other women conceive and experience motherhood.[49] Research does distinguish that women donating embryos versus eggs consider the embryo to be viewed as "potential children" versus as genetic materials.[50] In interviews of women who had donated eggs and/or embryos, Kirkman found that women donating embryos needed a connection with the other woman or family in order to donate her embryo, while egg donation did not require a relationship between the parties.

Research also indicated that, "egg donors and recipients may see pregnancy and subsequent care as crucial to mothering: genetic connection is not privileged in defining the mother-child relationship.[Snowdon,1994] [51] As, for donor identity, in one study in the U.K., most women donating eggs identified a preference to being anonymous but also were open to contact from the donor conceived child. In addition, 80% of women indicated they would still donate their eggs if the records (in the U.K) were open.[52]

Kirkman's interviews with women donors highlights that women donating eggs and embryos look at issues of care, love, nurturing and raising of the future children by the recipient mothers as significant factors of parenting. In addition, some women indicated that the gestation and carrying of the egg and/or embryo also fostered the relationship between the recipient and her relationship as "mother".[53]

Research from Australia on donor inseminated (DI) children, indicates that donor conceived children benefit psychologically if they have information regarding certain

aspects of their genetic origin, especially if this is done early in the child's development. The "three forms" of information DI children have identified as beneficial are: knowing they were conceived by genetic donation; genetic history of the donor and to satisfy curiosity of the donor's identity.[54]

It has been indicated empirically that children told about their conception at an early age interpret this information in more "positive" and "neutral" ways than if told or found out about their DI status as an adult.[55]

Based on the research regarding the types of information DI children may want to seek out, it may be beneficial to consider a registry system such as the one proposed by legislation in Victoria, Australia. This legislation:

> [M]andates the maintenance of two registers which formally record all births from donor conception in the State as well as the information about donors of sperm, eggs, and embryos. Identifying information can be released to donor-conceived people from the age of 18. The Infertility Treatment Authority, the body established to administer these central registers, also maintains two voluntary registers which formally record applications for the exchange of information between donor and donor-conceived person where the conception took place before the mandatory registers were established.
>
> Sweden, in 1985, was the first country to make legislative provisions for the person conceived by sperm donation to have information about the donor. New Zealand legislation ensures that clinics use only donors who are willing to be identified, in the future, to people conceived from their gametes or embryos. The U.K. has had legislation since April 2005 that allows people conceived from future donor procedures to have greater access to both identifying and non-identifying information about their donors upon reaching the age of 18; in the Netherlands, since June 2004, donor-conceived people have been able to retrieve such information once they turn 16. [citations in text removed][56]

However, donor conceived children can only access registries or seek out the information topics about donors cited previously, if the children *know* they are donor conceived. Research indicates, overwhelmingly, that heterosexual parents using donor assisted reproduction, do not disclose to their children that they are donor conceived. One study highlights that 89% of heterosexual parents receiving donor assistance had not disclosed to their children that the children were donor conceived.[57] In contrast:

> In studies of donor-assisted conception, it has generally been found that lesbian couples and single women are more likely to choose identifiable donors and to report higher rates of disclosure intentions than heterosexual couples.[58]

Generally the research indicates that parents who disclosed to their children that they were donor conceived did not regret this decision and more positive relationships

between parents and children existed in those that had disclosed this information to their children than in families that had not disclosed. [59]

As indicated in the FRA Review discussion papers, the focus on the rights of children to have access to their donor information can serve and facilitate to identify potentially pertinent health information for the child. In addition research has indicated that psychological well-being can be fostered with early disclosure of donor conception for the child and thereby can facilitate a more open parental relationship dynamic. However, it is critical, just as was articulated in the previous section, that such interest and rights must be contextualized with in power relations, potential harms or challenges to equality and autonomy for single women and lesbian parents.

The strong focus on father's rights as centred on genetic donation, as mentioned earlier, requires single women and lesbian couples be protected from the insertion of genetic fathers into families where their was not intention of such an assumed role. As legal scholar, Julie Wallbank argues that:

> [T]he emphasis on rights in the private familial dispute brings about the conjunction of children and fathers' rights and that these are utilized to women's detriment and to dilute the perceived gains they [women] have made in relation to family life.[60]

Balance must be found among women's autonomy and decision-making ;children's right to donor information and lesbian couples and single women's rights to create families without repercussion of genetic fathers and the power the State and family law affords them. Wallbank notes:

> To contribute one's genes to the creation of a child is not congruent with the social role of parenthood. Usually, sperm donors have no desire to act as fathers. There is no reason to believe that this would change if they were identifiable.[61]

Fundamentally, primary caregiving, intention, genetics and addressing systemic and historical gendered, raced, and classed power relations within family law must always be a guiding analysis to the law reform in these matters.

Positive Steps: Provisions to Consider

The discussion paper illustrates some positive legal developments from other jurisdictions may be beneficial, they are:

- The legislation of Alberta and Quebec offer useful legislation in the area of legal parenthood. In particular the language from the Alberta case of *Fraess* v. *Alberta (Minister of Justice and Attorney General),* [2005] A.J. No. 1665 (Q.B.) (cited in the discussion paper) which stated:

A person is the parent of the resulting child if at the time of an assisted conception the person was the spouse of or in a relationship of interdependence of some permanence with the female person

(a) his sperm was used in the assisted conception even if it was mixed with the sperm of another male person, or
(b) the person's sperm was not used in the assisted conception, but the person consented in advance of the conception to being a parent of the resulting child.

This provision is beneficial because it applies to a birth mother's female partner and makes her the child's parent if before conception she consented to being the child's parent.

- Quebec's presumption of legal parentage applying to same-sex couples and heterosexual couples if the child is born as a result of assisted reproduction is also a beneficial provision.

- The New Zealand Law Commission proposed two-stage process for a donor of genetic material to become a legal parent if the donor and the couple who would be the child's legal parents agreed that the donor would also be a legal parent and raise the child jointly is also positive. As cited in the discussion paper the two step process of consideration before conception and after the child's birth are useful steps. The steps:

1. Before conception the couple and the donor would file with the court:
    - A sworn statement by the woman and her partner that the donor will be the child's genetic parent and that they want the donor to be a legal parent, along with a sworn statement from the donor that he or she will be the child's genetic parent and wants to be a legal parent;
    - Evidence that all of them received independent legal advice, as well as counselling about issues raised by their planned family; and
    - An agreement between the couple and the donor, about contact between the donor and the child or the role of the donor in the child's upbringing.

If satisfied that the evidence is in order, a Family Court registrar would give interim approval to the appointment of the donor as legal parent.

2. After the child's birth, with proof of the donor's genetic parentage, the registrar would approve the appointment. The donor would then be allowed to be registered with the Registrar-General of Births, Deaths and Marriages, along with the couple, as legal parent.

- The proposed legislation of Victoria, Australia (cited in previously in this submission) on donor identification and the formation of registries also

provides some useful frameworks to consider. However, West Coast LEAF would not support any mandatory process of donor identification whereby a two-tiered system of donor identification was created, by the clear evidence of single women and lesbian couples letting their children know of their donor conception while heterosexual couples making invisible donor assistance.

- Finally, we strongly submit that a more complex analysis of assisted human reproduction be explored to address the very serious and complex factors that may be raised in contested custody applications involving women, lesbian and gay couples and those marginalized by race, class, and ability.

V. Recommendations - Chapter 11 – Spousal and Parental Support

West Coast LEAF and LEAF National have historically been active in proposing law reform in the area of spousal support. LEAF's interventions on leading spousal support cases have always been guided by the social and economic disadvantages women experience in their role both in the workforce and also as the primary unpaid caregivers of children. In addition, women's contributions to the management and maintenance of housework, food preparation and general organization of the home are also not fully appreciated or accounted for economically. LEAF's arguments regarding the disproportionate disadvantage women experience has assisted in shaping the analysis of gender equality factors for consideration in *Moge* v. *Moge*.

Although West Coast LEAF is concerned regarding the area of Parental Support our main focus for this submission will be focused on Spousal Support issues.

Research indicates that the disproportionate impact for women post-separation continues to be detrimental for women and children. Research indicates that women's average incomes following post-divorce represented 69% of men's incomes and that 46% of women identified living below the poverty line.[62] The "feminization of poverty" that women experience has also been captured in post-divorce research from Australia that identified:

> [T]he consistent finding both in Australia and other western countries being that men are financially better off after the breakdown of marriage, while women are disproportionately worse off. In particular, sole parent families headed by women and older divorced women living alone typically experience a "drastic fall in living standards" post-divorce, with many in this group remaining financially disadvantaged in the longer term. While recent studies have differed on the extent of men's advantage, the results regarding women's disadvantage have not.[63]

The "clean break" model of early spousal support cases was impacted by the breadth of feminist , social science and economic research into women's disadvantage.

As Professor Carol Rogerson highlighted in her review of Canadian spousal support laws:

> By the late 1980's and early 1990's a substantial body of literature had developed documenting the severe decline in the economic circumstances of women and children after marriage breakdown. Attention was focused not only on the plight of homemakers left impoverished after long, traditional marriages, but also on that of younger mothers left with custody of children. The clean break mode of spousal support, which was seen as contributing to the feminization of poverty, came under increasing criticism in Canada for its unfair treatment of former spouses. In its 1992 decision *Moge*, the Supreme Court of Canada, building on developments in provincial appellate courts, responded to those criticisms and rejected the clean break model of spousal support. Drawing inspiration in part from academic writing the Court endorsed a much more expansive, "compensatory" model of spousal support.[64]

The need for a compensatory model of spousal support continues to be relevant so as to consider and reflect support payments that reflect women's economic reality of unpaid labour, primary caregiving responsibilities, increased time performing household duties, and receipt of lower income than men.[65]

The Spousal Support Guidelines created by Professors Rogerson and Thompson were intended to provide some more consistency, clarity, and predictability of spousal support assessments. The goal for lawyers and judges was to have a starting place in the negotiation or court process on spousal support issues. The Guidelines were also provided to address decisions that reflected the huge discretion judges were afforded on spousal support matters.

In their paper and presentation at the 2007 CLE Family Law Conference in Vancouver, "The Spousal Support Advisory Guidelines in B.C.: The Next Generation", professors Carol Rogerson and Rollie Thompson indicated that:

> B.C. has embraced the Spousal Support Advisory Guidelines as a 'useful tool' in determining spousal support. Since Yemchuk, the Court of Appeal has continued to endorse and apply the Guidelines in another nine appeals.[66]

In addition:

> B.C. has generated the highest number of spousal support decisions on the Advisory Guidelines – 122 out of the 302 decisions we have collected as of June 25, 2007.[67]

As Rogerson and Thompson have identified, the Spousal Support Guidelines were created to allow for some consistency and predictability of spousal support outcomes that could help counter the purely discretionary determinations emerging from the courts.

In the 2005 "Spousal Support Advisory Guidelines: A Draft Proposal"[68], Rogerson and Thompson identified some potential disadvantages that may emerge from guidelines when compared to the predominantly discretionary regime of spousal support before the courts. Some of the possible disadvantages identified in the Draft were:

- The Guidelines being too rigid and not providing individualized, unique or exceptional cases to be argued before the court;
- The nature of spousal support is too complicated and a formula will not be able to consider or account for the diversity of fact patterns in family law matters;
- The benefits of discretion allow for a flexible approach that can accommodate "intuitive reasoning" regarding some issues of justice in family matters that formulas may not be able to provide;
- There are too many "variations" between regions for a standard guideline; and
- The Guidelines will "foreclose litigation"; judges may use the Guidelines to restrict arguments made in court and instead promote negotiation.[69]

To address some of these disadvantages the Draft highlights that the proposed Guidelines are only "advisory" in nature, with multiple formulas, a range for duration and amounts and list of exceptions where the diverting from the Guidelines is more appropriate

However, in the most recent presentation and review of how the Spousal Support Guidelines are being used by lawyers and judges in B.C.,[70] Rogerson and Thompson indicate a few areas that continue to be under used within the Guidelines and some areas for concern with certain types of cases. The following are some of the points highlighted from this presentation:

- "'No-entitlement' decisions are contentious, particularly those in which courts have made findings of minimal, economic disadvantage experienced by women who have been primary caregivers of children in relatively long marriages (see Frouws and W.J.M. v. L.A.M.). Gender clearly makes a difference when it comes to entitlement: finding…"[71]
- "Duration has proven to be a much more difficult issue under the *with child support* formula. Most orders are indefinite, but time limits do appear in a minority of cases."[72]
- The review also indicates that: "Since the Guidelines are advisory only, judges and lawyers can always depart from the formula ranges when the outcomes don't seem 'right'"[73]
- Exceptions to depart from the Guidelines are listed and include: compensatory exception in short marriages; illness and disability; debt payment; prior support obligations; and compelling financial circumstances at the Interim stage. These exception were included in the Guidelines to provide for flexibility where the ranges or formulas may not be appropriate. However, most judges and lawyers do not engage the category of exceptions. In particular, Rogerson and Thompson indicate that: "The inability of the courts to come up with any consistent approach towards these illness and disability cases means that the Advisory Guidelines can

> only give limited advice about the appropriate outcomes within the exception. This is an area where the law really needs to develop, and there have been no signs of such development in BC – or anywhere else in Canada – over the past two years."[74]

The gendered reality and impact of economic disadvantage women experience post-separation along with the difficulties and barriers of capturing and framing women's economic contributions and sacrifices during relationships make using the guidelines problematic. The fact that the "exceptions" of the Guidelines still remain under utilized, especially in cases where complexities of disability exist, raise further concern about the focus of lawyers and judges submitting to a standard range of the Guidelines versus undertaking a more in-depth analysis of disability, economics, gender and support that need consideration. In addition, feedback from judges in the review process of the Guidelines indicated that some lawyers use the formula ranges in an "unsophisticated fashion" where decisions at arriving at such a range of support it not explained or exceptions have not been engaged.[75] The result is determinations based on numerical formulas without engaging, in some cases, complex weighing of factors as set out in *Moge* that accounted for the gendered impact and compensation of spousal support for women. Furthermore, many lawyers using spousal support software can come to court or mediation sessions with drastically different spousal support ranges. Depending on the familiarity, education and training levels of lawyers with such software, and even then, spousal support proposed, especially when factoring child support can be inconsistent.[76] Furthermore, women in positions of self-representing where spousal support is at issues face further barriers in being able to advocated for themselves when faced with family lawyers and complex software calculations on support.

It is also interesting to note that the feedback sessions of the Guidelines indicated that they were "most valuable" for payors, which research indicates would primarily be men. While recipients, primarily women, engaged the Guidelines to a "lesser degree". [77] This is not surprising in that research indicates that women continue to seek spousal support in few cases and where issues of custody of children are also being addressed, spousal support issues are often not even raised.

One of the main concerns noted in the research on spousal support and which was flagged in the list of possible disadvantages to having guidelines was the increasing push to settle such matters in negotiations and not before the court. The general trend in family law matters in B.C. has been to focus on more mediated and negotiated settlements on a range of family law matters including spousal support. The gendered impact of such a move will be addressed in feedback on Chapter 12 - Co-operative Approaches.

However, it is important to highlight briefly, the impact of private negotiations and mediated settlements for women regarding spousal support. Researchers have raised some key concerns of this trend and have indicated the following:

- Research indicates a concern with the adversarial process of going to court for women but flags that it has only been through contested applications before the

courts that such profound reflective decisions regarding gender inequality, such as Moge have influenced the legal landscape and women's equality rights in family law matters. If these matters were pushed towards settlement or negotiation judicial attention to issues of public and societal reality would not be raised and further reflected in law reform to address issues of historical disadvantage.[78]

- Research also highlights the gendered disadvantage of mediated negotiations for women:

  Women's tendency to avoid conflict, meet the needs of those around them before identifying and asserting their own needs, engage in the ethic of care, and focus on emotional, rather than on financial issues surrounding family breakup – all are key factors in understanding gender-based proclivities and aversions . Tolerance of risk, therefore, is affected by one's placement in the "domain of loss" as opposed to the "domain of gain", one's culturally-derived experiences and one's gender.[79]

- Power imbalances, violence, inaccessible legal processes, lack of legal aid, fear of losing children, visible and invisible dynamics of control and pressure contribute to mediated negotiation and settlements regarding spousal support, among other issues, to be disadvantaging.

- In research reviewing spousal maintenance in Australia, it was found that cases of spousal maintenance were not being made, as the Australian Institute of Family Studies review of empirical data indicated, that payment of spousal maintenance was "rare, minimal and brief".[80] The push by the Family Court of Australia to encourage claims of spousal maintenance where women have been disadvantage economically in their relationships is indicated in this research as a recognition in general, that more women and children who were not making claims for maintenance were then relying on the "public purse" for support.

Some researchers have indicated that the Guidelines provide a base for women choosing and able to make a claim for spousal support to ease the uncertainty and encourage women that they were entitled to a range of support. Some women have benefited from Spousal Support Guidelines, however for the majority, those tend to be women that are not reflective often of the most vulnerable women and children who may need support.[81]

West Coast LEAF would like to see the fundamental barriers for women in accessing spousal support, the valuing of women's unpaid contributions and lack of legal assistance such as fully funded legal aid in such matters as spousal support claims be addressed in order for women's economic disadvantage post-marriage to be remedied appropriately. West Coast LEAF supports the Spousal Support Guidelines as an

"advisory" mechanism to be used as one tool in a variety of tools to be able to comprehensively address the gendered impact of spousal support. However the Guidelines should not be legislated as the only tool for spousal support determinations as the Guidelines do not fully appreciate the complexity and diversity of experiences shaped by race, gender, class, ability, etc. that further marginalized disadvantaged groups in seeking economic recognition. They are prone to provide "cookie cutter" applications without flexibility and full appreciation of systemic inequalities in relationships. Furthermore, a focus exclusively on Guidelines encourages a priority on numeric analysis that, with exclusion to comprehensive attention to social realities, creates a lack of recognition and value for gender equality.

Compensation for the role of childrearing, primary care, missed opportunities as result of the relationship, economic disadvantage, need – which must be constructed in progressive terms, recognition of support when disability or illness exists, and lower income are useful as part of the complex framework to reflect the disproportionate impact women experience in relationships. It is also important as Miriam Grassby highlights that:

> It is easy to forget that women, just like men, develop their capacities and expand their earning abilities on the job market. It is easy to overlook, the fact that the extra time that many spouses spend cleaning, shopping, cooking, assisting with homework, and looking after children, can adversely affect earning capacity and enrich the other spouse who is free to advance a career because of less than equal participation in these tasks. Here lies the source of the difficulty that the employed lower income spouse faces in court. If the judge does not recognize how much work is invested in the home, and only sees value in remunerated employment, the value of her contribution of service may be ignored.[82]

Finally, West Coast LEAF strong discourages a push towards negotiation and mediation of spousal support matters where women do not have adequate understanding, support, and legal advocacy to navigate the power imbalanced context of alternative dispute measures and/or "co-operative" approaches. Litigation, although fraught with many problems, still has a role to play. As Marie Gordon commented:

> [I]t is entirely less likely that it was ten years ago, that Mrs. Moge would have been able to prosecute her case all the way to the Supreme Court of Canada to achieve monthly support of $150.00. The actions of the federal government as well as provincial governments across the country have, unfortunately, but inexorably, resulted in less support for provincial legal aid programs, and as a result access to civil legal aid coverage is less than secure. These trends in the modern Canadian context make it in our interest to ensure that negotiation-based results are fair, if not fairer, than results achieved through traditional judicial adjudication. The outcomes not only affect individuals, but also the "big picture" in terms of collective social welfare and economic well-being.[83]

VI. Recommendations – Chapter 12 – Co-operative Approaches

West Coast LEAF strongly opposes the move to mandatory consensual dispute resolution in family law matters. The notion of mandating a consensual process in of itself is a contradiction. Family law is profoundly gendered and women's ability to navigate family law matters in a climate of devastating cuts to legal aid, increased self representation and cuts to women's advocates and organizations leave women's equality rights in family law matters compromised and vulnerable. Mandatory dispute resolution processes only further compound women's vulnerability and risk.

In a 2002 research article on spousal support, legal scholar Marie Gordon, accurately predicated the types of law reform measures that would dominate family law, she cites:

> Canadians have also seen a substantial withdrawal of resources from the legal aid systems upon which low-income individuals have depended for legal services when in need. While a relatively affluent spousal support claimant may be able to weigh the benefits of the traditional adversarial model versus the collaborative model and make a choice based on self-interest, many low-income spouses are not able to avail themselves of such choices. The most financially vulnerable parties have the greatest interest in assuring themselves that negotiation, as opposed to litigation, yields fair results as they are far less able to exercise the choice in favour of litigation. As legal aid programs design more and more ways in which to harness their expenses and collaborate with court-mandated mediation programs, mandatory mediation may be the shape of the future for everyone except the independently affluent.[84]

What has emerged in B.C. and is being enforced by the promotion of such law reform measures as consensual mandatory dispute resolution is a two-tiered system of access to justice based on privileges of class, gender, race, and ability. Economic privilege is gendered, as West Coast LEAF's Phase II Submission highlighted, women are disproportionately represented statistically in the poor and working poor. Race and ability further emphasize disproportionate representation of racialized and disabled women in the poor and working.

West Coast LEAF continues to advocate for a fully funded legal aid system that is accessible for all family law matters. Access to independent legal counsel for family law matters is essential for all parties to be able to address complex family law decisions. West Coast LEAF has highlighted in our research publications *Legal Aid Denied* and the *Court Watch Report* that the impact of women self-representing in court and of being denied legal aid have fundamentally impacted women's and children's equality interests in family law matters.

In addition, women's disproportionate experience of violence in relationships makes any mandatory dispute resolution process a risk for the safety of both women and children. In "Post-Separation Parenting – Submerged Gender Issues"[85], Madam Justice Martinson addresses mandatory mediation where violence against women is present, she writes:

> The question of whether women who have experienced violence should be required to attend mediation is not without controversy. However, there is significant evidence that they should not. *The NJI Domestic Violence Bench Book* [FN65] suggests that mandatory mediation is, as a general rule, not advisable. It points out that the process encourages cooperation, collaboration and compromise. It is private rather than public and relies on participants being able to present arguments relating to individual needs and interests on equal footing. Violence against women, however, is associated with inequality, coercion, and misappropriation of power and control. Mediators are expected to be neutral. They do not have either the jurisdiction or the authority to impose decisions based on legal precedent. The result is that unequal negotiation between participants can produce an unequal outcome. Agreements reached in mediation may not be equitable or safe.[86]

In addition, Justice Martinson highlights that:

> The *NJI Domestic Violence Bench Book* emphasizes that potential settlement options presented by a lawyer or by judge, particularly a male lawyer or judge, can be experienced as comparable to a direction or order. Violence can affect self-esteem and capacity to resist settlement pressure. In addition, separation is a time of heightened danger for women. They must try to limit contact with the man for their own safety. Therefore, they are under enormous pressure to resolve family cases as quickly as possible. As such, they are highly susceptible to suggestions and to any indication of pressure to settle.[87]

Unequal bargaining power between men and women is further compounded by other experiences of marginalization. For example, Aboriginal women and immigrant and refugee women face increased challenges in a legal system that has systemic barriers regarding race, culture, language and the continued impact of colonization. Also having lawyers or judges that are predominantly male and white, "encourage" racialized women to co-operate or come to some resolution with ex-partners, would increase pressure on women to agree even if they were at risk.

Furthermore, legal scholar Linda C. Neilson highlights that:

> Even requiring attendance at an initial mediation session risks creating inappropriate pressures to settle on some kinds of parties, such as those whose ability to protect their own interests has been impaired by psychological or physical victimization, or those who are substantially disadvantaged in relation to the other party in terms of knowledge, experience and/or resources.[88]

We encourage the FRA Review Team to take into consideration the complex and intersecting realties of women as highlighted in West Coast LEAF's Phase II FRA Review Submission. Lack of power and systemic issues of intersecting oppressions, such as race, class, ability, sexual orientation, Aboriginal heritage and gender, further disadvantage women in family law matters make proposed law reforms such as mandatory mediation more dangerous.

In, "Would ADR Have Saved Romeo and Juliet", Pam Marshall identifies the problems experienced by marginalized communities, she states:

> It is important to point out that dispute awareness, transformation, and resolution are experienced differently by people. The particular social position that people occupy will impact on not only their personal perception of whether a dispute exists but other peoples' acceptance of their perception. Marginalized people will not be given recognition of a dispute's existence as readily as will someone in majority group. If disputes are not recognized as disputes, then there is no requirement for any action to resolve them. If the existence of a problem is not accepted, there is no reason to look for a resolution. It is clear that people in marginalized groups such as the poor, minority groups, and the disabled, are less likely to have their problems recognized, less likely to have them labeled as disputes, and less likely to be seen as having a legitimate claim to redress. Lawyers' complicity in this process of dispute naming deserves a brief examination. [89]

Research indicates that other problems with dispute resolution processes include lawyer's conceptualizing ADR processes as "soft" law not "real" law; that informal processes such as ADR allow for stereotypes and bias to go unchecked and to be fostered leaving, for example, women and people of colour facing discrimination; that the move toward ADR, collaborative law and mediation both in the legal system and law schools encourages fewer family law cases to be litigated and more cases move from mediation to settlement without even the option of litigation; and finally the continued separation and devaluing of family law matters as "private" matters that do not address "public" issues of concern.[90]

West Coast LEAF does not support that notion of "encouraging" parties through mandatory consensual dispute resolution to resolve their issues. The FRA should not "encourage" parties to co-operate and resolve their disputes, especially through agreements. Mandatory consensual dispute resolution should absolutely not be included in the FRA. The reasons highlighted above and in our previous Phase II Submission clearly identify, through research and women's lived experiences, that such mandatory provisions will be more detrimental to women and children. The fundamental rights to access to justice and equality for all women cannot be sacrificed in family law matters but isolating them to mandatory mediation models.

Encouraging relationships between front-line advocates and family law lawyers; investing in publicly funded family law legal aid; providing women accessible public legal education and access to independent legal counsel, and assisting the most marginalized women and children in family law matters with a holistic response that addresses not only legal factors but also social and economic challenges are a few steps the FRA, the Family Law Bar and Judiciary would be moving in the right direction.

VII. Recommendations – Chapter 13 – Time Limits and Definitions

West Coast LEAF offers a brief response to only some of the areas covered in the time limits and definitions chapter of the FRA Review.

- Unmarried spouses only have within one year after separation under the FRA to make a claim for spousal support. This time period is too short. Many women might have to forfeit their ability to access support because of this tight limitation period. The Federal Divorce Act does not limit when a claim for spousal support can be started. B.C. should not set a limit for when a claim of spousal support can be made by unmarried spouses. A one year limitation period is not realistic and sets different standards for married and unmarried spousal claims, thereby impacting the equality of women who choose to not get married but cohabit with their partners.
- B.C. is the only province that includes a time limit for starting an action against a step-parent for support. The time limit currently in place is that the action needs to be started within one year of the last time the step-parent contributed to the child's support. If you are a legal parent or guardian there is no such limit. West Coast LEAF proposes that there be no such time limit in seeking child support from step-parents.
- We are concerned about notions of the FRA "encouraging" or seeking parties to "genuinely" try to resolve their matters so that the right to preserve their right to legal action can be maintained. Every party should be able to preserve their right, whether they attempt to resolve their matter prior to a court action or not. This provision seems to be an attempt to mandate resolution and settlement with the bonus being the preservation of court action, while parties can start an action whether they agree to attempting resolution before trial. Settlement quite often occurs before trial, parties should be allowed to continue to have this right without any conditions.
- The FRA should be amended to remove the difference between the time limits in s.65 and s. 68 to promote fairness and certainty on how the agreements are reviewed.
- Finally, the definition of stepparent for the FRA might best be served by the provision cited in the discussion paper of Alberta's *Family Law Act*, which looks at the intention to be a parent and the subsequent formation of the relationship with the stepchild versus the qualifying elements indicated currently in the FRA.

VIII. Recommendations – Chapter 14 - Relocating Children

Cases involving the relocation of children and the mobility rights of custodial parents are complex. The decisions emerging from mobility cases have included a range of considerations reviewed by the courts, but often lacking predictability about the outcome of each case. The gendered impact of mobility cases is clear as mothers are the primary custodial parents of children post-separation and decisions by the courts in limiting or allowing their ability to relocate with their children challenges women's ability to make autonomous decisions about their lives and the lives of their children.

LEAF has been actively involved in addressing women's equality rights in mobility cases. LEAF having intervened in the Supreme Court of Canada case of *Gordon* v. *Goertz* has continued to work at arguing for the right of custodial mothers to be able to relocate with their children.

One of the major challenges for women in mobility cases is the courts consideration of the impact of relocation for the children and their ability to preserve a relationship with the non-custodial parent, generally the father. Cases focusing on the need to preserve contact between fathers and their children often highlight the importance and necessity of having regular contact versus an investigating the nature and significance of the contact between parent and child.

Research reviewing children's adjustment issues post –divorce, including issues of contact with non-custodial parents, illustrate a few key finding that are important to highlight and consider for the FRA review, they are:

- Studies highlight that three key factors impact children's adjustment to divorce, these are: "the adjustment of the custodial parent, adequate provision of financial resources, and parental conflict".[91]
- Research on regular contact indicate a variety of results: "Frequency of contact with the non-custodial father has no effect on children's adjustment, others showing that it has positive effects, and still others showing that it has negative effects."[92]
- In terms of the quality of the contact between children their fathers, research indicated that, "how often fathers see their children is less important than what fathers do when they are with their children". Furthermore, "frequency of contact between non-custodial fathers and their children was not a good predictor of children's well-being".[93]
- Research on sole vs. joint custody also is interesting: "some of the early studies had found children in joint physical custody arrangements to be better adjusted than children in sole custody, more recent, methodologically strong studies have found 'few differences in adjustment between children in sole versus joint physical custody other than higher parental income and education and regular child support payments among joint custody parents'". [94]

- A greater theme in the research indicates, "consistency of the finding that children fare better after divorce when they have a custodial parent who functions well is hardly surprising". [95]

This research serves to support arguments made in support of relocating children. Unfortunately, even with supportive studies on children's adjustment, the determination of mobility cases still lacks a significant obstacles in the courts continued focus on making sure fathers, even when not active, have the ability to equally access their children. Subsequently, custodial mothers are placed in a cautious position when wanting to move locations that would limit frequent access for father's to their children.

Decisions such as *Karpodonis* v. *Kantas* [2006] B.C.J. No. 1209, 27 R.F.L. (6th) 254 highlight the significant focus on preserving paternal access, by restricting the mother's ability to move from Vancouver to Houston for employment reasons. The disregard, in this case, of the mother's great efforts to offset costs and encourage contact between the child and his father and paternal family in Vancouver, if she was permitted by the court to move, was not adequately considered.

Research indicates that custodial parents (mothers), have success before the courts when they seek to move, especially where the children are younger and the mother provides primary care, in addition, the non-custodial parents (fathers) in these situations would not be actively involved in the children's lives.[96] The reality is that the courts treatment of mobility cases for women seeking to relocate does not support such certainty.

West Coast LEAF supports efforts to increase the certainty of relocation cases so that women are able to not be constrained by the courts to preserve, in some cases, the mythical role of the father in the family, while allowing for the economic, well-being or potential educational pursuits of custodial mothers to be subordinated.

Specific Recommendations

- West Coast LEAF supports the definition of relocation in the Phase III FRA Review Submission of Professors Susan Boyd and Gillian Calder[97], where they indicate:

  "A definition of 'relocation' should be: a change to the child's primary residential location that makes it significantly more difficult for the child to have a meaningful relationship with one parent"[98]

  Furthermore, Boyd and Calder highlight:

  "Defining relocation in a way that centres meaningful relationships rather than maximum contact is key. This definition emphasizes that a meaningful relationship can be had through creative mechanisms, e.g. frequent phone and email contacts as well as extended visits at certain periods."[99]

- West Coast LEAF does not support the inclusion of a notice to move provision to be included in the FRA. It is essential, in particular to issues concerning women and children's safety where such provisions may be of harm. In addition, there are avenues for including notice provisions for moves that do not require the creation of new legislative provisions in the FRA. However, if the FRA does include a provision for notice to move, the notice period should be at least 30 days and the notice should not only be limited to written notice. The provision to apply to both custodial and non-custodial parents and finally the provision should not be mandatory but should be permissive.
- Mediated Settlement and Co-operative approaches have been addressed in the section on West Coast LEAF's fundamental concerns regarding women to be pushed towards making agreements or settling claims when the power relations are unequal between the parties. In addition, issues of safety concerns where violence against women in relationships may exist further make approaches like co-operation more dangerous for women and children. There are couples, many, that are able to navigate and establish agreed upon arrangements that address relocation issues without the involvement of the FRA, courts or mediated processes. If parties are unable to co-operate and do not seek any assistance with making shared decision, or where the parties are clearly hostile with each other, provisions in the FRA to "encourage" out-of-court settlements will not only be ineffective but may prove further damaging to the relationship between the parties. Furthermore, the right to determine how to proceed on one's legal matter, must be supported and accommodated through publicly funded family law legal aid in order to facilitate access to justice.
- Mobility cases and the ability to relocate does require more certainty so that mothers, as the primary custodial parents, can seek to move ahead with their lives and the lives of their children with some feeling of security. As highlighted by Boyd and Calder, "some degree of deference must be given to the moving parent's decision".[100]
- Presumptions, in general can be very problematic, especially in the context of gendered, raced, and classed realties that make parties more vulnerable to unequal treatment in family law matters. The concern of course of any presumptions are their potential to be used as backlash against those most vulnerable and at risk in relocation matters. Instead of supporting a presumption for the FRA Review West Coast LEAF supports having a standard of deference for custodial parents that focuses on the primary caregiving role of the custodial parent, the relationship between the custodial parent and the child; and the linking of positive choices that benefit the well-being of custodial parents to the beneficial impact for the children. In promoting deference for custodial parents, the hope is that the courts will recognize the significance of the custodial parent.
- A list of factors that will help move towards greater certainty in the area of mobility case is supported by West Coast LEAF. The following are some key factors the judges should consider:
    - Economic benefits to relocating that would provide the custodial parent and the children economic security must be considered.

- The primary caregiving responsibilities provided by the custodial parent.
- Consideration to both quality and quantity of time spent with non-custodial parents, to establish if a meaningful relationship has been fostered.
- The non-custodial parent being asked if they can move where the custodial parent and child are moving to preserve their parental relationship.
- A contextualizing of issues that illustrate the benefit and well-being to the custodial mother of any proposed relocation and linking this to the transferred well-being of the child. Research has indicated that if a custodial parent is well that the children benefit from such wellness.
- Any impact of violence, particularly violence against women in relationships, that makes women and children vulnerable.
- Reasons of the custodial parent for the move.

- Factors such as those highlighted in the previous point would be useful to include as factors to assist a contextual analysis of the reasons to move. However, custodial parents planning to move should not be asked by the court is she would relocate without her child.
- We strongly oppose any recommendation that permits "access parents to be given a dollar for dollar reduction in child support to offset the costs of exercising access after a move" as indicated in the discussion paper.
- Finally, a judge should consider the economic reality of the parties before determining an allocation or division of any costs associated regarding preserving contact. This analysis should look at proportionate sharing options whereby women's reduced economic reality is factored into the analysis.

IX. Conclusion

It is critical in the scope of the discussion papers for the Phase III FRA Review process that the impact of women's disproportionate disadvantage in family law matters be highlighted and remedies through law reform initiatives be determined. In addition, experiences of those most marginalized in family law matters through intersections of gender, race, class, ability, sexual orientation, age, language, culture, Aboriginal heritage and status must be kept at the forefront to address systemic historical, social, political and economic power imbalances in family law. Family law is becoming increasingly diverse and complex. Different parenting arrangements, definitions of legal parenthood for same sex couples, and assisted reproductive technologies challenge existing dominant norms of parenting and family. Uncertainty in spousal support determinations and relocation cases identify that the law reform is necessary to provide some security and assistance for custodial mothers. Finally the reforms proposed to address different administrative and procedural frameworks and the unifying of timelines to create a clearer and more responsive family law system are necessary. West Coast LEAF looks forward to the outcomes proposed upon review by the FRA Review Team of these final submissions.

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