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VIA EMAIL (CPLO@gov.bc.ca)

Civil Policy and Legislation Office
Justice Services Branch
Ministry of Justice
PO Box 9222, Stn Prov Govt
Victoria, BC V8W 9J1

Re: Submission in response to discussion papers regarding the *Family Law Act*

We write to provide West Coast LEAF's submissions in response to the two current consultation discussion papers regarding guardianship and property division under the *Family Law Act*.

West Coast LEAF is a non-profit organization that seeks to achieve equality by changing historic patterns of discrimination against women through BC-based equality rights litigation, law reform and public legal education. We have a particular expertise in equality, human rights and family law and we have done in-depth law reform research on the impacts of BC's family laws on women. We also actively participated in the consultation process leading up to the development of the *Family Law Act*.

Discussion paper: Guardianship issues under the *Family Law Act*

The discussion paper presents three options for consideration in response to questions raised about the fairness and clarity of the guardianship provisions under the *Act*. The first two options undermine the rights of women and children and are legally untenable. In our submission, the status quo should be retained as per Option C, except insofar as the rights of grandparents and other caregivers are ignored. Our concerns and specific recommendations are detailed below.

Option A

Option A proposes that a biological parent is their child's guardian unless there is an order or agreement otherwise. Under this model, parents are guardians by virtue of their biological relationship to the child; they are not required to do anything to maintain guardianship.

This option will result in substantive inequality between mothers and fathers, contrary to the equality provisions of the *Charter*. The plaintiff father in *AAAM v British Columbia (Children and Family Development)*[1] argued that s. 39 of the *Act* contains an "inherent bias against fathers being 'presumed' guardians". If this is true, it is only because women are more likely to live with their children and continue to be disproportionately responsible for their primary care. By privileging cohabitation and actual caregiving, the current provisions actually promote substantive sex equality rather than undermine it because they recognize that parents who provide day-to-day care for their children are best placed to be their guardians.

Forcing a primary caregiver to share guardianship decision-making with a biological parent who does not provide regular care to their child has a disproportionately negative impact on women because they will be more likely to be obligated to seek and consider the opinion of someone uninvolved in the primary care of a child when exercising parenting responsibilities. It is not uncommon for abusive men to use the legal rights to children as a method of continued control over their female spouses or co-parents. The amendment proposed in Option A would create additional opportunity for these kinds of abusive tactics.

In addition, the proposed amendments in Option A would undermine the foundation of best interests of the child determinations. Under s. 37 of the *Family Law Act*, the best interests of the child are the *only* consideration when making orders or agreements with respect to guardianship, which is consistent with the UN *Convention on the Rights of the Child*. The presumption of parents as guardians and therefore the primary day-to-day decision-makers in the lives of a child is not based on biology; it is based on the rationale that those providing such day-to-day care are best placed to assess their child's needs.[2] In addition, international law is clear that children are entitled to individual assessments of their best interests made based on their own circumstances.[3] To give a biological parent who has not lived with or provided care for a child presumptive guardianship rights flies in the face the right of the child to such individual justice and to have decisions about their best interest made by the person(s) best placed to make those determinations.

Finally, biological presumptions are also counter to the intent of Part 3 of the *Act*, which addresses legal parentage for children conceived via assisted reproductive technologies. A focus on biology undermines these provisions, which disproportionately impact women and members of the LGBTQ communities.

Option B

Under Option B, a biological parent acquires guardianship status for a specified period of time (e.g. 12 months) after the child is born or they learn of the child's birth. If the parent lives with

[1] 2015 BCCA 220.
[2] *Young v Young*, [1993] 4 SCR 3 at 48.
[3] General Comment No. 14 (2013), Committee on the Rights of the Child, adopted at its 66th session (14 January – 1 February 2013) at para 49.

or regularly cares for the child, or seeks an agreement or court order concerning parenting arrangements during that time, the parent remains a guardian. If none of those things occur, guardianship lapses. The parent would be required to apply under s. 51 if they subsequently sought guardianship.

Because Option B is also prefaced on a biological presumption to determine guardianship, the same concerns set out above apply. These concerns are only slightly allayed by a time limitation on the presumption that guardianship flows from biological parentage. Twelve months is a significant period in a child's life, particularly the first year of life; a failure to provide regular care during this time is significant and is not commensurate with the responsibilities of guardianship.

Option C

Under Option C, unless there is an order or agreement otherwise, a biological parent is only a guardian if they have either resided with or regularly cared for their child. This option retains the status quo.

Option C also ensures that the equality of women is respected by removing some of the obstacles for women who have had children with partners who do not participate in the lives of the child as well as women who have had children with violent or otherwise abusive partners. Option C allows those women to be able to freely make crucial decisions in the lives of their child without unnecessary difficulty when one birth parent does not participate in the life of the child, or without further the abuse from their former partner.

Tying guardianship to residency and caregiving is also vital to ensuring that the best interests of children are prioritized. As set out above, children's best interests are served by having those who know them best making decisions on their behalf. The biological tie to a parent is irrelevant; what is relevant is who actually is providing care and therefore who is actually in tune with what a child needs.

The discussion paper raises an interesting question about the uncertainty that may arise where neither biological parent has resided or cared for the child. In some circumstances, a child may be in the care of a grandparent, other relative or another caregiver immediately following birth. In these circumstances, the rights of the caregiver and the best interests of the child would be best served by their primary caregiver being endowed with guardianship rights and responsibilities.

The meaning of "regularly cares for"

If BC is contemplating legislative clarification to assist in interpreting the meaning of "regularly cares for", we suggest that any definition or interpretive assistance should support an individualized assessment focused on care that includes consistent involvement, supervision, and coordination of all matters related to a child's health, education, well-being, basic needs

and activities. In addition, we submit that an intention to regularly care for a child should not satisfy the provision. Such an interpretation would support women's equality and the best interests of children, as set out above.

Current provisions	**Suggested amended provisions**
39 (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian. (2) Despite subsection (1), an agreement or order made after separation or when the parents are about to separate may provide that a parent is not the child's guardian. (3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies: (a) section 30 *[parentage if other arrangement]* applies and the person is a parent under that section; (b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian; (c) the parent regularly cares for the child. (4) If a child's guardian and a person who is not the child's guardian marry or enter into a marriage-like relationship, the person does not become a guardian of that child by reason only of the marriage or marriage-like relationship.	39 (1) While a child's parents are living together with the child and after the child's parents separate, each parent of the child is the child's guardian. (1.1) Where a child does not reside with the child's parents, the adult caregiver who resides with the child will be presumed to be the child's guardian unless otherwise ordered or agreed upon by the child's parents. (2) Despite subsection (1), an agreement or order made after separation or when the parents are about to separate may provide that a parent is not the child's guardian. (3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies: (a) section 30 *[parentage if other arrangement]* applies and the person is a parent under that section; (b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian; (c) the parent regularly cares for the child. (3.1) For the purposes of this section, the parent regularly cares for the child if that parent has consistent involvement, supervision, and coordination of all matters related to a child's health, education, well-being, basic needs and activities. (3.2) For the purposes of this section, intent to provide regular care is not sufficient to

	establish that a parent regularly cares for a child. (4) If a child's guardian and a person who is not the child's guardian marry or enter into a marriage-like relationship, the person does not become a guardian of that child by reason only of the marriage or marriage-like relationship.

Discussion Paper: The Presumption of Advancement and Property division under the *Family Law Act*

The presumption of advancement should apply and it is consistent with s. 15(1) of the *Charter*. Any significant unfairness in applying the presumption of advancement is countered by the potential for reapportionment under s. 95.

When property is transferred between spouses, the intent of the transferee may be to gift or share the property. To say “once excluded, always excluded” and to therefore ignore the intent of the transfer would be unduly formalistic and patently unjust. Since men are more likely to earn higher incomes, and therefore more likely to have accumulated property prior to marriage, the changes to the property division regime in the new *Family Law Act* already disproportionately advantaged men by excluding such property.

The presumption of advancement can be used to counter this disproportionate impact and to support economic equality by starting with a presumption that protects the non-propertied spouse by bringing excluded property back into the definition of family property where title was transferred to her name during the relationship. Women are more likely to face obstacles negotiating fair financial agreements outside of the default presumption due to economic dependence or financial abuse in their relationships so it is particularly important that the default law support the less propertied spouse. To say “once excluded, always excluded” would unduly impede the ability of spouses to attempt to equalize their holdings, for example by transferring title of the family home or holiday property to both spouses. While parties should be in a position to ensure the property is excluded through contractual terms to this effect, the presumption should apply in the absence of such explicit intent.

The *Act* should be clarified to ensure that the presumption of advancement does apply and that it applies to both common law and married spouses equally. It is particularly important that the presumption is transparently reflected in the *Act* so that parties are aware of their rights when negotiating financial settlements. Otherwise, significant public education will be required.

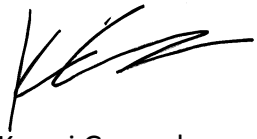
Further, we recommend that BC explore the implications and benefits of deeming the family home to be included property regardless of its source in specific situations. Given the significance of the family home to safety, caregiving and child raising, there are some situations

in which the family home should be subject to equal division regardless of who brought it into the relationship. We strongly urge BC to hold public and transparent consultations on such an amendment.

Conclusion

Given the above discussion, we urge BC to ensure that any revisions to the *Family Law Act* prioritize the constitutionally protected equality of women and the legislatively mandated best interests of the child. Thank you for considering our submission.

Yours truly,



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