

Family Law Statutes Amendment Act, 2010

Alberta Justice Webinar
June 20th and 29th, 2011



Freedom To Create. Spirit To Achieve.



Introduction

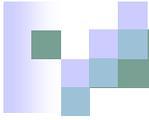
- The *Family Law Statutes Amendment Act, 2010 (Amendment Act)*, which contains amendments to the *Family Law Act*, the *Maintenance Enforcement Act* and the *Injurious Support Orders Act* was passed in the fall of 2010.
- A limited number of the amendments to the *Maintenance Enforcement Act* have been proclaimed into force.
- Justice is working towards proclamation of the amendments to the *Family Law Act* in the summer of 2011 (likely August 1st).



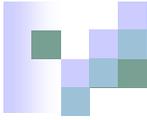
Amendments to the *Maintenance Enforcement Act (MEA)*

- A number of amendments to the *MEA* came into force when the *Amendment Act* was passed in November 2010:
 - Amendments to s. 13(1)(a) which expand the definition of “business organization from whom the Maintenance Enforcement Program (MEP) can get information;
 - New s. 14.1 which gives MEP the ability to locate the creditor; and
 - Amendments to s. 15(3) with regard to information sharing.

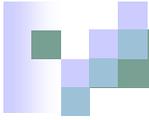
- It is not yet known when the remainder of the amendments to the *MEA* in the *Amendment Act* will come into force.



- The amendments to the *MEA* increase MEP's ability to locate creditors and debtors.
- Amendments to s. 13 expand MEP's authority to require banks, unions and employers to provide location and asset information regarding debtors.
- The new s. 14.1 gives MEP the ability to request creditor information from:
 - The Government;
 - A Provincial agency or defined statutory agent; or
 - A business organization.



- The amendments to s. 15(3) improve provisions regarding confidentiality and the disclosure of information, in line with the *Freedom of Information and Protection of Privacy Act (FOIP)*.
- Previously, the MEA provisions placed tighter constraints on MEP than FOIP did.



- MEP now has authority to release:
 - Receipts and the rationale for court-ordered charges to both parties;
 - Information to law enforcement agencies to assist in investigations;
 - Information the individual has consented to being released;
 - Necessary Information to surviving spouses, partners or relatives of a deceased individual; and
 - Information the Director believes will avert or minimize an imminent danger to the health or safety of any person.



Amendments to the *Family Law Act* (*FLA*)

- Since the *FLA* was implemented in 2005, Justice has been monitoring case law to see how the Act has been working.
- The independent evaluation by the Canadian Research Institute for Law and the Family (CRILF) gathered feedback from the Bench, Bar, professionals and the public.
- Although the *FLA* was well received overall, there were some areas where it appeared amendment was needed.



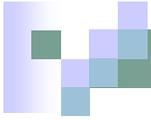
Application to transfer a proceeding to the other Court

- For most applications under the *FLA*, applicants can commence proceedings in either the Provincial Court or the Court of Queen's Bench.
- It will be possible, under the amendments, for a party to make an application to the Court in which the proceeding was brought, for an order transferring the matter to the other Court.



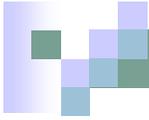
Parentage

- The parentage provisions of the *FLA* determine the legal status of parent-child relationships for all purposes of the law in Alberta.
- Although the current *FLA* has the most advanced parentage law in Canada, it has not kept up with advances in assisted human reproduction (AHR) and therefore, not all combinations of parents & children are covered.



- The amendments will provide the same legal certainty for parents and children regardless of the method of conception.

- 3 categories of parent & child relationships:
 1. Children conceived without AHR (standard situations);
 2. Children conceived with AHR but whose birth mother is an intended parent; and
 3. Children conceived with AHR who are born to a surrogate birth mother.

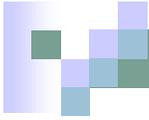


1. Children conceived without AHR (standard situation)

- Amendments do not affect these parentage rules.
- The legal parents continue to be:
 - The birth mother; and
 - The biological father.
- The only way for a birth mother or biological father to lose parentage is through an adoption.

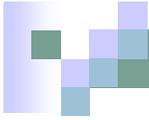
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- If there is any dispute with regard to who the biological father is, look to the presumptions of parentage in section 8.
 - There are some minor amendments to this section.

 - If there is still a dispute, a declaration of parentage can be obtained under section 9 that someone IS a parent or IS NOT a parent (*new*).



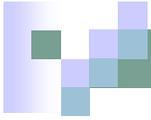
2. Children conceived through AHR whose birth mother is an intended parent

- The legal parents are:
 - The birth mother; and
 - The male person who provided human reproductive material (HRM) with the intention of becoming a parent (if any); or
 - The male or female person who was married to or in a conjugal relationship with the birth mother and consented to be a parent at the time of conception (if any).



- A birth mother who uses donated HRM and who is not married or in a conjugal relationship will be the only legal parent.

- Maximum of 2 legal parents.



3. Children conceived with AHR who are born to a surrogate birth mother

- A surrogate is a person who gives birth to a child as a result of assisted reproduction if, at the time of the child's conception, she intended to relinquish that child to the intended parent(s).
- At birth, the only legal parent is the surrogate birth mother.

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- If the surrogate consents, an Order can be granted declaring that she is no longer the legal parent and naming as legal parents:
 - The person(s) who provided HRM;
 - The male or female person who was married to or in a conjugal relationship with the person who provided HRM and consented to be a parent at the time of conception (if any).

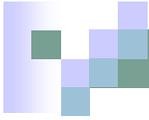
 - At least one intended parent has to have provided HRM.

 - Maximum of 2 legal parents.



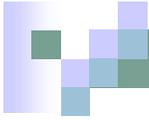
Guardianship

- Although the amendments significantly change when a parent will be also be a guardian by operation of law, they do not change the overall guardianship scheme.
- In Alberta guardianship, rather than parentage, is the foundation of all parental authority.
 - Whether the guardians are in an intact relationship or not.

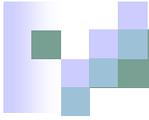


- The *FLA* specifies the powers, responsibilities and entitlements of guardianship (s. 21) including:
 - The power to decide the child's place of residence;
and
 - The power to consent to health-related treatment for the child.

- There is no limit to the number of guardians that a child can have.



- When guardians live together, they each have the full array of powers, responsibilities and entitlements.
- When guardians live apart, they each continue to have the ability to exercise all incidents of guardianship unless otherwise allocated by agreement or through a Parenting Order.
 - Not dependant on the amount of parenting time each one has.

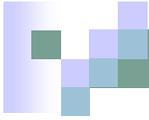


- There are 3 ways for a person to be a guardian under the *FLA*:
 1. If the person is a parent who fits within the **statutory guardianship** provision (s. 20) they will be a guardian by operation of law;
 2. If a person is appointed a **guardian by Court Order** (s. 23); or
 3. If a person is **nominated by a guardian** in a will or written document (s. 22)

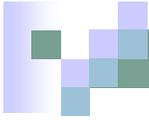


Statutory Guardianship (s. 20)

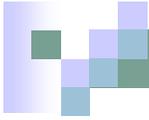
- This section specifies when a parent will also be a guardian of the child.
- The current section has attracted a substantial amount of criticism from the Bench and the Bar because of:
 - lack of certainty;
 - lack of clarity; and
 - lack of consistency between this section and the rest of the guardianship scheme.



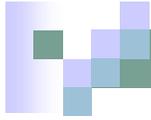
- One of the biggest problems was that fathers in short term relationships had automatic guardianship status from birth until the child established usual residence with the mother, even if he had no involvement with the mother or the child.
- That problem was most evident in child protection and adoption proceedings, particularly when the mother was unsure of the father's whereabouts.



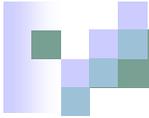
- The underlying assumption of the amendment is that, an individual who believes he or she is a parent of the child and has shown an interest in the well being of the child is likely to make decisions in the best interest of the child.
- It was necessary for the amendment to balance the need for certainty with regards to the identity of the guardians and the need to ensure that both parents have an equal opportunity to become guardians by operation of law, to satisfy the *Charter of Rights*.



- The amendment provides that **a parent** is automatically a guardian if that parent, within one year from either becoming aware of the pregnancy or becoming aware of the birth of the child, whichever is earlier:
 - **acknowledges** that he or she is a parent of the child, and
 - **demonstrates** an intention to assume the responsibility of a guardian in respect of the child.

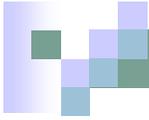


- There are no formal requirements for the **acknowledgement** of parentage – the idea is just that the person is not disputing that he or she is a parent of the child.
- A parent can **demonstrate** an intention to assume responsibility for the child by taking one of the steps set out in s. 20(3).



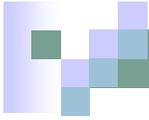
- Steps a parent can take to **demonstrate** an intention to assume responsibility for the child:
 - being in a specified relationship with the other parent around the time of the birth;
 - voluntarily providing or offering to provide reasonable financial or other support, other than pursuant to a court order, for the child; or
 - entering into a guardianship agreement with the other parent (has to be in writing, dated and witnessed).

- The list is not exhaustive – the Court may find that a parent has demonstrated an intention in other ways.

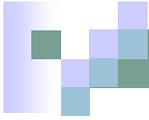


- It will be possible for statutory guardianship to “spring up” for a period of time after the birth as the result of the parent’s actions.

- To protect the interests of the parental guardian who steps up at birth to care for the child, as well as the best interests of the child, there is a time limit on the amount of time a parent’s actions will result in guardianship springing up.
 - The time limit is “one year from either becoming aware of the pregnancy or becoming aware of the birth of the child, whichever is earlier”.

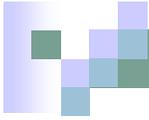


- Having the time run from the time the parent “knows” of the pregnancy or birth will ensure that the birth mother cannot exclude the biological father by failing to advise him of the pregnancy or the child’s birth.
- If the parent does not act within the time limit, but later wishes to have a role in the child’s life, he or she can apply for guardianship under s. 23, subject to the child’s best interests.

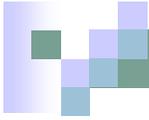


- If the pregnancy was the result of a sexual assault, the parent committing the assault will not automatically become a guardian under this section.
 - May require a court determination.

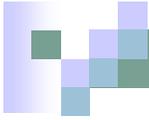
- Some parents, generally fathers who were in short term relationships with the mother and haven't taken a step to demonstrate an intention, will be excluded from automatically being guardians.



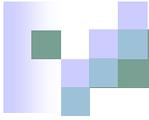
- To determine if a parent is automatically a guardian, it is necessary to consider the parents' actions during the relevant time period.
 - To determine if a parent is a guardian at the time of birth, it would be necessary to consider the parent's actions between the time the parent learned of the pregnancy and the birth.
 - To determine if a parent is a guardian at a later date, it would be necessary to consider the parent's actions within one year of that parent either becoming aware of the pregnancy or becoming aware of the birth of the child, whichever is earlier.



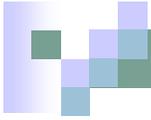
- If the parties cannot agree whether or not a parent fits within the requirements, the Court can make a **determination about guardianship status** (s. 20(6)).
- Section 20(6) can also be used by a parent who is the **sole guardian** to make an application for an order confirming that status.
 - If there is only one guardian, there should be no need to give notice to anyone about the application, although the Court may order that someone is to be given notice.



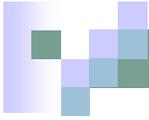
- The determination of guardianship under s. 20(6)
 - Would be a finding of fact, and therefore the best interests of the child test would not apply;
 - Can be made on application under this section or on the Court's own motion; and
 - Can be made in an *FLA* proceeding or in a proceeding under the *Child, Youth and Family Enhancement Act*.



- It will be up to the Court to decide if there is enough evidence to make that determination or if a separate application should be commenced.
- Since that determination would be a finding of fact and not based on the best interests of the child, the application is designed to be summary in nature, rather than requiring a full hearing.



- In a determination of guardianship, the Court may also **identify** the powers, responsibilities and entitlements of the guardian.
- A parent who is determined by the Court to not be a guardian under this section, can apply to be appointed a guardian.



- Section 20(9) is a **transitional provision** which states that a person who is a guardian of a child immediately before the amendments coming into force does not cease to be a guardian by reason of this section.



Guardian by Court Order (s. 23)

- A person may become a guardian of a child by Court Order under section 23.
- The amendments do not affect this, although the section has been amended to clarify that the only test that the Court is to apply in a guardianship application is the best interests of the child.



Guardian by Nomination (S. 22)

- A person may be nominated by a guardian in a will or written document to be a guardian in the event of the guardian's death.
- The amendments replace nomination “by deed” with nomination in “a written document that is signed and dated.”
- The nominated guardian would only have the guardianship powers that the nominating guardian had.



Parenting Orders (S. 32)

- No substantial amendments have been made to the parenting order provisions.
- When guardians live apart, they each have the ability to exercise all incidents of guardianship unless otherwise allocated by agreement or through a parenting order.
- The Court can use provisions in a parenting order to craft the right solution for the each family.



Contact Orders (S. 35)

- A contact order specifies the amount of time that a non-guardian has with a child.
- The amendments provide that a guardian can also make an application to have contact by a non-guardian specified.
- This would be useful in situations such as when a non-guardian parent or grandparent is asking the guardian for contact with the child, and the guardian wants the contact specified in an order.



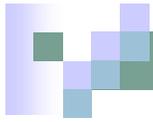
Enforcement of time with a child (S. 40)

- No amendments affect enforcement of time with a child provisions.
- A person who has court ordered time with a child but has been denied that time can make an application to the Court for an enforcement order, whether the time with a child is under:
 - a parenting order or contact order under the *FLA*; or
 - a custody order or access order under the *Divorce Act*.



Effect of divorce proceedings

- [Section 45.1](#) says that the Court's jurisdiction to grant or vary a guardianship order, parenting order or contact order under the *FLA* continues even if divorce proceedings have been started, until an interim or final custody or access order has been granted in the divorce proceedings.
- This parallels [section 81](#) which deals with the Court's jurisdiction in support matters.



Support of Child

- There are no substantial amendments that affect child support.
- Every parent has an obligation to provide support for his or her children.



Support of spouse or adult interdependent partner

- The amendments clarify that the obligation for spouses or adult interdependent partners to support each other is subject to the factors and objectives in the remainder of the provisions, which must be considered before a support order can be granted.



General Support Matters

- A support order or support agreement binds the estate of the person having the support obligation, unless the support order or agreement says otherwise.
- The amendments provide that, where a support order or agreement is binding on an estate, an application can be made to vary that order or agreement to allow the estate to be wound up.
- The Court is required to consider the needs of other dependents.



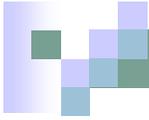
Consequential Amendments

- The *Legitimacy Act* has been repealed.
- The *Vital Statistics Act* has been consequentially amended to coincide with the *FLA* amendments.
- Definitions of “mother” and “father” have been moved to the *Interpretation Act* and have been amended to provide for the possibility of 2 mothers or 2 fathers.
- Numerous statutes have been amended to refer to “parents” rather than “mother and father”.

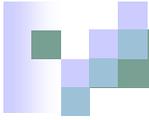


Amendments to the *Family Law Act* *General Regulation*

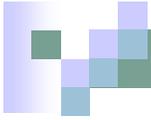
- Proposed amendments to the *General Regulation* are being considered by Cabinet to come into force at the same time as the amendments to the *FLA*.
- It is proposed that Section 2, which sets out the requirements for a surrogate's consent to declaration, be amended to coincide with the *FLA* amendments with regard to declarations of parentage in surrogacy situations.



- Section 5 of the *General Regulation* currently limits the authority of the Court to require parties to attend courses and programs to the Parenting After Separation Seminar.
- It is proposed that section 5 be amended to provide that the Court can require parties to attend any course or program that the Court feels is appropriate.



- A process is set out for approval of *FLA* forms in the current section 6. That process is no longer required because of the creation of the Family Law Rules Advisory Committee, which makes recommendations to the Provincial Court and to the Rules of Court Committee with regards to procedural issues including forms for *FLA* matters.



- A new provision is proposed which would require guardianship agreements to be:
 - In writing;
 - Dated;
 - Signed by the parents; and
 - The parents' signatures must be witnessed by a 3rd party.