

The Politics of Ontario's Family Law Reform Act

Vue d'ensemble du OFLR dans l'optique de ses conséquences pour la femme.

Introduction

The Family Law Reform Act (FLRA) became law on April 1, 1978 in Ontario. This article examines some of the changes in Ontario's family law with respect to property settlement and maintenance, and how these changes are affecting women's economic situations at marriage breakdown. The material presented here is part of a larger study on the implications of the FLRA for women conducted in the summer of 1979. In this article, we will first present an overview of the principles of the act. We will then examine how the act has taken effect with regard to maintenance and support in the everyday context.

The most striking feature revealed by our study is what we call a 'rupture' between women's accounts of the divorce process, and how this process is dealt with by legal professionals. In terms of maintenance and support, our research data show two kinds of rupture between the legal system and women's experience. First, there is a discrepancy between what the act says and what actually happens when it is implemented. As will be seen, some of the provisions are not easily enforceable. More importantly, the court has not made a concerted effort to ensure their proper implementation. Second, lawyers' concepts of equality in terms of maintenance and support are derived from legal definitions.

In contrast, women's perceptions of the matter are not guided solely by legal and monetary considerations. From our study, it becomes clear that the extent to which women can exert their legal rights is restricted by time constraint, financial resources available to them, and other contingencies which confront them on a daily basis.

Principles and Provisions of the FLRA: A Brief Overview

The FLRA is seen to be a revolutionary piece of legislation in the legal system because it is the first time that equality between the spouses in a marriage is *legally* recognized. In the preamble, it clearly states the 'equal position of spouses as individuals within marriage.' It recognizes marriage as a form of partnership. This is the fundamental premise governing the provisions of the act.

Under this general principle, a system of separate property is adopted during the marriage, when the spouses live together. In this system, each spouse continues to own property that (s)he acquired before the marriage separately. Property that is acquired during the marriage also remains the property of the spouse who acquires it so long as the marriage continues.

In the event of marriage

breakdown, the provisions in the FLRA come into effect regarding property division. The family assets property system is applied at separation. That is, all properties belonging to the spouses are divided into family and non-family assets. Both spouses have equal rights to share in any property considered a family asset, regardless of who owns it. The basic guideline for property division of family assets is a 50-50 share.

Family assets are 'owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children, while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes' (Part 1, s.3(b)). They usually include the matrimonial home, furniture for the family, the family car and money in a bank account used for family purposes. 'The value of the benefit derived from assets, which, although owned by a corporation or trust, would be family assets if owned by a spouse'¹, such as a company car, and 'a house or other property registered in the name of one spouse's business if it is used by both spouses or their children'² are also considered family assets.

Non-family assets are those not used for family purposes, including the earnings of either spouse and her/his business. In general, non-family assets remain the property of the owner, except in exceptional cases. Under

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specific circumstances (see s.4(6)(a)&(b)), the court may order the division of non-family assets. The intent of the FLRA is to rectify previous injustices which overlook the woman's contribution in the home or her husband's business or farm.

At separation, all family properties are grouped together. A 'user' test is applied, according to the criteria described, to determine what constitutes family assets or non-family assets.

What about support? Again, the act recognizes the equality of both spouses within a marriage. Thus, 'every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so' (s.15). For the first time in the history of the judicial system, women are not considered dependents of their husbands and are required to be self-sufficient. With regard to the matrimonial home, both spouses have equal right to live there, regardless of whose name is on the title deed.

However, the act has clauses which outline the power of the court. The 50-50 share and support obligation may be altered by judicial discretion in the interest of fairness (for example, s.4(6)). The judge has ultimate decision-making power with regard to division of assets and maintenance payment.

At the same time, the act also gives the spouses the right to decide how they wish to divide their properties by drawing up a domestic contract, either a marriage contract or a separation agreement. This contract would take precedence over the FLRA, if drawn up properly, according to what can be enforceable by law (cf. FLRA, Part 4).

The FLRA is not to be confused with the Divorce Act. The FLRA is a provincial law governing the interim period

between separation and divorce. At the point of divorce, the federal Divorce Act takes precedence and the FLRA no longer applies.

Maintenance and Support

Most lawyers feel that maintenance and support are areas where women have lost ground. Previously, a wife could preserve her right to maintenance, regardless of her income, if the husband had committed a matrimonial offence. The FLRA states explicitly that each spouse has the obligation to support her/himself to the extent that (s)he is able to do so. Since, by implication, the spouses are considered equal in this respect, the wife no longer has this right. However, the court does take women's limited role in the labour force into consideration when dealing with maintenance. Thus, the court may order support for the wife's re-training to enter the labour force if she has been a full-time homemaker. But her ultimate obligation is to maintain herself.

Some lawyers think that while this provision may not drastically affect younger women with no children, it is grossly unfair to women who have been out of the work force for a long time. A lawyer recounts:

People who needed the help and the protection are [like] my 56-year-old client, who has stayed home for 31 years, has brought up three children who are now married. She has been out of the work force for all these years. And at the age of 56, she sits in here weeping, saying that her husband has told her to go and get a job. And, of course, the court is going to tell her the same thing.

The provision for collecting support has been improved under the FLRA. Now, if the husband fails to give the wife

and children support payments, the wife can obtain a charging order from the court, and his employer has to send his wages or portion of his wages directly to family court for an indeterminate period of time. This method is less cumbersome than garnishee, which required the spouses to appear in court repeatedly. In addition, a man can be put in jail for non-payment.

According to one lawyer, however, it is almost impossible to get the court to issue charging orders. It is also equally impossible to get the court to send the husband to jail. Thus, even with the new provisions in the FLRA, the common offence of non-payment of support remains. As a lawyer rightly indicates:

One of the reasons husbands don't pay is because they know nothing serious is going to happen.

Most husbands don't pay, not because they can't, but because they don't bother. And unless they have the sense of the weight of the law behind their wives, they are not going to.

With regard to women on Family Benefits (welfare), a legal aid worker complains that, despite the provision in the law, it is difficult to get the government to collect support payments on behalf of the wife. This is especially true in cases where the husband cannot pay the full amount and Family Benefits has to supplement the payment. The reason for this is that, by the time the cost of the whole proceeding is taken into account, including court time, legal fees, etc., it would cost more for the state to collect for the woman than to provide her with welfare benefits. The court is therefore reluctant to enforce this provision.

Ultimately, the onus is on the woman to assert her legal right to support payments from the husband. Many women, especially women in low income groups, hesitate taking legal recourse for non-payment because legal proceedings take time and resources which these women cannot afford. One of our informants expresses her feeling in the following way:

I settled for mediocre legal services. And it wears you out, because everything is very complicated. And the lawyers are not particularly interested in your particular case. What does it mean to them, another \$50, another \$100 a month? . . . I mean, it's not a priority for them. They make their living that way. You don't get the sense, when you are in there, that . . . I mean, it means something to me to get an extra few hundred, but it doesn't to them. And every time you propose fighting for something, you are immediately reminded of how expensive that will be.

For lawyers, maintenance and support are matters of rational decision-making and careful calculation to be worked out equitably. A lawyer tells us that she usually advises her clients to draw up a budget of their cost of living, so they have an idea of the financial reality of the situation. Based on this budget, she can then work out with them the amount of support to be negotiated. She is often surprised and annoyed that, even after this painstaking effort, her clients refuse to request a reasonable allowance.

There are two issues we wish to emphasize here. First, there is a difference between equality on paper and in practice. Even when an agreement is arrived at legally between the two parties, the woman is endowed with no power to enforce it. While the

legal mechanism is available to her, it does not automatically work on her behalf. Legal recourse is a formal, lengthy and costly process which few women going through the divorce process can afford.

Second, the legal process is only one aspect of the entire divorce process for the woman. While a lawyer's primary job is legalities, it is a small part of the woman's life. She has to work. She has to look after her children, probably more than before. She may have to cope with living in a totally new environment, not to mention the problems she may have with her husband. All these things present themselves to her on an immediate, on-going basis. Her life is not compartmentalized for her the way a legal 'case' is.

If they possibly can, most women simply do not want to ask for support. Some of our informants talk about harassment by their husbands after they were separated. One woman described her husband's behaviour after their divorce was finalized: He tried to take the children away from her; he told people that she was an unfit mother, and generally interfered with her life. Another woman described how her husband attempted to stop her from obtaining her share of the family assets by declaring bankruptcy.

In view of these and other problems that women have to deal with, it is not surprising that they are reluctant to create more hassles by pressing for support. Women are also aware that receiving money from a spouse constitutes a tie with a past relationship which they are trying to sever. Most of them simply want to be independent and begin a new life. One woman summed up why, although she was awarded \$50-a-month child support from her first husband, she had never tried to collect the money:

Whenever there is money involved, the relationship never really ends.

As far as the father seeing the kids is concerned, I don't mind at all.

But I don't want any money involved, because it becomes a matter of control.

We all know that those who have money control!

Although all the women we interviewed suffered a drop in their standards of living, the overwhelming impression we get is a sense of the freedom and control they now have over their lives. In a strange but real sense, they feel they are now more secure financially, because they have complete control over how money is to be spent in the household. From our research findings, it is clear that there are constraints inherent in the legal system and society which prevent women from pursuing their legal rights. Specifically, we feel that the enforcement of maintenance and support to ensure a truly equitable distribution of incomes to the new household(s) is an area which has not been adequately addressed and dealt with by the legal system.©

Footnotes

¹Family Law Reform Act: Your New Rights, p. 11.

²ibid

This article is abridged from the report of a study entitled, "IS 50-50 EQUITABLE DIVISION? SOME IMPLICATIONS FOR WOMEN OF ONTARIO'S FAMILY LAW REFORM ACT", by Roxana Ng, with Sandra Monteath and Mary Stokes.

Copies of the report are available from: Advisory Council on the Status of Women, Box 1541, Station B, Ottawa, Ont. K1P 5R5.



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