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May 27, 2019

Senate Committee on Legal and Constitutional Affairs

Ottawa, Canada

Attn: Committee Clerk, Ms. Keli Hogan, <Keli.Hogan@sen.parl.gc.ca>

Brief on Bill C-78: Reforms of the Parenting Provisions of the *Divorce Act*

Prof. Nicholas Bala.*

I am writing to you on behalf of the Ontario Chapter of the Association of Family and Conciliation Courts (AFCC-Ontario) about Bill C-78, the amendments to the *Divorce Act*, and in particular the parenting provisions of this Bill. **The enactment of Bill C-78 will improve the process of divorce and outcomes for children, and should be a priority for Parliament and the government. There is a need for similar amendments to provincial law, and government resources to support implementation of the law.**

While we recommend that the Senate enact Bill C-78 without amendment, we suggest that your Committee write to Legislative Counsel to recommend that the marginal note (title) to s.16(6) should be revised to read “Parenting Time Consistent with Best Interests.” This would be a much more accurate summary of the provision, while the present marginal note “Maximum Parenting Time” is misleading. It is our understanding that a change in the marginal note would technically *not* be an amendment that would require approval of the House of Commons (or indeed the Senate).

* Nicholas Bala, L.S.M., B.A., J.D., LL.M., F.R.S.C. Professor, Faculty of Law, Queen’s University. Bio at end of Brief). bala@queensu.ca. Nicholas (Nick) Bala has been a professor at the Faculty of Law at Queen’s University since 1980. He is an internationally recognized expert on issues related to children, youth and families in the justice system. Much of his research work is interdisciplinary; he has undertaken many collaborative projects with psychologists, social workers, criminologists and health professionals to better understand the effects of involvement in the justice system on children, youth and families. His work is cited by all levels of court in Canada, including the Supreme Court, as well as trial and appellate courts across the country, and internationally. His contributions to family law research and professional education were recognized in by the awards from Law Society of Ontario and the Ontario Bar Association in 2009. In 2013 Prof. Bala was elected a Fellow of the Royal Society of Canada, and in 2019 he was appointed the William R. Lederman Distinguished University Professor by Queen’s University.

Prof. Bala wrote an article providing a detailed proposal for the reform of the parenting provisions of the *Divorce Act*, and was a witness before the House of Commons Justice Committee studying BillC-78 in November, 2018. A number of his key proposals are reflected in Bill C-78. See N. Bala, Bringing Canada’s Divorce Act into the New Millennium: Enacting a Child-Focused Parenting Law (2015) 40 Queen’s L J 425.

Association of Family & Conciliation Courts, Ontario Chapter (AFCC-Ontario)

The Association of Family and Conciliation Courts (AFCC) is an international organization with over 5000 members from a range of professions including lawyers, family court judges, mental health professionals, social workers, psychologists, mediators, court administrators, researchers, and other professionals working in the family dispute resolution field. The AFCC-Ontario is the Ontario Chapter of this international organization and has over 400 members in the province who are dedicated to the resolution of family conflict. Our members share a strong commitment to education, innovation, research, and collaboration in order to benefit communities, empower families, promote a healthy future for children, and improve access to family justice. Our focus is on the promotion of the interests of children and parents involved in the justice system and family dispute resolution.

I am submitting this Brief with the authorization of the AFCC-Ontario Board, but I must emphasize that members of the Board and Chapter who are judges, employees of the governments of Ontario or Canada, or Legal Aid Ontario, took no part in the decision to submit this Brief and take no position on its contents.

Background

It is widely acknowledged there is a need for major changes to the family justice system in Canada, including the need to reform the parenting provisions of Canada's *Divorce Act*. The 2018 federal budget allowed for the extension of Unified Family Courts in Nova Scotia, Ontario and Alberta, and an expansion of the Unified Family Courts has begun. That was an important step to help address issues of access to family justice and improve the efficiency of the family court system. Further changes are needed, but they are beyond the scope of this Brief,¹ which focuses on the parenting provisions Bill C-78.

On 22 May, 2018 the government introduced Bill C-78, which included the first significant change to the parenting provisions of the legislation since it came into effect in 1986. The enactment of Bill C-78 will help address some of the challenges facing the family justice system, separating parents and their children. Bill C-78 has very significant support from family lawyers, judges and scholars,² as well as arbitrators, mediators and mental health professionals.

This Brief focuses on some of the most significant proposed reforms in Bill C-78 as they relate to parenting, and supports these reforms, though we would note that the other provisions of Bill C-78 are also important.

Concepts: Parenting Plans and Parenting Orders

There have already been statutory changes to the parenting laws enacted in Alberta, British Columbia and Nova Scotia, as well as court decisions in other provinces that have encouraged

¹ For a discussion of changes need to the family justice system, see N. Semple and N. Bala, *Reforming the Family Justice System: An Evidence-Based Approach* (AFCC-Ontario, 2013) <http://afccontario.ca/wp-content/uploads/2015/11/Semple-Bala-Family-Justice-Reform.pdf>

² See Submission of Family Law Section of the Canadian Bar Association, to Minister of Justice, Dec. 22, 2017; Bertrand, Paetsch, Boyd & Bala, *The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program* (Canadian Research Institute for Law & the Family, 2016). On July 11, 2018 at the National Family Law Program of the Federation of Law Societies of Canada, there was plenary session on Bill C-78. There were more than 500 family lawyers and judges at the conference. Prof. Bala surveyed the audience using Poll Everywhere about key provisions of the Bill; most of the provisions were supported by 85%-93% of respondents; only the relocation provisions resulted in a significant difference of views, with 69% supporting the proposed provision, while 15% were opposed and 16% unsure.

moves towards use of the “parenting plans” and “parenting time” rather than the historic terms “custody orders” and “access.” While Bill C-78 will have only limited impact on those Canadian family justice professionals who have already adopted child-focused collaborative approaches to family dispute resolution, **the use of the new concepts should have a significant impact on the courts and on practitioners who have a more adversarial approach to family law, as well as on self-represented litigants who may look to the *Divorce Act* for guidance.**

Many other countries have abandoned the antiquated concepts of “custody” and “access” that are found in Canada’s present *Divorce Act*; those concepts have their origin in property law and place an emphasis on the protection of parental rights. Bill C-78 focusses on the needs of children, and the responsibilities of parents rather than their rights. Although many separating and divorcing parents in Canada already make parenting plans based on some form of *co-parenting or shared parenting*, based joint custody or shared custody, the fact the present statute uses terms that have proprietary connotations is the wrong place to start parents thinking about the process. It leaves a lasting impression that one parent will be the “winner” of custody, and the other is the “loser,” afforded only the access rights of a “visiting parent.” The use of these terms is especially problematic for self-represented individuals who may look to the legislation for guidance, as well as for clients whose professional advisors continue to use such terminology.

Individualized Decision-Making and Co-parenting

Bill C-78 does not establish any presumptions about the amount of time that each parent will spend the child or how parental responsibilities are to be exercised, and in particular does not mention any notion of “equal” parenting time or responsibilities. To the contrary, it is expected that individualized parenting plans will be made for each child, and that these plans are likely to vary over time as children mature, and the needs and circumstances of children and their parents change. **The absence of a presumption in favour of “equal parenting rights” is an important and desirable feature of Bill C-78**, though it has been the subject of criticism by Equal Parenting advocates (a.k.a. “Fathers’ Rights” advocates).³

There is an important place for various forms of *co-parenting (or shared parenting)*, a broad concept that includes but is not limited to equal parenting time and fully shared decision-making for all issues.⁴ The concept of co-parenting emphasizes the value, in most cases, of parents *sharing* time and responsibilities, with each parent being involved in a significant but often not “equal” way in their children’s lives. In most intact families, parents share responsibilities, but they do not spend equal time on child care,⁵ so legislation should not specify that an “equal arrangement” would be presumed to be in the interests of a child. In many cases there are logistical and practical constraints to equal parenting time. Further, this type of arrangement requires parents who are able to effectively communicate and co-operate. Today in Canada, over 70% of children whose

³ See e.g Toronto lawyer Gene Colman (June 13, 2018), who advertises as a “dedicated advocate of protecting fathers’ rights” proposes a “presumption of equal parenting time: www.complexfamilylaw.com

⁴ For a discussion of the range of concepts involved in co-parenting (or shared parenting), see Bala, Birnbaum, Cyr, Poitras, Saini & Leclaire, Shared Parenting in Canada: Increasing Use But Continued Controversy” (2017) 55(4) Fam Ct Rev 513. Note that co-parenting (or *shared parenting*) and *shared custody* are different concepts, and each also differs from *equal shared parenting*.

⁵ See e.g Statistics Canada, *Changes in parents’ participation in domestic tasks and care for children from 1986 to 2015* (2017).

parents divorce have some form of joint legal custody, but only about 25% have shared physical custody (40%-60% of time) and only about 10% have substantially equal time with each parent.⁶

While shared decision-making is often desirable, in higher conflict cases where legislation and courts are most relevant, it will normally be preferable for parents to be required to consult about major decisions, but to leave one parent with the final authority to make a decision, so that potential for resort to the courts resolve disagreements is limited. Although a number of studies suggest that children have better outcomes if they are in joint care arrangements that involve significant time with each parent rather than in the sole custody of one parent,⁷ it is important to appreciate that these studies are largely based on the experiences of families where the parents have agreed to some form of shared parenting, not cases where it is imposed by a court.⁸ Court imposed “equal parenting” can be especially stressful for children whose parents have a high conflict separation and are having difficulty co-operating.⁹ Experience in jurisdictions that have tried various forms of statutory presumptions about parenting time reveals that such presumptive legislative rules promote litigation, especially among high conflict parents, who are not well suited to this type of arrangement. Too often claims for equal parenting time (or shared custody) are put forward to reduce child support obligations rather than benefit children.

In Australia, largely as a result of lobbying from fathers, in 2006 their Parliament enacted legislation with a presumptive rule in favour of “equal shared parental responsibility” and required that courts “consider ... equal” parenting time, but those provisions were repealed in 2011. Two Australian scholars, Bruce Smyth and Richard Chisholm, the latter a retired judge of the Family Court, reviewed the experience in their country and recently concluded:

In our view, a preoccupation with time as such may encourage parental feelings of entitlement rather than benefits for children. Children may well benefit where separated parents voluntarily choose shared-time arrangements that they can manage cooperatively and tailor to the children's changing needs, whereas rigid arrangements between warring parents are likely to have a negative impact on children.¹⁰

In the United States, there has been a long debate about presumptions of custody or parenting time. While many states have reformed their laws to abandon the old custody and access concepts, experiments with statutory presumptions, in particular of “equal parenting,” have generally proved short lived and unsuccessful. American law professor Margaret Brinig summarized experiences of states with joint custody presumptions:

Although strong presumptions of joint custody were popular in the 1980s when several states adopted them, the more recent practice, after some twenty years' experience, has been to allow

⁶ There is a lack of good data in Canada on post-separation parenting, but see Bala, Birnbaum, Cyr, Poitras, Saini & Leclaire, Shared Parenting in Canada: Increasing Use But Continued Controversy” (2017) 55(4) Fam Ct Rev 513; and Justice Canada, Research and Statistics Division, JustFacts, *Child Custody and Access* (Novmeber, 2017)

⁷ Linda Nielsen, Joint versus sole physical custody: Outcomes for children independent of family income or parental conflict (2018), 15 Journal of Child Custody 1

⁸ See e.g. Birnbaum, Bala, Saini & Sohani, Shared Parenting: Ontario Case Law and Social Science Research (2016) 35 Can Fam L Q 139-179.

⁹ See e.g. Ilana Arje-Goldenthal, Equal Parenting Time in Ontario: Exploring Legislative, Judicial and Social Science Attitudes to the Issue (2018) 37 Can Fam L Q 189-228.

¹⁰ Bruce Smyth & Richard Chisholm, Shared-Time Parenting After Separation in Australia: Precursors, Prevalence, and Postreform Patterns (2017), 55 Fam Ct Rev 586; and J Neoh, & D Mellor, “Shared Parenting: Adding Children's Voices and Their Measures of Adjustment to the Evaluation” (2010), 7 Journal of Child Custody 155-175.

joint custody as one of several options, rather than to presume that it is in the best interests of children. In other words, after experimentation with joint custody, some states have realized that continual moving between households may be harmful to children, that the bulk of newly divorced spouses cannot remain as positively involved with each other on an everyday basis as joint physical custody requires, or that the presumption is causing more litigation to already crowded dockets.¹¹

While there continues to be advocacy by fathers' groups in the USA for legislative presumptions of equal parenting time, only Kentucky presently has such a law.¹² Most American legal scholars recognize the value of encouraging substantial post-separation involvement of both parents in the lives of their children, but also appreciate the need to

avoid using the hard edge of legal presumptions to undermine the lived experience of children, while at the same time circumventing the perils of unpredictable case-by-case determinations unguided by presumptions or preferences. The most promising efforts chart a third course: nudging separating and divorcing parents into a framework that encourages them to implement shared parenting. Shifting the parental focus from litigating custody to jointly crafting a parenting plan also may serve to alleviate the worst aspects of the trauma children often experience when their parents break up.¹³

While, as discussed below, Bill C-78 provides some important guidance for the making of parenting plans and the resolution of relocation disputes, this Bill wisely follows the approach of provincial reforms and avoids broad statutory presumptions about time sharing or decision-making, but rather focuses on individualized decision-making.¹⁴

Grandparents and Contact Orders

Under Bill C-78 a court can make a “contact order,” allowing a grandparent to have continuing contact.¹⁵ Grandparents are mentioned in the Bill C-78, with “best interests” decisions to take into consideration of the “nature and strength” of a child’s relationship to “grandparents and any other person who plays an important role in the child’s life.”¹⁶ **However, we support the approach that there is no presumption that grandparents will have contact with a child, and they must still seek leave of the court to make an application for contact or parenting time under the *Divorce Act*.**

Dispute Resolution and Conflict Reduction: Duties for Parents and Legal Advisers

There are a number of significant new provisions in Bill C-78 that are intended to impress upon parents the harm done to children by exposing them to conflict from the divorce process, and that impose duties on lawyers and other legal advisers to encourage

¹¹ Margaret F. Brinig, Penalty Defaults in Family Law: The Case of Child Custody (2006) 33 Fla St U L Rev 779, at 781–82.

¹² Michael Alison Chandler, More than 20 states in 2017 considered laws to promote shared custody of children after divorce, December 11, 2017, *Washington Post*. Kentucky is the only state to have a presumption of equal parenting time and joint custody.

¹³ J. Herbie DiFonzo, From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy (2014) 52 Fam Ct Rev 213, at 213.

¹⁴ John-Paul Boyd, The case against having default shared custody, *Lawyers Weekly*, Feb. 21, 2014.

¹⁵ s. 16.5.

¹⁶ s.16(3)(b).

parents to consider using non-court based methods of family dispute resolution. We strongly support these provisions.

Subsection 7.7(2) will require “every legal adviser” to inform their clients of “their duties under this Act.” Thus, legal advisers will be *obliged* to speak to parents going through a divorce about the parent’s duty to act in manner consistent with their child’s best interests, protect their children from conflict, and try to resolve issues outside of the court process. This requires family lawyers and other legal advisers to be “child-focused” advocates for their adult clients, not simply taking instructions, but providing advice about parental conduct that may harm their children, such as abusive conduct or alienating behaviour.

These provisions are intended to remind parents and their professional advisers of the harm to children from exposure to continuing parental conflict and to encourage resolution of disagreements about parenting and economic issues outside of the adversarial process, to help parents move towards a constructive co-parenting relationship.¹⁷ As with the changes in terminology, these provisions can contribute to “changing the culture” of professionals and societal expectations about the divorce process.

To encourage reducing the conflict in the divorce process, Bill C-78 also provides that “to the extent that it is appropriate to do so, the parties to a proceeding *shall* try to resolve” matters through some form of non-court “family dispute resolution process,” which is defined to include “negotiation, mediation and collaborative law.” Bill C-78 also provides that a court dealing with a divorce may order the parties to attend a family “dispute resolution process,” like mediation, but only if permitted under provincial law in the jurisdiction, as in British Columbia.¹⁸

One important form of response to for high conflict separations where parents is the possibility of requiring both parents, and often their children as well, to attend counselling services to help them gain a better understanding of their relationship problems, improve communications between the parents and between parents children, and ensure compliance with parenting plans and orders. These services can be especially useful for cases involving problems where children are resisting contact with one parent (which may be alienation or estrangement).¹⁹

The jurisdiction of the courts to order or direct attendance of parents and children at counselling services is very important; judges may need to receive reports on whether parents are attending and meaningfully engaging in counselling, as this can be critical for ensuring effective responses to some high conflict cases. **The best approach to high conflict cases often requires collaboration between courts, lawyers and counselling or social service providers.**²⁰

Best Interests of the Child

The present *Divorce Act* requires that decisions about custody and access are to be based solely on the “best interests of the child,” though it does not specify what this entails. Broadly consistent with the provisions of most provincial legislation, Bill C-78 sets out a non-exhaustive list of factors that are to be considered in making a parenting order. Although this list is non-exhaustive and sets out no priorities, as discussed more fully below, s.16(2) specifies that “the court *shall* give *primary consideration* to the child’s physical, emotional and psychological *safety*,

¹⁷ St. George’s House Consultation, *Modern Families, Modern Family Justice* (Windsor, UK: 2018)

¹⁸ s. 16.1(6)

¹⁹ See e.g. Bala & Hebert, “Children Resisting Contract: What’s a Lawyer to Do?” (2016) 36 Can Fam L Q 1-57, for a discussion of interventions and strategies to help reduce conflict and promote the interests of children.

²⁰ See e.g. *Leelaratna v. Leelaratna*, 2018 CarswellOnt 16633 (Ont. S.C.J.) where Audet J. held that she had jurisdiction to make a counselling order, though discussing cases where judges took a different view.

security and *well-being*.” This establishes that concerns about family violence may be given priority, though consideration of such factors as the emotional well-being of not being unjustifiably alienated from a parent might also be a “primary consideration.”

While the new s.16(3) list of best interests factors is largely a codification of existing law, it is valuable for courts, professionals and parents to have this provision enacted.

Support for the Other Parent: s. 16(6) – Revise the Marginal Note

The new s. 16(6) specifies that in “allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.” The “marginal note” for s. 16(6) (sometimes erroneously called the “heading” or “title”)²¹ of “Maximum Parenting Time,” is adapted from the marginal note to the present s.16(10), “Maximum Contact,” though the concept of “contact” has very different meanings under the two pieces of legislation. In interpreting the present s. 16(10) MacLachin J in *Young v Young* emphasized that:

it is clear that maximum contact is not an unbridled objective, and that it must be curtailed wherever the welfare of the child requires it. The best interests of the child remain the prism through which all other considerations are refracted.

While s. 16(6) of the new *Divorce Act* has a more positive and directive tone than s. 16(10) of the present Act, it is clear that this provision is *not* intended to establish a presumption of equal parenting time. It is intended to recognize that it is normally in the best interests of children to have significant involvement with both of their parents, and to encourage each parent to support the child’s relationship with the other parent, absent concerns about safety or a risk to the child’s well-being from such involvement. This intent is also reflected in the provision in s.16(3)(i), which states that one of the factors in deciding on parenting arrangements is the “ability and willingness” of each parent “to communicate and cooperate, in particular with one another, on matters affecting the child.”

These provisions are intended to remind parents, their professional advisers and the courts that it is generally in the interests of the child’s emotional and social development to have significant continuing relationships with both parents, and that most children want to have a significant on-going relationship with both parents.²² However, Bill C-78 also recognizes that in some cases, such as where there are concerns about family violence or significant parental mental health issues, contact with a parent may need to be restricted or even suspended.

The new subsection 16.2(1) and para. 16(3)(i) are welcome additions to Act. The effect of these provisions is to encourage sharing of parenting, without creating a legal presumption in favour of any particular regime of parenting time or decision-making. However, effectively and

²¹ Marginal notes are “the short notations appearing above or beside each section [...] of an Act or Regulation” (*Sullivan on the Construction of Statutes*, 6th ed., 2014, §14.59). These notes are intended to help readers identify pertinent provisions in the legislation. The name comes from the fact that they originally appeared in the margins of legislation next to the relevant provisions. Despite appearing in a statute, technically the marginal notes are not actually part of that legislation. However, as Ruth Sullivan observes, they are often influential:

“Although technically marginal notes are not considered part of legislation, in fact they are physically present and may well constitute the most frequently read component of many Acts and regulations. To ignore whatever light they shed on the meaning of legislation seems artificial and appropriate.” (§14.60)

There are cases in which marginal notes have been used for legislative interpretation (e.g. *R. v. A.D.H.*, 2013 SCC 28) though this is not uniformly the case. For example, in *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*, 2006 SCC 46, the Supreme Court says (at para. 57) “although marginal notes are not entirely devoid of usefulness, their value is limited for a court that must address a serious problem of statutory interpretation.”

²² See e.g. Bala & Hebert, “Children Resisting Contract: What’s a Lawyer to Do?” (2016) 36 CFLQ 1.

appropriately addressing cases of alienation and children resisting contact with one parent due to the influence of the other will require more resources for courts and support services, and more education for parents and professionals. The federal government should support the extension of services and efforts for public and professional education for cases where parents are not properly supporting their children's relationships with the other parent, while recognizing the need to screen for and address family violence issues.

We recommend that the marginal note to s.16(6) should be revised to read “Parenting Time Consistent with Best Interests.” This would be a much more accurate summary of the provision. Indeed, “Maximum Parenting Time” is misleading. It is our understanding that a change in the marginal note would *not* be an amendment that would require the approval of the House of Commons or Senate. It is our understanding that the Legislative Services Branch rather than Parliament is technically responsible for the marginal notes, and accordingly we recommend that the Senate Committee write to Legislative Counsel proposing this change, after ascertaining that this would not be a change that would delay enactment of the law.

Views of the Child

Although not mentioned as a factor in the present *Divorce Act*, there is growing appreciation of the importance of taking account of the perspectives and preferences of children who are the subject of parental disputes, as this promotes better outcomes for children, respects their rights, and often facilitates settlement.²³ **Although the new s.16(3)(e) is largely a statutory codification of existing caselaw, it is very appropriate and consistent with Canada's obligations under the *Convention on the Rights of the Child* to include this acknowledgement of the importance of the child's perspectives in the *Divorce Act*.**²⁴ This provision establishes an obligation on the court making a parenting decision and the parties presenting a case, to make reasonable efforts to “ascertain” the views and preferences children.

While children should be consulted, and their views sought, there must be a careful balance so that children are not inappropriately drawn into parental disputes or pressured to “take sides.” In cases that are going through the courts or mediation, a Views of the Child Report²⁵ should be considered, and in some cases appointment of child's counsel is appropriate. While children in Québec often meet with judges who are dealing with their parents' disputes, judicial meetings with children have been less common elsewhere in Canada. Although there are real limitations to what can be learned by a judge at a single, relatively short meeting, children often appreciate and benefit from meeting with the judge, and the judge may gain valuable insights from such a meeting.²⁶

²³ For a review of developments in a number of jurisdictions regarding children's involvement in family proceedings, see M. Fernando, *Family Law Proceedings and the Child's Right to Be Heard in Australia, the United Kingdom, New Zealand, and Canada* (2014) 52 *Fam Ct Rev* 46. See also e.g. R. Birnbaum & N. Bala, “Views of the Child Reports: The Ontario Pilot Project” (2017), 31 *Intern J Pol L & Fam* 344.

²⁴ See *BJG. v DLG* 2010 YKSC 44, 324 DLR (4th) 376 at para. 6 & 21, where Martinson J. cited the *Convention on the Rights of the Child* and social science research to express strong support for the *right* of children to meet the judge deciding a case, as well as emphasizing the potential value of the practice for the court.

²⁵ Birnbaum & Bala, “Views of the Child Reports: The Ontario Pilot Project” (2017), 31:3 *International Journal of Policy, Law & the Family* 344-362.

²⁶ Bala, Birnbaum, Cyr & McColley, “Children's Voices in Family Court: Guidelines for Judges Meeting Children” (2013) 47:3 *Family Law Quarterly* 381-410; and Bala, Birnbaum & Cyr, “Judicial Interviews of Children in Canada's Family Courts” in Tali Gal & Benedetta Durmay, eds. *International Perspectives and Empirical Findings on Child Participation* (Oxford University Press: New York, 2015) 135-156.

Family Violence

Although most provincial and territorial legislation governing post-separation parenting recognizes the significant negative impacts of **spousal violence for children, the present *Divorce Act* makes no mention of family violence. Consistent with the increased awareness of the effects of intimate partner violence not only on the direct victim, but also on children who are exposed to this violence, Bill C-78 has a number of procedural and substantive provisions related to “family violence.”**²⁷

Bill C-78 adds a useful provision requiring judges to make inquiries about other proceedings that may involve the parties, in particular civil, child protection or criminal proceedings that are related to family violence or child abuse. However, it will be up to provincial and territorial authorities to ensure that this can be done in a meaningful way through changes to court forms and appropriate information sharing.²⁸

The new law will continue to specify that “best interests of the child” is the only consideration to be applied a court in making a parenting order or contact order. However, s. 16(2) specifies that “the court *shall give primary consideration* to the child’s physical, emotional and psychological *safety, security and well-being.*” Further, the list of factors in s. 16(3) includes family violence as a best interests factor; courts are to consider the impact of family violence on the ability of a parent to meet the needs of the child, and “the appropriateness of making an order that would require” the parents “to cooperate on issues affecting the child.” These provisions are clearly intended to both protect children from direct harm, and to ensure that victims of intimate partner violence are not coerced into on-going abusive relationships with a former partner as a result of parenting arrangements. However, Bill C-78 recognizes that family violence is complex and multifaceted, requiring a court to consider not only the “impact of family violence,” including its seriousness and recency, but also whether it involved isolated incidents or a pattern of coercive and controlling behaviour, and to take account of any steps taken by the perpetrator to prevent further family violence and improve their ability to care for the child.²⁹

Relocation

The present *Divorce Act* has no provisions governing relocation, and the 1996 Supreme Court of Canada decision in *Gordon v Goertz*³⁰ established a highly discretionary “best interests of the child” test for making decisions about relocation. That decision has resulted in uncertainty about how courts will apply this test, and has contributed to frequent litigation about relocation.³¹ While there is no “perfect” scheme for addressing relocation cases, which inevitably involve some type of “least worst alternative” (at least for the child), the enactment of the basic scheme of Bill C-78 governing relocation will clearly an improvement over the present legal quagmire. **Having clear, child-focused presumptions about relocation and a clearer process will help to reduce uncertainty and litigation, and help planning and settlements, though the new provisions continue to have discretionary elements and some uncertainty will remain in this area.**

²⁷ “Family Violence is broadly defined in s. 2(1).

²⁸ s. 7.8.

²⁹ See Jaffe, Crooks & Bala, *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices* (Justice Canada, 2006); and Jaffe, Johnston, Crooks & Bala, *Custody Disputes Involving Allegations of Domestic Violence: The Need for Differentiated Approaches to Parenting Plans* (2008) 46 Fam Ct Rev 500.

³⁰ [1996] 2 SCR 27

³¹ See Bala & Wheeler, “Canadian Relocation Cases: Heading Towards Guidelines” (2012) 30 Can Fam L Q 271.

Resources and Research

Bill C-78 represents a significant and positive effort at law reform, but it will not be a panacea for the problems faced by divorcing parents and their children, and by Canada's family justice system. **There is a clear need for federal and provincial/territorial resources to support professional and public education, and services to promote a shift towards less adversarial and more child focused resolution of family disputes.** Indeed, implementing the law will create challenges, requiring changes in court rules and processes, and more significantly, create expectations that governments and professionals will provide the services and approaches promoted by the new law.

Bill C-78 should encourage parents to focus on the interests of their children rather than adult rights, and to reduce their conflict in the interests of their children. However, as emphasized by advocates for abused women, there are concerns that the encouragement in Bill C-78 to reach out-of-court resolutions may result in victims of family violence accepting unfair settlements or being placed in dangerous situations.³² These are important concerns, and implementation must be undertaken in a way that ensures the protection for victims of family violence.

There is will also be a need for on-going monitoring and research to ensure that the objectives of the reforms are achieved, and if necessary further systemic and legislative reforms are undertaken.

Provincial Legislative Reform

In provinces like Ontario, that have not recently amended their parenting legislation and that continue to use the concepts of “custody” and “access,” the enactment of Bill C-78 will create pressure for law reform, so that those using this provincial legislation, primarily used for parents who have not married, receive the same treatment as those using the *Divorce Act*. Experience in provinces that have adopted new regimes, such as Alberta, British Columbia and Nova Scotia, suggests that in practice lawyers and judges in provinces that do not reform their laws will tend to adopt the more child-focussed terminology and approaches of Bill C-78. However, there may be situations, most notably involving relocation, where the failure of a province to undertake legislative reform may result in challenges under the *Charter of Rights*.³³

³² <http://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10190233/br-external/NationalAssociationOfWomenAndTheLaw-e.pdf>

³³ See *Coates v. Watson*, 2017 ONCJ 454.