BILL C-78: REFORMING THE PARENTING PROVISIONS OF THE *DIVORCE ACT*

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On 22 May, 2018, the Liberal government introduced Bill C-78 to Parliament. This Bill will, if enacted, amend the parenting provisions of the *Divorce Act,* the first significant change to this part of the legislation since it came into effect in 1986.

There have already been similar statutory changes to the parenting laws in a few provinces, as well as appeal court decisions in Ontario that have encouraged moves towards the use of "parenting plans" and have abandoned the archaic and proprietary terms "custody" and "access." While Bill C-78 should have only limited impact on those family justice professionals who have already adopted child-focused collaborative approaches to family dispute resolution, it is hoped that the amendments will 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. It is already important for lawyers, mediators, and judges to be aware of these proposed amendments, as there may be retrospective effects from these amendments: most notably, the proposed legislation will give more weight than the present law to clauses that restrict relocation with a child.

Bill C-78 will affect the making of Orders and Agreements concerning children and parenting, and it includes provisions that will:

- abandon the "custody" and "access" terminology now in the *Divorce Act,* introducing the more child-focussed concepts of "parenting time" and "parental responsibilities," that are to be incorporated into "parenting plans";
- encourage parents and professionals to settle disagreements outside of the court process using mediation or other collaborative processes, though parents will not be required by Bill C-78 to use such alternatives to the courts;
- encourage recognition of the importance of one parent supporting their child's relationship with the other parent;
- specifically address issues of family violence, requiring courts to consider the effects of spousal abuse on both the immediate victim(s) and the children, and requiring judges in divorce proceedings to make inquiries about whether there are other concurrent proceedings;
- provide that the views and preferences of children should be considered by decision-makers: children must have a voice, but not necessarily a choice; and
- change the law governing cases where one parent wishes to relocate with a child.

Many of the changes proposed by the *Bill* related to post-divorce parenting are similar to reforms already introduced in Alberta, British Columbia, and Nova Scotia, for post-separation parenting. In theory, at present in those provinces, the terminology and concepts of the current federal *Divorce Act* are applied to married partners who are divorcing, while parents who never married are governed by the provincial statute. In fact, practice and terminology for both married and unmarried partners who are separating in those provinces were significantly affected by the reforms to provincial law.

Similarly, it is to be expected that if the federal *Divorce Act* is amended, this will likely affect practice regarding unmarried parents in Ontario, who in theory are regulated by the provincial *Children's Law Reform Act* which has not yet been amended. For the sake of

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clarity, it is to be hoped that the Ontario government will enact similar reforms to Bill C-78. It will also be important for Ontario to undertake procedural and programmatic reforms to help further the emphasis on non-court family dispute resolution that is emphasized by *Divorce Act* reforms.

The Justice and Human Rights Committee of the House of Commons heard from witnesses and received briefs in November. A number of advocates for "equal shared parenting," such as the Canadian Equal Parenting Council, appeared before the Committee to propose enactment of a statutory presumption that "equal parenting time" is in the best interests of children. Although these advocates asserted that the enactment of such a presumption is supported by social science research and has been introduced in a number of jurisdictions, in fact only Kentucky has enacted a presumption of equal parenting time. Further, there is a significant body of social science research, including articles in the October 2017 issue of the *Family Court Review*, that raise serious concerns about a legal presumption of equal parenting time.

Advocates for abused women, such as the National Association of Women and the Law, made submissions to the Committee expressing concerns that the new law's encouragement to reach out-of-court resolutions could force victims of family violence into accepting unfair settlements or dangerous situations, and proposed amendments to ensure the safety of women and children.

Visit AFCC-O's Recent Initiatives webpage to view their letter sent to the Minister of Justice regarding the proposed changes included in Bill C-78, and Professor Nicholas Bala's (AFCC-O Board member) presentation made before the Committee on November 28, its last day of public hearings. While Bill C-78 is clearly a progressive measure, there are concerns that governments will not provide sufficient resources to allow for proper implementation and for the kind of "cultural changes" intended by the new law.

There are other provisions in Bill C-78 that will affect family justice. For example: dealing with such issues as preserving the priority of spousal property claims in bankruptcy, improving access to financial information and tax returns to help establish and enforce support obligations, and facilitating international enforcement of parenting rights and child support obligations.

The Bill must complete the House of Commons Committee, receive 3rd reading, and then go to the Senate. There is never certainty with the legislative reform process, and there may be some relatively minor amendments as a result of the hearings, but the government seems to support the individualized approach to determination of a child's best interests, rather than support a presumption of equal time, an approach supported by the briefs submitted by the AFCC-O and others. It seems likely that the Bill will complete the legislative process in the Spring, and come into force before the Fall. The delay between Royal Assent and the amended Act coming into force will allow time for governments and professionals to prepare for implementation of the new law. The AFCC-O will be undertaking various projects to provide education for professionals and parents about the new law.

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