

# A DEEPER DIVE: THE INTERSECTION OF FAMILY LAW AND PSYCHOLOGY 2019

PAPER 1.1

## Bill C-78: Reforms of the Parenting Provisions of Canada's Divorce Act

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## **BILL C-78: REFORMS OF THE PARENTING PROVISIONS OF CANADA’S DIVORCE ACT**

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It is widely acknowledged that the parenting provisions of Canada’s *Divorce Act*, which came into effect in 1986, are in need of reform.<sup>1</sup> On 22 May, 2018 the Liberal government introduced Bill C-78 to Parliament, the first significant change to this part of the legislation since it came into force more than three decades ago.<sup>2</sup> The enactment of Bill C-78 should improve the process of divorce and outcomes for children, and should be a priority for Parliament and the government in the coming months.

The Justice and Human Rights Committee of the House of Commons held a relatively short set of hearings on the Bill in the late Fall of 2018, and made some minor amendments. The Bill received 3<sup>rd</sup> Reading in the House of Commons on Feb 6, 2019,<sup>3</sup> and is now being considered by the Senate. Although there is never certainty with the legislative process, it seems likely that the Bill will be passed by the Senate before the summer. The legislation is only likely to come into force several months later, giving the federal and provincial governments, lawyers and other professionals time to prepare before the law comes into effect.

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1 For a discussion of the background to Bill C-78 and previous failed efforts to amend the *Divorce Act*, see N. Bala, “Bringing Canada’s Divorce Act into the New Millennium: Enacting a Child-Focused Parenting Law” (2015) 40 *Queen’s LJ* 425.

2 Bill C-78, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 1<sup>st</sup> Reading May 22, 2018.

3 Amended by the Standing Committee on Justice and Human Rights, reported to the House of Commons on December 7, 2018; 3<sup>rd</sup> Reading, Feb. 6, 2019.

### 1.1.2

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 significant support from family lawyers, judges and scholars,<sup>4</sup> as well as mediators and mental health professionals,<sup>5</sup> as was reflected in the submissions at the Committee Hearings in the House of Commons in November 2018. A “presumption of equal parenting” was proposed by fathers’ rights advocates at the Hearings, but was rejected by the Committee. While not including a presumption of equal time, the Bill promotes a post-separation regime of sharing of parental time and decision-making, in a co-operative fashion that provides parents with as much time with their children as is consistent with the child’s best interests. Although the term does not appear in the proposed law, the Bill promotes the widely recognized concept of “co-parenting” for cases where this would not pose a significant risk to the child.

This paper focuses on the most significant proposed reforms in Bill C-78 as they relate to parenting, changes that will:

- replace archaic concepts of “custody” and “access” with child-focused terminology related to parenting;
- create duties for parties and their legal advisers to encourage the use of non-court family dispute resolution processes and reduce conflict;
- establish a non-exhaustive list of criteria with respect to the determination of of the “best interests of the child,” including consideration of the views of children and the willingness of each parent to support the child’s relationship to the other parent;
- introduce measures to assist the courts in addressing family violence in the context of parenting disputes, and make protection of safety and well-being of child a “primary consideration”; and
- establish a new framework for dealing with relocation of a child.

There are other significant provisions of Bill C-78, including proposed reforms that relate to international enforcement of parenting orders, disclosure of income information, enforcement of support orders and use of provincial support calculation agencies. A discussion of these issues is beyond the scope of this paper.<sup>6</sup>

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4 See e.g. Letter of Lawrence Pinsky, Chair, 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, with more than 500 family lawyers and judges at the conference, Prof. Bala surveyed a plenary session 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.

5 The Family Dispute Resolution Institute of Ontario and the Association of Family and Conciliation Courts Ontario Chapter each submitted Briefs that were broadly supportive of the reforms.

6 See John Paul Boyd (June 2018) A Brief Overview of Bill C-78, Part 2: Amendments Relating to Interjurisdictional Agreements and Treaties. <https://afcontario.ca/wp-content/uploads/2018/06/Boyd-Overview-of-Bill-C78-Pt-2-June-2018.pdf>

## I. Provincial Reforms

There have already been significant statutory changes to the parenting laws in Alberta,<sup>7</sup> British Columbia<sup>8</sup> and Nova Scotia,<sup>9</sup> as well as appeal court decisions in other provinces<sup>10</sup> that have encouraged moves towards the use of child-focused, language such as “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 lawyers and parents who have already adopted child-focused, collaborative approaches to family dispute resolution, the amendments should have an impact on the courts and on practitioners who have a more adversarial approach to family law, as well as on lay audiences, including self-represented litigants who may look to the *Divorce Act* for guidance.

Further, the relocation scheme in Bill C-78 will significantly change the law.

## II. Concepts: Parenting Plans and Parenting Orders

Outside of Canada, many 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; their use may encourage conflict between separated parents. Bill C-78 focuses on the needs of children, and the responsibilities of parents rather than their rights. Although many separating parents in Canada already end up with some form of co-parenting, such as “joint custody” or “shared custody”, the fact that the present *Divorce Act* still uses terms that have proprietary connotations is the wrong place to start parents thinking about the process. It leaves the 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.

In his October 2018 decision in *Van v. Palombi*, McDermot J. observed:<sup>11</sup>

The legal term, "custody" in family matters is close to having had its day. For years now, there have been efforts by legislators to rid statutes of that term, the latest of which are the proposed amendments to the *Divorce Act* which suggest exactly that. There is good reason for this; the term "custody" as it relates to children arises, from the 19<sup>th</sup> century and implies ownership of children which is, of course, not what any contemporary court order intends. It is also pejorative; the person who has custody feels as though they have "won" something, and the person without custody feels a loss and exclusion. The term is, in itself, the source of much litigation and gets in the way of settlement because of the emotional power behind the language

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7 Alberta, *Family Law Act*, S.A. 2003, c. F4.5, in force 2005.

8 British Columbia, *Family Law Act*, SBC 2011, c. 25, in force 2013.

9 Nova Scotia, *Parenting and Support Act*, SNS 2015, c.44, in force in 1 May 2017.

10 *M v. F*, 2015 ONCA 277.

11 2018 CarswellOnt 17245, 2018 ONSC 6228, at para 17.

#### 1.1.4

That said, on the facts of *the specific facts* of *Van v. Palombi*, which involved a very high conflict situation where the father had inappropriately involved the children in the litigation, defied court ordered terms for visitation and communication and refused to acknowledge the effect of his conduct on the children or his former wife, McDermot J. drastically restricted the role of the father in the lives of his children. The court ordered “sole custody” to the mother and a suspension of access to the father until he completed counselling. In such extreme cases, exclusive parenting arrangements will continue to be appropriate and possible under Bill C-78, albeit using different terminology.

Under Bill C-78, courts are to make “parenting orders” that allocate or schedule “parenting time,” and that allocate or share “decision-making responsibility.”<sup>12</sup> “Parental decision-making” refers to making decisions about major issues that have a continuing effects, such what school a child will attend. However, unless a court orders otherwise, the person with parenting time has the exclusive authority to make, during that time, day-to day decisions affecting the child, such as related to a child’s meals and bedtimes.<sup>13</sup> Bill C-78 also provides that any person to whom parenting time or decision making responsibility is allocated is entitled request information about the child from the other parent and third parties, such as schools and doctors, unless the court orders otherwise.<sup>14</sup>

Parents are encouraged to make their own arrangements outside the court process, “to the extent that it is appropriate”<sup>15</sup> and to agree to a “parenting plan” that addresses issues related to the care the child, including parenting time and decision making.

There is only a very general definition of the concept of a *parenting plan* in s. 16.6(2), which provides that it “means a document or part of a document that contains the elements relating to parenting time, decision-making responsibility or contact to [non-parents like a grandparent] which the parties agree.”

The federal government already has materials available on the internet to assist parents making a parenting plan;<sup>16</sup> these materials will be updated by the Department before the new law comes into force. The Ontario Chapter of the Association of Family and Conciliation Courts is also preparing a *Parenting Plan Guide* to assist parents and professionals making these plans.

These plans are normally to be developed on a consensual basis, either by the parents themselves or with assistance of professionals like mediators or lawyers. Children may have a role in the development of a plan, though they are not parties to any plan or agreement. The court granting a divorce “shall” incorporate the parenting plan that the parents have agreed to, unless, in the opinion of the court, it is “not in the best interests of the child to do so, in which

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12 s. 2(1) and s. 16.1.

13 s. 16.2 (5).

14 s. 16.4.

15 s. 7.3.

16 See e.g. Justice Canada, *Making plans: A guide to parenting arrangements after separation or divorce* (2017); <https://www.justice.gc.ca/eng/fl-df/parent/mp-fdp/index.html>; and *Parenting Plan Checklist* (2017) <https://www.justice.gc.ca/eng/fl-df/parent/ppc-lvppp/index.html>

case the court may make any modifications to the plan that it considers appropriate and include it in the order.”<sup>17</sup>.

The concept of a “parenting *plan*” suggests that it will be a “living document” that may provide for revision as the children grow older and circumstances change, and there may be possibilities for “trying out” an arrangement for a period of time to see how it works, and then changing it if appropriate.<sup>18</sup> Variation of a plan might occur without court involvement, though Bill C-78 allows for a court-ordered variation of a parenting order if there is a “change in circumstances.”

Courts may also include in parenting orders provisions that specify how communication between the parents or between a parent and child is to occur, or that prohibit relocation of a child without a court order or the consent of both parents.

### III. Co-Parenting Encouraged but NOT a Presumption of “Equal Parenting”

Bill C-78 does not establish any presumptions about the amount of time that each parent will spend with the child or how parental responsibilities are to be exercised, and in particular does not mention any notion of “equal” parenting time or joint parental decision-making responsibilities. To the contrary, it is expected that individualized 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.

A number of advocates for “*equal* shared parenting,” such as the Canadian Equal Parenting Council,<sup>19</sup> appeared before the House of Commons Committee considering Bill C-78 to advocate enactment of a statutory presumption that “equal parenting time” is in the best interests of children.<sup>20</sup> Although some Conservative members of the Committee supported such an approach,<sup>21</sup> the majority of the Committee and the House of Commons rejected a “presumption of equal parenting”.

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17 s.16.6.

18 Bruijn, Poortman & van der Lippe, “Do Parenting Plans Work? The Effect of Parenting Plans on Procedural, Family and Child Outcomes” (2018), 32 *International Journal of Law, Policy and The Family* 394–411

19 Canadian Equal Parenting Council, Submission to House of Commons Standing Committee on Justice and Human Rights Re: Bill C-78, *Fixing the Divorce Act and Family Courts Accessibility, Effectiveness and Best Interests of the Child* (2018): <http://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10207873/br-external/CanadianEqualParentingCouncil02-e.pdf>

20 Toronto lawyer Gene Colman (June 13, 2018), who advertises himself as a “dedicated advocate of protecting fathers’ rights” proposed revisions to Bill C-78 to create a “presumption of equal parenting time.” He also discusses the relationship between the “Fathers’ Right Movement” and the “Family Rights Movement,” see Gene Colman, “An Introduction to Fathers’ Rights” (2015) [www.complexfamilylaw.com](http://www.complexfamilylaw.com).

Another dedicated Canadian advocate of “equal” fathers’ rights is Professor Edward Kruk of the University of British Columbia; see e.g. Edward Kruk, *The Equal Parent Presumption: Social Justice in the Legal Determination of Parenting after Divorce* (McGill-Queen’s University Press, 2013); and Kruk (2018), Arguments Against a Presumption of Shared Physical Custody in Family Law, *Journal of Divorce & Remarriage*, DOI: 10.1080/10502556.2018.1454201

21 “MPs urged to enact ‘equal shared parenting’ in Bill C-78 but organized family law bar tells Ottawa to stay the course”, *Lawyers Daily*, Nov. 29, 2018.

### 1.1.6

While the term is not explicitly used, as discussed below, Bill C-78 clearly encourages various forms of *shared parenting*, a broad concept used in many countries, based on both parents being significantly involved in the care of children and decision-making, and that includes but is not limited to equal parenting time and fully shared decision-making for all issues.<sup>22</sup> The concept of co-parenting emphasizes the value, in most cases, of parents *sharing* time and responsibilities, with each co-parent involved in a significant but not necessarily (or usually) in an “equal” way in their children’s lives.

In most intact families, parents *share* responsibilities, but generally they do not spend *equal* time on child care,<sup>23</sup> so legislation should not specify that such an 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, and this type of arrangement is only likely to be beneficial to children if the parents are able to effectively communicate and co-operate. Today in Canada, over 70% of children whose parents divorce have some form of joint custody (or co-parenting or shared parenting), but most of them continue to have a “primary residence with one parent (usually the mother), and only about 20% of children of separated parents have “equal shared custody” (40%-60 of time with each parent), and only 10% have substantially equal time with each parent.<sup>24</sup>

Although 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. While a number of research studies have found that children generally 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,<sup>25</sup> it is critical to appreciate that these studies are largely based on the experiences of families where the parents have agreed to some form of co-parenting, not cases

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22 For a discussion of the range of concepts involved in shared parenting, see Marsha Kline Pruett & J. Herbie DiFonzo, “Closing the Gap: Research, Policy, Practice, and Shared Parenting” (2014), 52 Fam Ct Rev 152; and Bala, Birnbaum, Cyr, Poitras, Saini & Leclaire, “Shared Parenting in Canada: Increasing Use But Continued Controversy” (2017) 55(4) Fam Ct Rev 513.

23 See e.g Statistics Canada, *Changes in parents’ participation in domestic tasks and care for children from 1986 to 2015* (2015), which reports that *on average*, fathers in 2015 spent significantly more time on child care than in 1986, but still spent significantly less time than mothers (increasing from 28% of child care to 35% in those three decades. Even in families where both parents were fully employed in paid jobs, fathers in 1986 spent significantly less time on child care (104 minutes a day vs 143 minutes), though when both parents are employed fathers do more of some household tasks, notably outdoor work and home maintenance. Of course in some families (about 10%), both intact and separated, fathers spend significantly more time on child care than mothers.

24 For a discussion of the range of concepts involved in 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.

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

### 1.1.7

where it is imposed by a court.<sup>26</sup> In other words, there is a *correlation between shared custody and positive outcomes for children, but it is not established that this is a causal relationship.*

While children in general benefit from significant involvement of both parents in their lives, frequent contact with both parents is beneficial when conflict is low, but can have adverse effects if conflict is high, especially if it is prolonged past the immediate post-separation period.<sup>27</sup> Further children in general benefit not so much from frequency of contact with both parents *per se*, but rather from the extent to which post-separation residence arrangements reflect pre-separation arrangements. Research suggests that equal shared custody generally only benefits a child if there was already substantially equal sharing of parenting before separation.<sup>28</sup>

Court-imposed “equal parenting” can be especially stressful for children whose parents have a high conflict separation and are having difficulty co-operating.<sup>29</sup> Experience in jurisdictions that have tried various forms of statutory presumptions about parenting time reveals that such legislative rules tend to 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; not infrequently, after an equal parenting plan and reduced child support are put into place, the parent seeking this arrangement then reduces time and money spent on the child, but the other parent is too exhausted by the legal process to return to court to seek readjustment.

Largely as a result of lobbying from fathers, in 2006 Australia’s Parliament enacted legislation with a presumptive rule in favour of “equal shared parental responsibility” and that required 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.<sup>30</sup>

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

27 Mahrer, O’Hara, Irwin N. Sandler & Sharlene A. Wolchik (2018) Does Shared Parenting Help or Hurt Children in High-Conflict Divorced Families?, *Journal of Divorce & Remarriage*, 59:4, 324-347,

DOI: 10.1080/10502556.2018.1454200

28 Poortman, Pre-Divorce Parent-Child Contact and Child Well-Being: The Importance of Predivorce Parental Involvement (2018), 80 *Journal of Marriage & Divorce* 671-683.

29 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.

30 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. For an excellent discussion of the Australian experience, see Patrick Parkinson, (2018) Shared Physical Custody: What Can We Learn From Australian Law Reform?, 59 *Journal of Divorce & Remarriage* 401-413, DOI:

### 1.1.8

In the United States, there has been a long debate about presumptions of joint custody or equal parenting time. While many states have reformed their laws to abandon the old custody and access concepts, and to encourage forms of co-parenting, 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 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.<sup>31</sup>

There continues to be advocacy by fathers’ groups in the USA for legislative presumptions of equal parenting time, but only Kentucky presently has such a law.<sup>32</sup> 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.<sup>33</sup>

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10.1080/10502556.2018.145419

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

32 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. Arizona also comes close to having an equal time presumption; while the law in that state has resulted in fathers having more time with children, it would also appear to have been accompanied by more litigation. For a study of the Arizona law, see William V. Fabricius, Michael Aaron, Faren R. Akins, John J. Assini & Tracy McElroy (2018) *What Happens When There Is Presumptive 50/50 Parenting Time? An Evaluation*

of Arizona’s New Child Custody Statute, 59 *Journal of Divorce & Remarriage* 414-428, DOI: 10.1080/10502556.2018.1454196

33 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.

While, as discussed below, Bill C-78 provides some important guidance for the making of parenting plans and the resolution of relocation disputes, the Bill wisely follows the approach of provincial reforms and avoids broad statutory presumptions about time sharing or decision-making.<sup>34</sup>

#### IV. Grandparents and Contact Orders

Under Bill C-78 a court will be able to make a “contact order,” allowing a grandparent or other person who is not parent but with an important role in a child’s life to have continuing contact.<sup>35</sup> Grandparents are mentioned in 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.”<sup>36</sup> However, 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*, unless they stand in place of a parent, or intend to stand in place of a parent.<sup>37</sup>

#### V. Dispute Resolution and Conflict Reduction: Duties for Parents and Legal Advisers

There are a number of 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 parents to consider using non-court based methods of family dispute resolution.

Parents have a duty to exercise parenting time and decision making authority in manner consistent with the best interests of the child, a duty to use their best efforts to protect the child from conflict related to the divorce proceeding, a duty to provide complete, accurate and up-to-date information in the course of court proceedings, and a duty to comply with court orders, among other things.

Subsection 7.7(2) requires “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 will require family lawyers to be “child-focused” advocates for their adult clients,<sup>38</sup> not simply taking instructions, but providing advice about parental conduct that may harm their children, such as abusive conduct or alienating behaviour.

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

35 s. 16.5.

36 s.16(3)(b).

37 s. 16.1(1)(b). Similar amendments to Ontario to the *Children's Law Reform Act* to specifically name “grandparents” in s. 21 the Act as persons who may apply for custody or access have been held *not* “give grandparents a presumptive right of access to their grandchildren”. See *Whitteker v. Legue*, 2018 CarswellOnt 3450 (Ont. S.C.J.) and *Botelho v. De Medeiros*, 2017 CarswellOnt 10719 (Ont. C.J.)

38 Bala, Hebert & Birnbaum, Ethical Duties of Lawyers for Parents Regarding Children of Clients: Being a Child-Focused Family Lawyer (2017), 95 Can Bar Rev 557-589.

### 1.1.10

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.<sup>39</sup> 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 parents to reduce conflict in the divorce process, Bill C-78 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, “subject to provincial law,”<sup>40</sup> a court dealing may order the parties to attend a family “dispute resolution process.”<sup>41</sup> This would, for example, give a judge making an interim parenting order the authority to direct that the parties attend mediation, and arguably allow that as a “condition” of this order, the parents pay for this process in the way directed by the court.

One important form of response in high conflict separations is the possibility of a court order 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 promote 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).<sup>42</sup>

The best approaches to high conflict cases often require collaboration between courts and counselling or social service providers. The jurisdiction of the courts to order or direct attendance of parents and children at counselling services is important for an effective response to high conflict cases; 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. Although many judges accept that they have the authority to make these orders, there is some uncertainty about whether judges have this authority, especially in Ontario.<sup>43</sup>

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

40 In most provinces, there are no restrictions on family ADR, though in Quebec, family arbitration is not permitted.

41 s. 16.1(6).

42 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.

<sup>43</sup>— 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 for the parents and children, concluding that the court was not constrained by the Ontario *Health Care Consent Act* to seek their consent as the services were not “therapeutic.” However, in *Barrett v. Huver*, 2018 ONSC 2322, 9 R.F.L. (8th) 244 the court declined making an order compelling the parties to attend reunification therapy (the multi-day family intervention “Families Moving Forward”) on the basis of *Kaplanis*, but also on the basis that such reunification therapy was a “treatment” as defined in section 10 of the *Health Care Consent Act*, 1996, S.O. 1996, c.2, Schedule A (the “HCCA”), which required the consent of all parties and, presumably, of the child.

### 1.1.11

Subsection 16.1(6) specifies that a court may only make an order directing parties to attend a “family dispute resolution” process “subject to provincial law.” It is submitted that use of effective counselling services can be an important tool in cases of high conflict separations, and that courts already have jurisdiction to order counselling in appropriate cases, but that s. 7.2 and s.16.1 (6) reinforce this jurisdiction.

## **VI. 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:

### *Factors to be considered*

16(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

- (a) the child’s needs, given the child’s age and stage of development, such as the child’s need for stability;
- (b) the nature and strength of the child’s relationship with each spouse, each of the child’s siblings and grandparents and any other person who plays an important role in the child’s life;
- (c) each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse;
- (d) the history of care of the child;
- (e) the child’s views and preferences, by giving due weight to the child’s age and maturity, unless they cannot be ascertained;
- (f) the child’s cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) any plans for the child’s care;
- (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j) any family violence and its impact on, among other things,
  - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
  - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

### 1.1.12

(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

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, 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.”

## VII. Support for the Other Parent

Bill C-78 has a provision with the “marginal note” (sometimes erroneously called the “title”) “Maximum Parenting Time,” with the new s. 16(6) specifying 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 concept 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.<sup>44</sup> 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 somewhat 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

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44 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.”

Of most relevance for the present discussion, in *Young v Young* [1993] 4 S.C.R. 3, the Court made several references to the concept or objective of “maximum contact” in the present *Divorce Act* s. 16(10), though it is only a “marginal note;” the majority of the Court emphasized that it is not an absolute objective, but is qualified by the “best interests of the child.”

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.<sup>45</sup> These provisions are consistent with the changes in terminology and concepts, though 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.

*It is submitted that the combined effect of these provisions is to encourage sharing parenting, without creating a legal presumption in favour of any particular regime of parenting time or decision-making. The Bill also recognizes co-parenting is not appropriate if such an arrangement poses a risk to the safety or well-being of a child.*

## VIII. 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.<sup>46</sup> Bill C-78 will make the *Divorce Act* consistent with Article 12 of the *United Nations Convention on the Rights of the Child*, to which Canada is a signatory, and provincial family legislation in Canada, requiring consideration of the child's views as a best interests factor.

The new s.16(3)(e) specifies that in making a parenting plan, parents, professionals and the courts "shall" consider "the child's views and preferences, by giving due weight to the child's age and maturity, unless they cannot be ascertained." Although this 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*.<sup>47</sup> This provision establishes an

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45 See e.g. Bala & Hebert, "Children Resisting Contract: What's a Lawyer to Do?" (2016) 36 CFLQ 1.

46 For a review of developments in a number of jurisdictions regarding children's involvement in family proceedings, see e.g. 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.

47 See *BJG. v DLG* 2010 YKSC 44, 324 DLR (4<sup>th</sup>) 376 at paras 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:

Children have legal rights to be heard during all parts of the judicial process, including judicial family case conferences, settlement conferences, and court hearings or trials. An inquiry should be made in each case,

obligation on both 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, a Views of the Child Report<sup>48</sup> or appointment of counsel for a child could be considered. 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.<sup>49</sup>

An important responsibility for professionals involved in collaborative processes, mediation and other non-court family dispute resolution processes is to consider how to involve children. In some mediation cases, this may involve a mediator interviewing a child, having a report based on interviews with the child prepared by a mental health professional, or bringing older children into meetings with the parents. In other mediation cases, for example with pre-school age children or parents who are not in conflict over the children, it may be appropriate for parents to simply report on their conversations with their children to the mediator.

Professionals involved in family dispute resolution must be satisfied that they have appropriate knowledge, resources and skills to ensure that children are involved in a way that gives them a “voice,” without feeling forced by parents to take sides.

## IX. 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.

and at the start of the process, to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate. If the child does wish to participate then there must be a determination of the method by which the child will participate....

Obtaining information of all sorts from children, including younger children, on a wide range of topics relevant to the dispute, can lead to better decisions for children that have a greater chance of working successfully. They have important information to offer about such things as schedules, including time spent with each parent, that work for them, extra-curricular activities and lessons, vacations, schools, and exchanges between their two homes and how these [arrangements] work best. They can also speak about what their life is like from their point of view, including the impact of the separation on them as well as the impact of the conduct of their parents.

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

49 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.

### 1.1.15

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.” The concept of “family violence” is broadly-defined in the Bill to include physical abuse, sexual abuse, threats of harm to persons, pets and property, harassment, psychological abuse and financial abuse.<sup>50</sup>

Bill C-78 also 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.<sup>51</sup>

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. As noted above, subsection 16(3) provides a non-exhaustive list of factors to be taken into account in determining a child’s best interests. 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.” [Emphasis added]. 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 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.<sup>52</sup> Bill C-78 reflects an awareness that family violence is a complex and often evolving issue, and effectively encourages both victims and perpetrators to seek appropriate assistance to address issues of family violence.<sup>53</sup>

In Canada, many family justice professionals engaged in collaborative and mediation processes are already aware of the need to screen for domestic violence and other power imbalances.<sup>54</sup> However, the enactment of Bill C-78 will serve as a useful reminder to all professionals involved

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50 s. 2(1).

51 s. 7.8.

52 S. 16(4).

53 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.

54 See e.g. Family Dispute Resolution Institute of Ontario (FDRIO), *Family Mediation, Screening Guidelines* (<https://www.fdr.io.ca/certifications/mediation/family-mediation-screening-guidelines/>)

in the family justice process, and will also be important for those who are self-represented and may not appreciate the significance of harmful effects of family violence on children.

## X. Relocation

Perhaps the most significant change in Bill C-78 to the *substantive law* governing post-divorce parenting are the provisions that deal with parental relocation (also known as “mobility” cases.) The present *Divorce Act* has no provisions governing relocation, and the 1996 Supreme Court of Canada decision in *Gordon v Goertz*<sup>55</sup> established a highly discretionary “best interests of the child” test for making decisions about relocation. That decision gives little real direction, and the uncertainty about how courts will resolve these disputes has resulted in frequent litigation about relocation. Further, the fact that courts may give little weight to a non-relocation term in an agreement may have undermined reliance on parenting plans, and may have made their negotiation more difficult.<sup>56</sup>

Bill C-78 establishes a detailed procedural and substantive regime to govern relocation cases.<sup>57</sup> A parent who has rights or responsibilities under the *Divorce Act* will be required to give notice to the other parent of any change in residence,<sup>58</sup> though there are no consequences for a failure to give notice of change in residence that does not constitute a “relocation” of a child. Relocation is defined as “a change in the place of residence of a child... that is likely to have a significant impact on the child’s relationship” with the other parent.<sup>59</sup> A parent who intends to relocate must give at least 60 days written notice to the other parent;<sup>60</sup> while every parent must in theory give notice of the intent to relocate, whether or not the child spends significant time with that parent, there are only legal consequences for a failure to give notice if a parent relocates with a child.

A person intending to move may make an *ex parte* application to be relieved of the obligation to give notice, in particular if there is a “risk of family violence.”<sup>61</sup>

A parent who receives a notice of intention of the other parent to relocate with the child will have 30 days to serve a written notice of objection on the parent proposing to relocate or to make an application with the court objecting to the relocation of the child. If no notice is served and application of objection is filed to commence proceedings about this issue and there

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55 [1996] 2 SCR 27.

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

57 For a much fuller discussion of the relocation provisions of Bill C-78, see Rollie Thompson, “Legislating About Relocating: Bill C-78, N.S. & B.C.” (Feb 13, 2019, Vancouver, Family Law Seminar of National Judicial Institute).

58 S.16.8.

59 S. 2(1).

60 s. 16.9. Although in theory both parents are required to give notice of a planned relocation, in practice this will only be a legal issue if a parent want to “relocate the child.” There is no remedy if a parent relocates without a child.

61 S. 16.9(3)

### 1.1.17

is no previous order prohibiting relocation, the party intending to relocate with the child may do so.

If an application to prevent relocation is filed, the court dealing with the issue of permitting relocation shall make a decision based on an assessment of the “best interests” of the child, with the following onuses to apply:<sup>62</sup>

- If the parties have “substantially equal time” with the child, the party seeking to relocate with the child will have the onus of establishing that the relocation of the child is in the best interests of the child.<sup>63</sup>
- If the relocating party has the child for “the vast majority of ...time,”<sup>64</sup> the onus of establishing that the relocation is not in the best interests of the child will be on the objecting party.
- In mid-range cases, both parties have the burden of proof, and there are no presumptions about whether or not relocation should be permitted.

Although many cases will fall in the “grey zone” without a presumption, as a result of the enactment of Bill C-78 legal advisers will always want to consider whether a parenting agreements and consent orders will have a relocation restriction. If a notice of objection is filed or there is an order prohibiting relocation, one of the factors to be taken into account by the court making a decision about relocation is whether the parenting plan or order has a term that specifies the geographic area in which the child is to reside.<sup>65</sup>

A unilateral relocation of a child without notice, or relocation after a notice of objection is filed or there is an order prohibiting relocation, will be held against the relocating parent in court proceedings.<sup>66</sup> On the other hand, s.16.92(2) specifies that the court dealing with a relocation application is *not* to consider whether the parent seeking to relocate would relocate without the child, effectively preventing the “double bind” question. Further, Bill C-78 reverses *Gordon*

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62 Both Nova Scotia and British Columbia have a similar onus provisions against a move when parental time is substantially equal, but have different provisions for situations where there might be a presumption in favour of relocation. Under the doctrine of paramountcy, the federal *Divorce Act* provisions will apply if the parents were married and are getting a divorce, but there may well be pressure for these two provinces (and others without legislation on relocation) to enact statutes consistent with Bill C-78.

63 There will of course be litigation about the meaning of “substantially equal time,” a term that is intentionally somewhat vague and avoids the 40/60 threshold for “shared custody” under s.9 of the *Child Support Guidelines*. Although the term does not appear in other legislation, it is very similar to the term “substantially equal parenting time” in the reocation scheme in the British Columbia *Family Law Act*. British Columbia judges clearly accept that 40% of time satisfies this threshold: see *DAM v EGM*, 2014 BCSC 2019. Some BC cases accept 30% of time as “substantially equal” for these purposes, recognizing that a broader view may be more consistent with protecting stability in a child’s life: *CMB v DGB*, 2014 BCSC 780, but see *Hefter v Hefter*, 2016 BCSC 1504, for a case unwilling to accept less than 40%.

64 Again the term “vast majority of time” is vague, and 75% might be sufficient, but given the policy concerns and desire to promote stability, a threshold of at least 80% would be appropriate. See See Bala & Wheeler, “Canadian Relocation Cases: Heading Towards Guidelines” (2012) 30 Can Fam L Q 271; and Rollie Thompson, “Legislating About Relocating: Bill C-78, N.S. & B.C.” (Feb 13, 2019, Vancouver, Family Law Seminar of National Judicial Institute).

65 s. 16.92(1)(e).

66 s. 16.92(1)(d).

*v. Goertz* to the extent that the reasons for relocation will be a factor to consider.<sup>67</sup> This is a welcome reform and is consistent with most relocation case law, which effectively ignores the Supreme Court's *obiter* statement on not considering the reasons for the move.

These provisions in the *Divorce Act* should reduce the amount of litigation about relocation, and should help parents to place somewhat greater reliance on parenting agreements that include provisions about relocation,<sup>68</sup> and hence parents may be more likely to make agreements. Even before the amendments come into effect, those who are negotiating agreements or making orders should take into account that a clause restricting relocation may have greater effect in the future than it does at present, and the law may have a retrospective effect.

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.

## **XI. Conclusion: Challenges of Implementation**

Bill C-78 represents a significant and positive effort at law reform, but it will not be a panacea for all the problems of the Canada's family justice system. 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 in lower conflict cases to focus on the interests of their children rather than adult rights, and to reduce their conflict in the interests of their children. However, advocates for abused women, like the National Association of Women and the Law, made submissions to the House of Commons Committee expressing 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.<sup>69</sup> These are important concerns, and implementation must be undertaken in a way that ensures the protection for victims of family violence and their dequate resources and education.

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 should create pressure for law reform, so that those using this provincial legislation, primarily 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

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67 s. 16.92(1)(a).

68 In addition to a provision prohibiting relocation with a child, a parent might want to include that stipulates that

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

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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*.<sup>70</sup>

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